

---

Statement of the case.

---

favor of the claimants, and will give my views as briefly as may be. When the resolution giving the twenty per cent. was passed, nearly eight months of the year to which the allowance related had elapsed. The allowance was a mere gratuity. Hence there was no vested right arising from the resolution, and there could be none. But the resolution was operative in each case until the claimant was paid. When repealed, the gratuity which it gave fell with it. The repeal necessarily had that effect. I see no reason for giving the repealing section a more limited construction. It was intended to take away from all those who had not then been paid, the right to be paid thereafter. I think, therefore, that the judgments of the Court of Claims should be reversed.

---

PAHLMAN v. THE COLLECTOR.

Under the act of July 20th, 1868, imposing taxes on distilled spirits, the assessor and his assistant, in estimating the true producing capacity of a distillery, are empowered to fix as the true fermenting period such period as they, after examination and calculation, may deem the true one. They are not bound to take as such the period which the distiller, in the notice which the sixth section of the act requires him to give, has declared that he would use for fermentation, and which, subsequently, he actually did use.

ERROR to the Circuit Court for the Northern District of Illinois.

Pahlman & Co., distillers in the district of Illinois just named, sued Raster, a collector of internal revenue in the same district, to recover of him certain money which they had paid to him under protest, as tax upon distilling from February to July, inclusive, in 1871, the amount sued for being, as was asserted by them, so much *in excess* of what was really due.

The only question involved was one of law, and came up on demurrer to special counts in the declaration. That

---

Statement of the case.

---

question was whether, under the act of July 20th, 1868,\* entitled "An act imposing taxes on distilled spirits, tobacco, and for other purposes," the assessor and surveyor, in estimating a *true producing capacity* for a distillery, had power to fix upon a certain period as the *true fermenting period*, or whether they were bound upon this point by the period of which, in his *application*, the distiller has stated that he would make use, and of which in point of fact he did make use.

The distiller denied that they had. The collector took the contrary position.

The statute above referred to enacts:

"SECTION 2. The Commissioner of Internal Revenue, for the prevention and detection of frauds by distillers of spirits, is hereby authorized to adopt and prescribe for use such hydrometers, saccharometers, weighing and gauging instruments, meters or other means for ascertaining the quantity, gravity, and producing capacity of any mash, wort, or beer, used in the production of distilled spirits, and the strength and quantity of spirits subject to tax, as he may deem necessary; and he may prescribe rules and regulations to secure a uniform and correct system of inspection, weighing, marking, and gauging of spirits.

"SECTION 6. Every person intending to be engaged in the business of a distiller or rectifier shall give notice in writing, subscribed by him, to the assessor of the district within which such business is to be carried on, stating . . . the place where said business is to be carried on, and whether of distilling or rectifying. . . . In case of a distiller, the notice shall also state the kind of stills and the cubic contents thereof, the number and kind of boilers, the number of mash-tubs and fermenting-tubs, and the cubic contents of each tub, the number of receiving cisterns and the cubic contents of each cistern, &c. *The notice shall also state the number of hours in which the distiller WILL ferment each tub of mash or beer*, the estimated quantity of distilled spirits which the apparatus is capable of distilling every twenty-four hours, &c. In case of any change in the location, form, capacity, &c., of such distillery, or in the time of ferment-

---

\* Chap. 186, § 10, 15 Stat. at Large, 129.



---

Statement of the case.

---

ing the mash or beer, notice thereof, in writing, shall be given to the said assessor or to the assistant assessor of the division within twenty-four hours of said change.

"SECTION 9. Every distiller shall cause to be made an accurate plan and description of the distillery and distilling apparatus, distinctly showing the location of every still, boiler, doubler, worm, tub, and receiving cistern, the course and construction of all fixed pipes used or to be used, . . . and of every cock or joint thereof, and of every valve therein. . . . Such plan and description shall also show the number and location, and cubic contents, of every still, mash-tub, and fermenting-tub, together with the cubic contents of every receiving cistern, and the color of each fixed pipe.

"SECTION 10. Every assessor shall proceed, . . . with the aid of some competent and skilful person, to be designated by the Commissioner of Internal Revenue, to make survey of each distillery registered or intended to be registered for the production of spirits in his district, to estimate and determine its true producing capacity, &c., a written report of which shall be made in triplicate, signed by the assessor and the person aiding in the same, one copy of which shall be furnished to the distiller, one retained by the assessor, and the other immediately transmitted to the Commissioner of Internal Revenue. If the Commissioner of Internal Revenue shall at any time be satisfied that such report of the capacity of a distillery is in any respect incorrect or needs revision, he shall direct the assessor to make in like manner another survey, &c.

