UNITED STATES v. NEBRASKA DISTILLING CO.

(Circuit Court of Appeals, Seventh Circuit. May 3, 1897.)

No. 329.

1. INTERNAL REVENUE—ILLEGAL ASSESSMENT—LIMITATION.
The inhibition of Rev. St. § 3224, against suits "for the purpose of restraining the assessment or collection of a tax," and the provisions of sections 3226, 3227, that a suit to recover an illegal tax shall not be brought "until after appeal to the commissioner of internal revenue, and must be brought within two years next after the cause of action accrued," do not apply to a proceeding in which the government is the moving party; and, therefore, upon an application by the United States for an order upon a receiver to pay an assessment, the receiver may show that the assessment was erroneous or illegal, without regard to the lapse of time, or to whether there has been an appeal to the commissioner of internal revenue.

2. SAME—DEFICIENCY ASSESSMENT AGAINST DISTILLERY.
A deficiency assessment against a distillery is erroneous where the deficiency of production for which the assessment was made was caused by a defective still, and was not the result of "culpable neglect, default, or mismanagement of the owners"; and the failure to apply to the collector to have the distillery sealed up until the fault could be rectified, as provided by Rev. St. § 3310, was not in this instance a want of diligence.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

John C. Black, U. S. Dist. Atty.

Levy Mayer, I. K. Boyesen, John J. Herrick, Charles L. Allen, and Horace H. Martin, for appellee.

Before WOODS and JENKINS, Circuit Judges, and SEAMAN, District Judge.

WOODS, Circuit Judge. This appeal is from an order of the circuit court dismissing the intervening petition of the United States filed in the consolidated cause of John M. Olmstead and others against the Distilling & Cattle-Feeding Company, a corporation of Illinois, of which, by appointment of the circuit court, John McNulta was and is receiver. Included with the properties of which the receiver had been put in charge was the distillery of the Nebraska Distilling Company, located at Nebraska City, which had theretofore been transferred to the Distilling & Cattle-Feeding Company. Before the transfer, on November 21, 1891, a deficiency assessment against the distillery had been made by the commissioner of internal revenue, amounting, after reductions which need not be explained here, to the sum of $2,161.71, alleged to be unpaid. The petition, after alleging the facts, prayed an order upon the receiver to pay the assessment, or, in the event that such order could not be made, that permission be granted by the court for the immediate levy of a distraint warrant upon the distillery and premises, to the end that the same be sold, in pursuance of the statutes in such cases provided, to satisfy the claim. The receiver answered to the effect that the deficiency for which the tax was assessed was caused by the use of a new still, which was imperfect and defective in its working. The amount

and date of the assessment were agreed upon, and it was stipulated that certain affidavits which are set out in the record should be read on the hearing with the same force as if in the form of depositions. The final entry shows that after hearing the evidence and the arguments of counsel the court ordered that the petition be dismissed, and thereupon the United States interposed a motion to dismiss without prejudice, which motion the court denied, and thereupon ordered that the petition be dismissed for want of equity.

Error is specified in various forms, but the essential question is whether it was within the rightful power or jurisdiction of the circuit court to inquire into the validity or justness of the assessment which the court was asked to order paid or to permit to be enforced directly against the property in the custody of the court, against which the assessment had been made. The statutory provisions which have been cited as bearing on the question are sections 3224, 3226, 3227, 3264, 3309, 3310 of the Revised Statutes, and section 6, c. 125, 1 Supp. Rev. St. U. S. The inhibition of section 3224 against suits "for the purpose of restraining the assessment or collection of a tax," and the provisions of sections 3226 and 3227, that a suit to recover an illegal tax shall not be brought until after appeal to the commissioner of internal revenue, and must be brought within two years next after the cause of action accrued, are not applicable, it is clear, because this was not a suit either to recover or to restrain the collection of a tax. The case comes within the decision in Clinkenbeard v. U. S., 21 Wall. 65, that the prohibition against bringing a suit until after an appeal to the commissioner does not apply when suit is brought by the government, and the person taxed is defendant instead of plaintiff. The limitation of time prescribed in section 3227, it is equally clear, does not affect the right to set up matter of defense in a proceeding in which the government is the moving party. Besides, the limitation is against suits "for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected," and notwithstanding the alternative expression "assessed or collected," it is evident there can be no "recovery" of an uncollected or unpaid tax, and in this case, consequently, a cause of action to recover the tax had not accrued when the intervening petition was filed; and, once the government chose to come into court for relief, it was competent for the receiver, representing the interests involved, to show that the assessment was erroneous or illegal, and should not be enforced. In section 3207 of the Revised Statutes it is provided that the commissioner of internal revenue may direct the bringing of a bill in chancery "to enforce the lien of the United States for tax upon any real estate," and that at the hearing the court shall adjudicate all matters involved "and finally determine the merits of all claims to and liens upon the real estate in question"; and, while this was not a proceeding under that section, it was strongly analogous, and we have no doubt that the court, upon the petition presented, had authority to determine the merits, and was not

