SUPREME COURT DECISION.

Z. C. M. I. VS. O. J. HOLLISTER.

CO-OPERATIVE SCRIP NOT TAXABLE

In the Supreme Court of Territory of Utah.

Zion's Co-opretative Mercantile Institution *Plaintiff and Respondent,*
vs.
O. J. Hollister, *Defendant and Appellant.*

The plaintiff in its complaint alleges that it is and was at the times therein mentioned a corporation organized and existing under the laws of this Territory solely for the purpose of carrying on mercantile business. That the defendant at and during the same times was and is the acting collector of Internal Revenue for the United States.

That in 1876 the plaintiff made certain mercantile orders of the denominations of $1, $2 and $5, which were used in paying its employees who were willing to take their pay in merchandise, and also as a means of convenience in exchange for produce, which it was agreed should be paid for in merchandise, and that they were not made, or used, or paid, or circulated for any other purpose whatever; that upon the 25th day of July, 1878, the United States commissioner of internal revenue set down to and assessed against the plaintiff a special tax of ten per centum, amounting to $10,000 as a tax upon notes alleged to have been used by plaintiff for circulation, and paid out by it for and during the two months ending on the 30th day of November, 1876, and between the 30th day of November, 1876, and the 1st day of June, 1878; that the list containing said assessment was by said commissioner of internal revenue placed in the hands of the defendant, as such collector; that the defendant on the 7th day of August, 1878, as such collector, demanded of the plaintiff the payment of the aforesaid tax, assessed as aforesaid, and threatened that unless payment of the same was made he, the defendant, as such collector, would seize upon and sell sufficient of plaintiff's property to pay said tax; that while defendant was so threatening to sell and about to sell the property of the plaintiff, the plaintiff under protest and with notice then and there given by it to the defendant, that said tax was erroneous and illegal, and that suit by the plaintiff would be commenced against the defendant to recover the same and to prevent the seizure and sale of plaintiff's property as threatened by the defendant, paid to the defendant the amount of said taxes, the sum of $10,000. That on the 25th day of September, 1879, the plaintiff in due form of law made its appeal to the Commissioner of Internal Revenue to have said sum assessed against and paid by the plaintiff, refunded. That said Commissioner on the 14th day of October, 1879, decided said appeal against the plaintiff and refused to refund the same or any part thereof, excepting $500. That the said assessment, demand for payment and payments were made upon the said alleged merchandise orders, and upon no others, and for the use and circulation of them, as above stated; that by reason thereof there remains due and owing to the plaintiff from the defendant the sum of $9,500, with interest thereon. The defendant in his answer alleges that the orders described in the complaint were printed on good paper, in their general appearance resembled bank notes, and would be taken and considered as such by the masses of the people, or as circulating medium; that in addition to the words and figures given in the complaint as descriptive of said orders, the denomination of each of them appeared upon the face thereof, and across the same in their places, in large letters and figures. Defendant denies that the plaintiff did not use, make, pay out or circulate said notes or orders except for the purpose of paying its employees or as a means of convenience in exchange for produce; and upon information and belief, says that during the months of October and November, 1876, and during the time from November, 1876, until July, 1878, the plaintiff issued its notes or orders to the amount of one hundred four thousand five hundred dollars, in substantially the form above described, and of such form, material and appearance as to be readily taken and passed as money and a circulating medium.

That plaintiff paid out and issued said notes or orders to any and all persons who would accept them in payment of any debts owing by plaintiff for the produce, labor or other commodities or causes, the same as money; also received them in payment of goods or other commodities sold, or for debts due plaintiff, took and received said orders and notes the same as money; and again; paid out said notes and orders in the course of trade the same as other money. That after the issue of said notes or orders by plaintiff; they were used for circulation and and as a circulating medium at Salt Lake City as well as in other places in this Territory, by a large portion of the people in all their business transactions, the same as money; and by them treated as money, and to a considerable extent said note sand orders, during the years 1876 and 1878 inclusive, did displace as a circulating medium to the amount of such notes or orders, the lawful currency and money authorized by the government of the United States; and denies there is the sum of $9,500 or any part thereof due or owing to the plaintiff. That the tax or assessment levied and collected of plaintiff were the same as assessed, levied and collected on account of the issue and circulation of said notes and orders, and says that in the matter of said assessment and collection of said taxes, and in all he did connected therewith, he acted only by virtue of his authority as assessor and collector of internal revenue of the government of the United States, and under the direction of the proper officer of the United States government.