"SECTION 20. On receipt of the distiller's first return in each month, the assessor shall inquire and determine whether said distiller has accounted in his returns for the preceding month, for all the spirits produced by him; and to determine the quantity of spirits thus to be accounted for, the whole quantity of materials used for the production of spirits shall be ascertained; and forty-five gallons of mash, or beer brewed or fermented from grain, shall represent not less than one bushel of grain, and seven gallons of mash, or beer brewed or fermented from molasses, shall represent not less than one gallon of molasses. In case the return of the distiller shall have been less than the quantity thus ascertained, the distiller or other person liable shall be assessed for such deficiency at the rate of fifty cents for every proof gallon, together with the special tax of \$4 for every

---

Statement of the case.

---

cask of forty proof gallons, and the collector shall proceed to collect the same as in cases of other assessments for deficiencies; but in no case shall the quantity of spirits returned by the distiller, together with the quantity so assessed, be for a less quantity of spirits than eighty per centum of the producing capacity of the distillery, as estimated under the provisions of this act.

"SECTION 103. The Commissioner of Internal Revenue is authorized to make all such regulations, not otherwise provided for, as may become necessary by reason of any change of law in relation to internal revenue made by this act."

In accordance with his construction of the powers given him, the commissioner issued, on the 8th of March, 1870, a general circular regulating surveys, containing the following instructions:

"The true producing capacity of a distillery is not limited to what a distiller may produce by following a particular course which he has marked out, but what may be produced under favorable circumstances.

"The true producing capacity of a distillery is not the amount so proposed to be produced, but the amount which can be produced, using all the machinery and apparatus under competent and skilful management, taking as a basis for the calculation such premises as will produce the best practical results.

"The true spirit-producing capacity of a grain distillery is mainly determined by its *fermenting capacity*; but as this is sometimes affected by the modes of mashing and distilling, these are therefore to be considered.

"Having found the number of bushels which are required to fill the fermenters, the assessor and person designated to aid him will determine what, under all the circumstances, is a reasonable period to be allowed for fermenting, and in so doing they are not bound by the period stated in the distiller's notice, but are to take such period as will, under ordinary circumstances, and with good management, produce the best results. From the best information, it is believed that a fermenting period of sixty hours is as long a period as can be used consistently with good management or a profitable conduct of the business, and where a greater period than this is assumed it must be accompanied with such a statement of the circumstances as will show it to be justified as an exceptional case.

## Statement of the case.

"The surveyor, having ascertained by the measurement the cubic contents of the fermenting-tubs, finds it necessary to determine:

"1st. The number of dry inches to be allowed each tub for fermentation.

"2d. *The period necessary to enable the distiller to ferment each tub of mash.*

"3d. The number of gallons of spirits that can be produced from a bushel of grain.

"These are questions coming within the discretion and judgment of the assessor and his skilful assistant, with which the office of internal revenue has no disposition to interfere. But it has been thought proper, for the guidance of the surveyor, to prescribe certain rules on these points. Surveyors are, therefore, to be governed by the following rules in fixing the capacity of a distillery, except where they find that they do not correctly determine its capacity:

"Forty-eight hours is prescribed as the maximum period to be allowed for fermentation in sweet-mash distilleries.

"The only exception to this rule that is thought to be justified by sufficient reasons is where the mashing is done by hand, where hot water is the only heating agent, and the distillation is in copper by furnace heat. It is believed that with this imperfect mode of stirring and regulating the temperature, such a perfectly fermented beer cannot be uniformly produced as is necessary for distillation in copper with furnace heat, to prevent occasional burning of the still; in such cases seventy-two hours will be allowed for fermentation."

The provisions of statutes already given being in force, and the Commissioner of Internal Revenue having issued the regulations just quoted, the plaintiffs, on the 1st of August, 1870, intending to engage in the business of distilling alcohol from grain, gave notice to the assessor, as required in the sixth section of the act of July 20th, 1868, above quoted, that they would ferment each tub of mash, or beer, used by them in the manufacture of alcohol, for the period of *seventy-two* hours. When, however, afterwards the assessor and his skilled assistant estimated and determined the producing capacity of the distillery, pursuant to



---

Argument for the distiller.