limited to the inquiry whether an assessment had been made, and remained unpaid, as alleged. It follows that there was no error in the refusal of the court to allow the petition to be dismissed without prejudice. The merits having been put in issue, and the finding of the court announced, it was proper that there should be a conclusive decree. Whether, if the petition had been simply for leave to the government officers to enforce the collection of the tax by seizure and sale of the distillery, the court could properly have inquired into the merits of the assessments, is a question which does not arise, and is not determined.

In respect to the facts there is no dispute. It is clear that the deficiency of production, for which the assessment was made, was caused by a defective still, and "was not, in any sense, the result of culpable neglect, default, or mismanagement of the owners, proprietors, or managers having charge." The district attorney has urged that under section 3310 of the Revised Statutes "there should have been an application to the collector to have the distillery sealed up until the fault in the machinery could have been rectified," but we are convinced that there was no want of diligence in that respect, nor "any fraudulent purpose on the part of the distiller." See U. S. v. Rindskopf, 105 U. S. 418; Felton v. U. S., 96 U. S. 699.

Reference is made in the brief of the district attorney to an order of the court of January 28, 1895, which, it is said, was erroneous, and should have been set aside upon the filing of the intervening petition, because it restrained the collection of this tax. But no such order is shown in the record before us. The intervening petition makes no mention of it, and it does not appear that the court was asked to set it aside. The decree below is affirmed.

BOSTON & R. ELECTRIC ST. RY. CO. v. BEMIS CAR-BOX CO.

(Circuit Court of Appeals, First Circuit. April 21, 1897.)

No. 201.

1. PATENTS.
   Where an invention does not relate to matters of mere convenience, simplicity of form, or cheapening of cost, but involves a new and useful function, though in a limited field of operation, the patentee will be entitled to sufficient aid from the doctrine of equivalents to meet mere departures in form of such a character as to suggest that they are studied evasions of the claim.

2. SAME—CAR AXLE BOX.
   The Bemis patent, No. 239,702, for a car axle box, construed, and *held* valid and infringed as to the first claim. 75 Fed. 403, affirmed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a suit in equity to enjoin the alleged infringement of letters patent No. 239,702, issued April 5, 1881, to Sumner A. Bemis, for a car axle box, and No. 330,372, also to said Bemis, November 17, 1885, for a car wheel and axle box. The circuit court entered a decree for

complainant under the first patent, but found that respondent did not infringe the second one. 75 Fed. 403. From this decree the defendant has appealed.

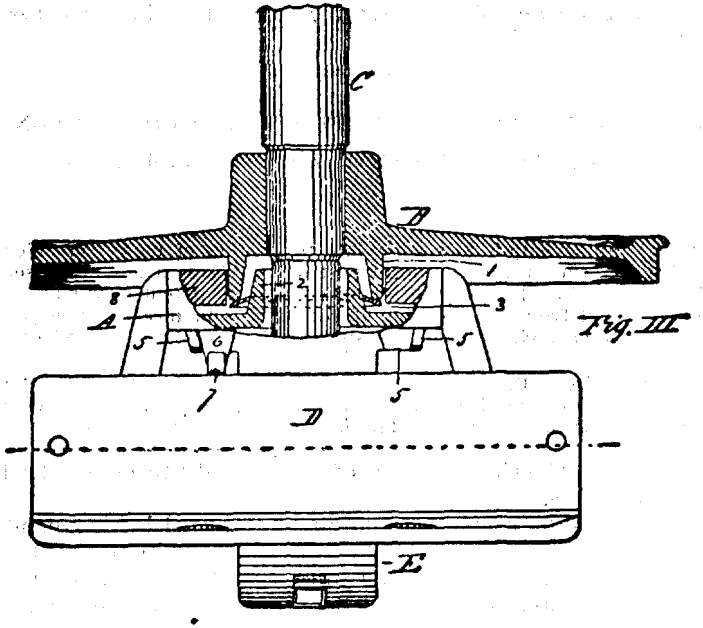
Francis Rawle, for appellant.