Upon the trial it was admitted by the defendant that the sample copies annexed to the complaint were true and correct copies of all the instruments taxed, as for, or on account of the use of which, the assessments and collections of the money sought to be recovered in this action were made; and that no part thereof had ever been refunded to the plaintiff, whereupon the plaintiff rested its case.

The following is a copy of one of the instruments:

No. 318. Series A.
SALT LAKE CITY, Oct. 18, 1876.
Pay David O. Calder or bearer
Five Dollars
in merchandise at retail.
To H. B. CLAWSON. G. H. SNELL.

It was in open court agreed by counsel for the respective parties that the only questions in dispute were: 1. Whether the instruments, the terms and characters of which had been admitted, were liable to the tax assessed against them. 2. If so, whether they were in fact used for circulation as money, and paid out by plaintiff as money, whereupon the plaintiff rested its case. The defendant offered in evidence the return made by the plaintiff to the defendant as the United States Collector of the District of Utah and offered to prove: 1. That these instruments were issued by plaintiff, drawn upon one of its officers, and that they were used for circulation and paid out by plaintiff. 2. That they were used for circulation, and paid out by plaintiff as money. 3. That they were used by the plaintiff and paid out by the plaintiff as money. 4. That by reason of the circulation and use of these instruments by the plaintiff, they displaced to a large extent the currency of the United States, to all of which offers the plaintiff objected, and the objections were sustained by the Court.

At the request of the plaintiff, the defendant objecting, the court instructed the jury to find for the plaintiff in the full amount claimed by the plaintiff with interest. To which instruction the defendant at the time excepted. The verdict was in compliance with the instructions. Judgment was entered accordingly. Motion for a new trial was filed, and overruled—and appeal taken to this court.

The following is the statutory provision under which the assessment was made: "That every person, firm, association, other than national bank associations, and every corporation, state bank, or state banking association, shall pay a tax of 10 per centum on the amount of their own notes used for circulation and paid out by them." Supplement to Rev. St., vol. 1, 1874-1881, p. 133, s. 19.

The material question in this case is, in what sense did Congress use the term *note* in this section?

To determine this question we are permitted to look at the subject matter of the statute as well as to the name given by it to the instrument.

A statute imposing a tax should be clear and unambiguous, and when by its terms it clearly and without doubt imposes a tax upon a particular class of property, it should not, by a forced construction, be held to include other property, which is not with reasonable certainty included by its language. A citizen about to make investments, or to engage in business, should be enabled by the exercise of ordinary judgment and discretion to know with reasonable certainty what his obligations under existing laws, as a tax-payer may be; and the ordinary use and force of the language used—the obvious intention of the legislature, will determine his rights and liabilities, as to this matter. Cooley on taxation 199 208.

In cases where the language of the statute is so obscure as to cause doubt as to the liability of an instrument to taxation, the construction is in favor of the exemption, because a tax cannot be imposed without clear and express words for that purpose. United States *vs.* Isham 17 Wall, 504. There are many instruments properly called notes, but in matters of commerce the word note means an instrument recognized as a note in the mercantile sense of the word—a promise to pay money, unless the term is qualified.

"Notes used for circulation' are necessarily negotiable and payable in money. They are intended to and do represent money, and do the work of money in business transactions, and on a day therein named become money.—1 Parsons on N. and B., 4245.

A note of this description made and "paid out" by the plaintiff, with the design and intention that it should be, and is, put into circulation and does the work of money, as a circulating medium, is clearly within the statute and taxable; but an order to pay D. O. C., or bearer five dollars in merchandize at retail is of another class or description of paper, which does not perform the office or functions of money and is not a note in the sense in which the word is used in the statute, United States vs. Van Auken, 96 U.S. 366. We are, for these reasons of the opinion that there was no proof that the respondent *issued any notes* within the intent and meaning of the statute, and *that the court below* did not err in excluding the evidence offered by the appellant of the issuing and circulation by the respondent of its orders or promises to deliver merchandise, and the other evidence offered by the defendant at the trial, and that there was no error in the instruction to the jury. The judgment of the District Court is affirmed.