---

the directions of the tenth section of the act, the capacity was determined by assuming the period of fermentation to be *forty-eight* hours; this assumption being made, of course, in accordance with the above-quoted regulations prescribed by the Commissioner of Internal Revenue. The tax was assessed and collected according to the survey thus made.

The court below gave judgment for the collector, and the plaintiff brought the case here.

*Mr. W. B. Scales, for the plaintiff in error :*

The commissioner, by his regulations, not only treats the sixth section of the act of 1868, and the notice which it requires to be given, as a nullity, but claims the right to fix upon any fermenting period which he thinks proper.

The object of the legislature in taxing distilled liquors was to raise revenue on them, not to cripple or destroy distillers; neither was it to compel them to carry on their business in a manner to produce the largest amount of taxable products without regard to facts or to the reasonable interests of the distillers.

That the notice in section six was intended to give the distiller the right to contract and fix his own period of fermentation is shown, not only by the language of the act, but by the debates upon it while under consideration in the committee of the whole.

The Congressional Globe\* of the time shows that when the act was before Congress, Mr. Beck, a member, moved to strike out the word "*will*," in section six,† and insert in lieu the words, "*usually takes to*," so that the passage would read—

"The number of hours in which the distiller *usually takes to* ferment each tub of mash or beer."

He said :

"It is impossible to tell how long it will take to ferment. I know it varies in my district, from three days and a half to five

---

\* Second session, Fortieth Congress, part four, page 3414.

† *Supra*, p. 190, fourth line from the bottom.

---

Argument for the distiller.

---

days; depending upon the weather and other causes. You should not punish a man who cannot help himself. He should not be held responsible for the failure to ferment within the time when the weather or a thousand other circumstances may prevent the fermentation.

The report continues:

"MR. SCHENCK. When I first read the form of expression contained in other legislation it struck me somewhat in the same way. We called a council of distillers on the subject and found that *this* was just the language they used. They have twenty-four hour, forty-eight hour, and seventy-two hour beer. Although there may be a little difference occasioned by the temperature, they classify their beer in that way, and *every distiller will tell*, in regard to a particular kind of beer, what time he wants for his mode of distillation, so that the bill is, in fact, drawn in conformity with the notions of the distillers themselves. The amendment would make it very vague even as to the rules of the distillers themselves.

"MR. BECK. They should not be punished for failing to do what is inevitable. The time varies in extreme cold or in extreme warm weather. A thunderstorm will so affect it that it will not ferment in a very long time. If the committee, however, think that the word '*will*' leaves margin enough I will not press the amendment.

"MR. ALLISON. I think it does.

"MR. SCHENCK. Permit me to say that our object is to charge upon the capacity, among other things, and if we leave an *uncertainty* about *this* we run the *risk* of not getting the *capacity taxed*. The distillers themselves have their rule on the subject, and whatever time it takes to ferment they designate their beer accordingly, as twenty-four, forty-eight, or seventy-two hour beer.

"MR. BECK. I withdraw the amendment. I only desired to call attention to the subject."

It is thus seen that the wording of section six, in inserting the word "will," and retaining it on debate, was intended by the chairman of the committee which ordered it, and that, too, after conference with distillers, to give distillers the right to fix and control the period of fermentation,

---

Argument for the government.

---

each for himself, and that, too, with reference to the per diem tax. And upon debate the word was retained, because it expressed and would secure that right to distillers.

*Mr. G. H. Williams, Attorney-General, and Mr. S. F. Phillips, Solicitor-General, contra :*

No canon for the interpretation of statutes justifies a reference to what was said by particular members of the legislature on the discussion of a bill which subsequently became a law.

The provision in section two, authorizing the commissioner to adopt and prescribe means for ascertaining the *producing capacity* of such beer, necessarily intrusts to him, in connection with the *skilful* surveyor, his agent, the power of selecting the point of time for applying such means; that is, the point at which such beer becomes most productive, or is *ripe*.

A *true* producing capacity implies a *true* fermenting period, and nature is as uniform in "her fermenting periods," for considerable quantities of beer and lengths of time, as in any other of those operations which render her uniformity proverbial. It seems, upon consideration, to be entirely reasonable to allow the Commissioner of Internal Revenue to determine, as matter of science combined with extensive observation, what within the United States, with rare exceptions, must be the *maximum* fermenting period, and equally so for a skilled surveyor to determine what is the *true fermenting period* of a certain distillery whose location and methods of operation he has examined.

