

sented, he being cheated into the supposition that it was what was represented, then he should receive allowances accordingly; in other words, his counter-claim. If you reach that point with regard to the counter-claim, the difficulties that I have stated may occur to you, and if the parties have not presented them in a way that you can understand them, you will have to do the best you can with regard to the amount thereof.

UNITED STATES *v.* BRISTOW and others.¹

(Circuit Court, D. Kentucky. April 1, 1884.)

1. INTERNAL REVENUE.

Taxes assessed by the commissioner of internal revenue under Rev. St. § 3309, may be sued for under Rev. St. § 3213.

2. SAME—ASSESSMENT.

The notice provided for in section 3184 is not a condition precedent to an assessment, but must be given before the tax can be distrained for, or penalty charged.

3. SAME—EVIDENCE OF ASSESSMENT.

The original assessment list signed by the commissioner, and on file in office of collector, is evidence of assessment.

4. SAME—SURVEY—EVIDENCE.

Original report of survey, and certificate of collector of delivery of one of the triplicate copies to distiller, held competent evidence.

At Law. Motion for new trial.

Geo. M. Thomas and *Geo. Du Relle*, for plaintiff.

O. H. Harrison, for defendants.

BARR, J. The obligation of the distiller's bond is that if the distiller "shall in all respects faithfully comply with all the provisions of law and regulations in relation to the duties and business of distillers of brandy from apples, peaches, or grapes, exclusively, and shall pay all penalties incurred or fines imposed on him for a violation of any of said provisions, then this obligation shall be void; otherwise it shall remain in full force." This was a suit on this bond for the amount assessed for a deficiency in the amount of spirits reported, being less than 80 per centum of the surveyed capacity. The commissioner of internal revenue had the right to make this assessment under section 3309, and did so in this case, as was shown by the original tax-list on the trial. The right to bring suit for taxes is expressly given by section 3213. Section 3184 provides for notice to be given the person liable to pay the tax within 10 days after the collector receives the list of taxes from the commissioner of internal revenue; but this notice is not part of the assessment, nor a condition precedent to an assessment, but is necessary by the terms of the stat-

¹ Reported by *Geo. Du Relle*, Asst. U. S. Atty.

ute before the tax-payer can be charged with the penalty of 5 per centum, and 1 per centum interest. This notice is also necessary before the collector can distrain for the taxes. See *U. S. v. Halloran*, 14 Blatchf. 1; *Savings Bank v. U. S.* 19 Wall. 234; *Clinkinbeard v. U. S.* 21 Wall. 65; *Cooley, Tax'n*, 303.

The obligation of the bond is that the distiller will, "in all respects, faithfully comply with all the provisions of law in relation to the duties and business of distillers of brandy from apples," etc., and the law requires the distiller shall make at least 80 per cent. of the surveyed capacity of the distillery, and pay tax thereon. The distiller is liable for this tax when assessed against him by the commissioner of internal revenue, although he is not liable for the penalty, nor his property to be distrained for the tax, until the law as to notice is complied with. The original lists, which were signed by the commissioner of internal revenue and by the collector, and which were records in the collector's office, were good evidence, if not the best, of the assessment. The survey of the distillery which was kept in the collector's office, and the certificate of the collector that a copy had been delivered to distiller, were, I still think, competent evidence.

Motion for new trial overruled.

In re MARSHALSHIP FOR THE SOUTHERN AND MIDDLE DISTRICTS OF ALABAMA.

(District Court, M. D. Alabama. February, 1884.)

1. NOMINATION FOR OFFICE BY THE PRESIDENT—REJECTION BY THE SENATE CONCLUSIVE—REV. ST. § 1768.

Where the senate of the United States rejects the nomination of a person for an office made by the president its action is conclusive. Rev. St. § 1768.

2. PRESIDENT OF THE UNITED STATES—POWER TO SUSPEND OFFICERS AND TO MAKE TEMPORARY APPOINTMENTS.—REV. ST. § 1768.

Rev. St. § 1768, authorizes the president to suspend an officer, and to make a temporary appointment to fill the vacancy thus created until the end of the next session of the senate.

3. PERIOD OF TEMPORARY APPOINTMENT BY PRESIDENT OF UNITED STATES TO FILL VACANCY IN OFFICE—RULE WHEN VACANCY OCCURS THROUGH SUSPENSION OF OFFICER.

A commission issued by the president of the United States to fill a vacancy in an office, during a recess of the senate, continues until the end of the next session of congress, unless sooner determined by the president, even though the person commissioned shall have been in the mean time nominated to the office, and his nomination rejected by the senate; and this rule applies where the vacancy occurs through the suspension of an officer.

4. TEMPORARY APPOINTMENT BY PRESIDENT OF THE UNITED STATES—EFFECT OF REFUSAL OF SENATE TO CONFIRM TEMPORARY APPOINTEE FOR PERMANENT APPOINTMENT—EFFECT OF REFUSAL ON SUSPENDED OFFICER.

The temporary appointment of a person to an office by the president of the United States is not terminated by the refusal of the senate to confirm him for the permanent appointment, and the powers of a suspended officer whose position he occupies are not revived by such refusal.