STEPHEN P. TWISS, A. J.

Hunter, C.J., and Emerson, A.J. concur.

Sheeks and Rawlins for respondent.

P. T. Van Zile for appellant.

BY TELEGRAPH.

PER WESTERN UNION TELEGRAPH LINE

AMERICAN

WASHINGTON, 30.—Wm. A. Cook says he proposes to sue the Attorney General for slander. Brewster made certain charges against Cook in a recent interview published in the Philadelphia *Press*. The following correspondence explains itself:

WASHINGTON, June 29.

Benjamin Harris Brewster, attorney general:

Sir—On the 7th inst I mailed you a letter, of which the following is a copy: "Washington, 7.—Benjamin Harris Brewster, attorney general of the United States. Dear Sir.—My attention has been called to an interview with you, published in the Philadelphia *Press*, May 14th. It appears that, among other things, you stated to the correspondent of the *Press* that the defendant in the Star route cases not only used the proceeds of their robberies to pay counsel, but money was expended in spiriting away witnesses, in buying up ex-counsel of the government, and in hiring newspapers to defend their rascality. Government has paid for all this. It also appears that the following question was asked you, viz: What do you mean by the assertion that defendants bought ex-counsel for the government in these cases? To which you replied: I meant that J. N. Brewster, of Carlisle, Pa., showed Mr. Bliss his book containing a record of payments made him on account of expenses incurred in the defense of these suits, among other things, and Mr. Bliss told me that Bosler's books contained entries of several thousand dollars paid to his law partners, Mr. Wm. Cook, and Mr. A. M. Gibson were orginally retained by the government on these bases, and I dismissed them because I felt that their services could be dispensed with. Allow me to enquire whether you are correctly represented in these extracts from the *Press*. You will observe that they contain first, strong and plain implications that, as one of the ex-counsels in the Star route cases, I was bought by the defendants, and second, positive assertion that you dismissed me as one of the original counsel. I will be pleased to receive an early reply. Respectfully,

WILLIAM COOK."

As you have not seen fit to reply to this letter, I am compelled to conclude that your utterances to the correspondent of the Philadelphia *Press* were correctly reported. Indeed this was a reasonable presumption, but I deemed it proper to afford you a fair opportunity for explanation or correction. I am not accustomed to notice misrepresentations or censure which uninformed or malignant persons may circulate or publish against me. I have neither time nor inclination to do so. But your accidental position as Attorney General of the United States imparts to your accusations an importance which they would not possess if they emanated from you as a private individual, and therefore both personal and public respect require that they should receive the proper denial from me. First, it is *utterly false* that the defendants in the Star route cases bought me as one of the ex-counsel. No one of them had the audacity to attempt it. I believe that Mr. Cole was for awhile *employed by* Mr. Rerediell, *but I am credibly informed* that he gave a receipt for his fee, which was turned over to the government. It is to be presumed that you knew this fact, moreover you were not ignorant of the truth that Mr. Cole and I were only limited partners in civil cases; this information you had twice from my lips, so that your assertion was not only untrue but made with full *information of the actual facts.* The *second declaration, that you dismissed* me as one of the original attorneys in the late star route cases could not be surpassed in misstatement. March 14, 1882, I send you a written and unsolicited resignation of my appointment as *special* attorney. On the 17th of that month you transmitted a reply in which *you said that my letter of resignation* was a surprise to you and that you could not see the necessity for it, and that had I continued in the cases and labored in them my usefulness would have been appreciated. It cannot be therefore doubted that when you made the assertion that you had dismissed me, it was utterly untrue. The intellectual and moral depravity which tempted and impelled you to malign and misrepresent me as you have, I am unable to comprehend. You probably can. It only remains for me to say that I will publish this reply to your manifestly malignant falsehood in the public press and pursue any other plan of vindication I may deem proper. An attorney-general cannot assail my professional or personal character with impunity, especially one who obtained his distinguished position amid the smoke of an assassin's pistol, and possibly by means which reflect little or no honor on exalted manhood. Yours, etc.

(Signed) WILLIAM COOK.