In general, however, it seems enough to say that the statute is as careful in requiring from the distiller minute data for ascertaining actual results, contemplated or accomplished, as it is in leaving the surveyors to use their *skill* untrammelled, under the general superintendence of the commissioner, in determining what *ought* to be the result, at least with a margin of twenty per cent.; and that it will be injurious to confound matters intended to be kept apart, if this *skill* is to be embarrassed by the rules of practice of per-



---

Opinion of the court.

---

sons not required to be skilful ; persons of whom all that the law knows is, that they *intend to become* distillers.

Mr. Justice STRONG delivered the opinion of the court.

The question is whether, by the act of Congress under consideration, the assessor and his assistant, in estimating the true producing capacity of a distillery, are empowered to fix, as the true fermenting period, any other than that which the distiller in his notice to the assessor, required by the sixth section, has declared he would use for fermentation, and which he actually did use.

That the producing capacity of a distillery is conclusively determined by the survey and estimate made under the tenth section of the act (that survey, however, being subject to revision by the Commissioner of Internal Revenue), was ruled in *Collector v. Beggs*.\* In that case we said "the survey and estimate of producing capacity made under the tenth section were conclusive while they remained, though subject to revision under the direction of the Commissioner of Internal Revenue. And the extent of liability to taxation was, by the act of Congress, directed to be measured, not by the actual product of spirits, but by what should have been the product of the materials used according to the estimate made under the tenth section." And this is very plainly the intention of the law, for by that section, the only one which expressly provides for the ascertainment of the producing capacity, it was made the duty of the assessor, with the aid of some competent and skilful person to be designated by the Commissioner of Internal Revenue, to make survey of each distillery registered, or intended to be registered, for the production of spirits in his district, not only to estimate, but to *determine* its producing capacity. Of this estimate and determination the assessor and his assistant are required to make a written report in triplicate, signed by them, one original of which is to be furnished to the distiller, one retained by the assessor, and the third is to be

---

\* 17 Wallace, 182.

## Opinion of the court.

transmitted to the Commissioner of Internal Revenue. It is also provided that if the commissioner shall at any time be satisfied that such report of the capacity of a distillery is in any respect incorrect, or needs revision, he may direct the assessor to make another survey. Thus a measure of taxation is fixed, and the distiller is notified of it before he commences distilling. All this leaves no doubt that the reported survey was intended by Congress to be conclusive until corrected by direction of the commissioner.

But while this is not denied by the plaintiffs in error as a general proposition, it is insisted that in estimating and determining the producing capacity of the distillery, the assessor must be controlled by the notice which the distiller is required to give him by the sixth section of the act, and must base his calculations upon the period of fermentation fixed in that notice. It is said he has no power to adopt any other period of fermentation, even though ordered to do so by the commissioner, and, if he does, that his estimate and determination are not conclusive. In this objection we cannot concur. It is founded, we think, upon a misapprehension of the statute. The sixth section requires every person engaged in, or intending to be engaged in, the business of a distiller, or rectifier, to give notice in writing to the assessor of the district within which he proposes to carry on the business, stating therein his name, his associates, if any, and his proposed place of business. If he be a distiller, he is required to state in his notice the kind of stills and the cubic contents thereof, the number and kind of boilers, the number of mash-tubs and fermenting-tubs, and the cubic contents of each tub, the number of receiving cisterns and the cubic contents of each cistern, together with a particular description of the lot or tract of land on which the distillery is situated, with the size and description of the buildings thereon, and of what material constructed. The distiller is also required to state in his notice the number of hours in which he will ferment each tub of mash or beer, and the estimated quantity of distilled spirits which the apparatus is capable of distilling every twenty-four hours.

---

Opinion of the court.