Frederick P. Fish and W. K. Richardson, for appellee.

Before PUTNAM, Circuit Judge, and WEBB and ALDRICH, District Judges.

PUTNAM, Circuit Judge. The controversy in this case is over claim 1 of a patent issued to Sumner A. Bemis, on April 5, 1881, and the claim was sustained and held infringed by the court below. The appeal is from the usual interlocutory decree for an injunction and an account, entered on a hearing of the cause on bill, answer, and proofs. The complainant below (now the appellee) assures us that its device has proved in practice completely effective; but we do not find the evidence of this in the record, nor do we find any proofs showing to what extent it has been used, or the patent publicly acquiesced in. Therefore the patent is without the support which might come from a condition of facts favorable to it in these respects (Reece Buttonhole Mach. Co. v. Globe Buttonhole Mach. Co., 10 C. C. A. 194, 61 Fed. 958, 970); and we are left to determine the case from what appears in the records of patent offices, domestic and foreign, from the testimony of experts, and from what we can ascertain to be matters of common knowledge and experience.

The appellee's device is shown by the following drawing, forming a part of the application for its patent:



The inventor to whom appellee's patent issued described his invention as an "Improved Car Axle Box"; and all he said in his specification relevant to claim 1 was as follows:

"The object of my invention is to provide a cheap and convenient manner of securing the springs in place between the housing and the pedestal, to ease the side movement of the car, and also an effective way or means of excluding the dust and dirt from the axle bearings; and I accomplish these objects by the means illustrated in the accompanying drawings. * * * In the drawings, C represents a car axle; B, the car wheel; E, the axle box; and A, the housing at the inner end of the box, on the inner part of which housing is made a tubular sleeve, 2, tapered on its periphery, as shown clearly in Fig. III. That part of the housing nearest the car wheel is filled with wood blocking or other suitable material, 8, with a circular space between the blocking, 8, and the sleeve, 2, to receive the sleeve or flange, 1, cast on the outer face of the wheel. A washer, 3, is placed on the sleeve, 2, the hole through the washer being a little smaller than the largest part of said sleeve, 2; and when the axle bearing is in its proper position in the axle box, the end of the sleeve or flange, 1, on the wheel, impinges against the washer, and tends to crowd the latter further upon the sleeve, 2; and when in this position, as there is always contact between the end of the flange on the wheel and the side of the washer, and also contact between the inner rim of the washer and the outer surface of the sleeve, 2, on the housing, of course the dust cannot get past the washer into the axle box."

Claim 1, in issue here, is as follows:

"The combination, in a car axle box, of the car wheel provided with a flange projecting out from the side of the wheel and around the axle, a tapered sleeve on the box or its housing projecting into the said flange on the wheel, and surrounding the axle, and a washer placed upon said tapered sleeve on the box, and there confined by contact with the end of the flange on the wheel, substantially as described."

For the purpose of attacking the novelty of this device, and also for the further purpose of limiting its range, the respondent below (now the appellant) introduced many prior patents, both domestic and British. We are unable, however, to perceive that any of them contained all the elements found in the appellee's device, or were intended to perform precisely the same function. The elements found in the claim are (1) the projecting flange; (2) the tapered sleeve; (3) the washer; (4) the location of the washer so as to be "confined by contact"; and (5) some elasticity in the washer, implied from common knowledge, and from the words "confined by contact," as well as from the words in the specification "always contact between the end of the flange on the wheel and the side of the washer." A combination of all these is not found in any prior device proved in the record, and the novelty of the appellee's device is established to our satisfaction.

As bearing on the question whether the device involved patentable invention, the appellee's expert testified as follows:

"I understand that the purpose of the tapered sleeve on the axle box is to provide a part which will hold a flexible washer thereon, which washer in the patent is indicated by 3, and that the purpose of the flange which projects out from the side of the wheel is to provide a suitable part which rotates coincidingly with the wheel and the axle, to have such a bearing against the outer side of said flexible washer as will prevent dust from entering into the box between the edge of said flange and the adjoining side of the washer. The flexible nature of the washer permits a certain end motion of the axle, or its journal, within the box, or of a similar motion of the box and its journal brass on the journal, such as is common in car constructions, and still keeping the outer side of the washer and the flange on the wheel so in contact that, even