CHICAGO, 30.—The strife between west bound roads in reference to securing passengers for Denver, to the encampment of the Grand Army of the Republic, is still as great as it was a week ago, when the Rock Island met the St. Paul rate by putting the round trip tickets at $29.80, instead of rebate tickets. Other roads appeared to take no particular notice of the rate-making ability of the two roads, but they immediately began to understand that it was necessary to do something or they would not secure a particle of travel. Agents were dispatched to various parts of the country, especially to Ohio, Indiana, Michigan and Illinois points, with instructions to work quietly but to secure every passenger possible, with the distinct understanding that they would be carried at as low a rate as that made by any other road; this plan has been continued by several of the roads' agents, in most instances being members of the Grand Army, who were in a position to attend the meetings, if necessary, and present claims of the roads they represented for a share of the travel to Denver. While all this has been going on the roads have been watching each other in constant fear that the rate would be made still lower and be so secretly done, that it would come to their knowledge too late to be met. Yesterday a new complication commenced to stare them in the face. The round trip rate from Denver to San Francisco to the triennial conclave is $65, while from Chicago it is $69.50. The roads are anxious to sell as many tickets from Chicago as they can, but have become alarmed at the prospect of a rate being made to Denver that will be less than $24.50, for fear advantage may be taken of it to purchase tickets at the reduced rate and then buy their Santa Fe tickets at Denver. There was a rumor yesterday to the effect that the rate would be made to Denver as low as $20 and possibly less, and several of the representatives of west bound roads are becoming somewhat anxious to have a settlement of the question before such rate is offered, but have not yet called for a meeting to take action upon the subject, and none of them seem anxious to take the initiative in the matter. The attitude of the St. Paul and Rock Island is regarded as decidedly belligerent, and if a meeting is to be suggested it will be done by some other line. While there has been no open announcement that tickets would be on sale before July 15th, six days before the trains start and nine days before the meeting at Denver, it is currently reported among those who claim to know that tickets have been sent out and placed in the hands of prominent members of the Grand Army, with the distinct understanding that they shall be sold to meet any rate made by roads out of Chicago. A meeting is to be held at Denver from July 24th to 27th *inclusive*, and tickets have been announced *to be* on sale on July 15th, leaving but little time to fix matters up if the roads desire to prevent a war of rates that will possibly bring the price of tickets down to $15, and seriously interfere with their sales of tickets to San Francisco.

STAUNTON, Va., 30.—It is impossible at this time to gather minute details of the duel. *Elam* has been concealed not many miles from the scene of the combat for several days past. He was at the residence of John Lewis, son of *Hon. H. J.* Lewis. The arrangement for the meeting was mutual in Richmond at the time when Elam was in this vicinity, and Beirne in West Virginia. Some point midway between *the two places was* fixed [illegible] place, a change of seconds [illegible] the cartel as previously determined, namely, Colt's sixes, eight paces, was equally agreed upon. Both principals managed to evade the vigilance of the authorities, and at 6 o'clock this morning met in a strip of woods about two miles from Waynis, the junction of the Shenandoah Valley and C. & O. railroad. The distance was marked off, and at the first fire neither of the men were struck. Beirne, the challenger demanded a second shot which was granted and a bullet from his pistol buried itself in the upper part of Elam's right thigh. Beirne was untouched. Elam fell to the ground and *Beirne*, raising his hat to his fallen opponent, was hurried into a carriage and driven rapidly away. Subsequently he took the train at the station; Elam was also conveyed in a carriage to a house near by, where a surgeon attended him. It was found that the extraction of the ball would be attended with danger and a consultation among the surgeons was held. The fact that the ball had failed to force itself through is taken as evidence in connection with the character of the weapon used and the distance, that it came in direct contact with one of the large bones. No arrests have been made, nor does there seem to be a disposition to institute a legal investigation. Elam was removed to the residence of J. F. Lewis and his wife sent for.

Later—The physician then gave the word, "Gentlemen, are you ready, fire, one, two, three. Shots were to be exchanged after the word "fire" and before the word "three." At the word "one" both pistols were discharged in succession, but without effect. The same programme was repeated, both reports being simultaneous and just at the word "one." As Elam staggered under the effect of a wound, his seconds ran forward and assisted him to cushions which they had on the grounds. The wounded man was under the impression that the ball had penetrated both *legs*, and insisted that such was the case. When assured by the surgeon that it had