---

The object of these requirements is too plain to be misunderstood. Clearly it is not to enable the distiller to determine for himself the producing capacity of his distillery, and thereby partially fix the extent of his liability to taxation. It is to furnish protection against frauds, and possibly to assist in the ascertainment of the quantity of spirits actually distilled. If intended at all to bear upon the estimate of the producing capacity of the distillery, it can only be regarded as suggestive, not as controlling. It is after this notice has been given that the assessor and his skilled assistant are required, as by the tenth section of the act, to make an estimate and determination of the producing capacity. They are no more required to take the fermenting period designated in the notice as the true fermenting period than they are controlled by the distiller's statement of the number and cubical contents of the stills, mash-tubs, and cisterns he intends to use, or by his estimate of the capability of his apparatus. They are required to calculate and report what the distillery can produce, not what the distiller proposes to produce, or what the apparatus would produce, if employed in a particular manner. To enable them to discharge this duty the provisions of the ninth section were enacted. That section requires the distiller to furnish to the assessor an accurate plan of the distillery and distilling apparatus, showing the location and mode of construction of the apparatus and the cubical contents of each vessel. Undoubtedly the main elements necessary for a determination of the producing capacity are the size of the stills, mash-tubs, and cisterns, and the duration of the fermenting period. There is unquestionably, in the nature of things, a true fermenting period, dependent on the operation of natural processes, a period which may be variant from that selected by a distiller. This period may vary somewhat in different latitudes, but it is everywhere ascertainable, and the commissioner, we think, is authorized by the second section of the act to prescribe regulations for ascertaining it. By that section he is authorized to adopt and prescribe for use such hydrometers, saccharometers, weighing and gauging instruments,



---

Opinion of the court.

---

meters, or other means for ascertaining the quantity, gravity, and productive capacity of any mash, wort, or beer used or to be used in the production of distilled spirits, as he may deem necessary. This is inconsistent with the idea that the notice of the distiller is to determine the producing capacity. And though in his notice he is required to state the time in which he will ferment his mash, and also an estimate of the quantity of distilled spirits which the apparatus is capable of distilling every twenty-four hours, that is his estimate. Nowhere in the act is any provision made that his statement and estimate shall be obligatory upon the assessor and his skilled assistant. Nor is there to be found in the act any rule by which the producing capacity of a distillery is to be determined, except that the commissioner of internal revenue is, by the second and one hundred and third sections, empowered to make necessary regulations. The declaration shows that such regulations were made, and they were followed by the assessor. The survey was made accordingly. If instead of following the instructions given by the commissioner, the assessor must adopt a period for fermentation given to him by the distiller—a period which may, or may not, be a true one; that is, the period within which complete fermentation takes place—it is obvious there can be no certainty in the ascertainment and determination of the actual producing capacity of the distillery, and the object which the law has in view will be defeated. At most, all the assessor and his assistant can do will be to ascertain the actual product. The possible product cannot be ascertained; yet, as we have had occasion to say heretofore, when giving a construction to this act of Congress, both the producing capacity and the quantity of spirits actually produced are made by the law measures of taxation, and provision is made for the determination of each.\*

But without pursuing the subject farther, we have said sufficient to show that in our opinion the notice given by the distiller of the time he will ferment each tub of mash or beer does not control the survey. The assessor must deter-

---

\* United States v. Singer, 15 Wallace, 111.

---

Statement of the case.

---

mine and report the true actual capacity, and not what the distillery will produce in the distiller's proposed mode of running it. There is, therefore, no well-founded objection to the conclusiveness of the survey in this case, and as the tax assessed and collected was in accordance with the survey, the plaintiffs have no right of action to recover it back.

Nor is there any such hardship as is suggested. We have seen that a report of the surveyor's determination of producing capacity is by the law required to be placed in the hands of the distiller before he commences business. If dissatisfied with it, he may apply to the commissioner for another survey. He is thus informed of the extent of his liability to taxation. He has, therefore, little reason to complain, when he commences distilling, and does not produce at least eighty per cent. of what his distillery can produce, as determined by the survey, if he is taxed according to a standard which is not false, and of which he had thus early notice.

JUDGMENT AFFIRMED.

---

THE LOTTAWANNA.

1. It is error and ground of reversal for a Circuit Court to affirm a decree in admiralty of the District Court, and at the same time dismiss the appeal.
2. Where claims on the proceeds in the registry of a vessel sold are not maritime liens, the District Court cannot distribute those proceeds in payment of the claims if the owners of the vessel oppose such distribution.
3. A creditor by judgment in a State court, of the owners of the vessel, even though he have a decree *in personam* also in the admiralty against them, cannot seize, or attach, on execution, proceeds of the vessel in the registry of the admiralty.
4. Where an appeal is taken to the Circuit Court from the decree of the District Court in a proceeding *in rem*, the property or its proceeds follows the cause into the former court.

APPEAL from the Circuit Court for the District of Louisiana; the case—divested of irrelative incidents, with a great number of which, as seen in the record, it had come here confused and perplexed—was thus: