HILLS *v.* NATIONAL ALBANY EXCHANGE BANK.*

Supreme Court of the United States. April 3, 1882.

1. INJUNCTION—COLLECTION OF STATE TAX—SUIT BY NATIONAL BANK.

A suit may be maintained by a national bank on behalf of the shareholders to enjoin state officers from the collection of a state tax on the shares of the bank, on the ground of an illegal assessment arising from the failure to deduct from the valuation the debts owed by the shareholders.

2. SAME—SUIT BY SHAREHOLDER.

A shareholder who has made the affidavit and demand therefor required by law, may bring suit to enjoin the collection of such tax.

3. SAME—TENDER, WHEN NOT NECESSARY.

As a general rule, when tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused, or that payment or performance will not be accepted.

4. SAME—SUIT ON BEHALF OF SHAREHOLDERS.

Where it is shown that an affidavit and demand would have been unavailing, the shareholders may be permitted to show in an action by a national bank, brought on their behalf, the deductions to which they were entitled, and the collection of the amount of such deductions would be enjoined.

Appeal from the circuit court of the United States for the northern district of New York.

MILLER, J. This is an appeal from a decree in chancery of the circuit court for the northern district of New York, and it presents very much the same questions that have just been decided in the case of *Sup'rs of Albany Co.* v. *Stanley.* That was a commonlaw action to recover for taxes unlawfully exacted for years prior to 1879 on shares of the National Albany Exchange Bank, and the present suit was brought to enjoin the appellants from collecting a

similar tax assessed and yet unpaid for that year. In this case the bank sued in right of and as representing all the stockholders, and the circuit 94 court made a decree perpetually enjoining the collection of all taxes on shares of said bank. Several questions are raised or rather suggested which we think have heretofore been decided by this court, such as the right of the bank to maintain a suit on behalf of its shareholders. This was established by the cases of *Cummings* v. *Nat. Bank,* 101 U. S. 153; *Pelton* v. *Nat. Bank,* Id. 143. There is also an attempt to show that there was a settled rule of purpose on the part of the assessors to value the shares of the appellee bank higher in proportion to their real value than in the case of other banks, bankers, and moneyed corporations. We think the proof fails to establish this in a manner to justify the interference of a court of equity. *Nat. Bank* v. *Kimball,* 103 U. S. 732.

The bill, however, in its main feature asserts the right to an injunction on the ground that the act of 1866, under which the bank shares were assessed, is absolutely void because it makes no provision for deduction from the assessed value of these shares of the debts honestly owing by the shareholders. And the court, proceeding upon the idea that both the statute and the assessment made under it are absolutely void, decreed relief accordingly. Under the ruling just made on that subject this decree must of course be reversed, because as to the larger number of the shareholders whose taxes are enjoined there is no evidence that they owed any debts whatever at the time the assessment was made.

The allegations of the bill on this subject are (1) that one shareholder owning 532 shares of the stock made affidavit that the value of personal estate owned by him, including said bank shares, after deducting his just debts and other investments not taxable, did not exceed one dollar, and presented said affidavit to the

board of assessors, with a demand that they should reduce the assessment of his shares accordingly, which was refused. The evidence shows this to have been Mr. Chauncey P. Williams; (2) the further allegation of the bill on that subject is that other shareholders were indebted to an amount equal to or in excess of the personal property owned by them, including their bank shares, but omitted to make affidavit and demand the proper deduction, because they knew such demand would be refused by the board, both from information of their refusal in other cases and from knowledge of the decisions of the court of appeals of New York that they had no authority to make such deduction. This allegation is also supported by the evidence of four or five shareholders who are represented in this action.

While the decree of the court enjoining the collecting officers as to 95 all the tax assessed on the shares of this bank must be reversed, the question arises, what shall be done with the cases in which it appears that there are shareholders taxed who owed just debts entitled to deduction?

With regard to the case of Mr. Williams we have no doubt that there should be an injunction to the amount of his tax. He made the requisite affidavit and the proper demand for deduction, and his affidavit shows that no assessment should be made on his shares. He has not yet paid the money and is entitled to relief by injunction.

A more difficult question is presented in regard to those who made no affidavit or demand for deduction, but who have shown that they would have been entitled to deduction if the demand had been properly made. The question is whether the fact clearly established, that their demand would have been unavailing, dispensed with the necessity of making the affidavit and demand. It is a general rule that when the tender of performance of an act is necessary to the establishment of any right against another party,

this tender or offer to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused—that payment or performance will not be accepted. Such is the doctrine established by this court in repeated decisions in regard to another branch of the law concerning the collection of taxes. *Bennett* v. *Hunter,* 9 Wall. 326; *Tacey* v. *Irwin,* 18 Wall. 549; *Atwood* v. *Weems,* 99 U. S. 183.

Without elaborating the matter we are of opinion that, considering the decision of the court of appeals of New York, the action of the assessors in the case of Mr. Williams, and their own testimony in this case, it is entirely clear that all affidavits and demands for deduction which could or might have been made would have been disregarded and unavailing, and that the assessors had a fixed purpose, generally known to all persons interested, that no deductions for debts would be made in the valuation of bank shares for taxation. It is therefore not now essential to show such an offer when it is established that there were debts to be deducted and when the matter is still *in fieri,* the tax being unpaid. And we are of opinion that it is open to the court below, when this case returns, to permit such amendment of the pleadings as will enable plaintiff to make proper allegations on that subject, or by reference to a master to allow each shareholder to establish the amount of deduction to which he was entitled at the time of the assessment, and to enjoin the collection of a corresponding part of the tax. But as the assessment is not void, but only voidable, it must stand good for all of the assessment in each case 96 which is not shown to be in excess of the just debts of the shareholder that should be deducted.

The decree of the circuit court is reversed, and the case remanded for further proceedings in accordance with this opinion.

State Taxation—Injunction.

GERMAN NAT. BANK OF CHICAGO *v.* KIMBALL. Appellant filed a bill in chancery in the circuit court for the northern district of Illinois to enjoin defendant as collector, and Samuel H. McCrea as treasurer, from enforcing payment of the taxes assessed against its shareholders on their shares of the bank stock, on the general ground that the assessment violates the provision of the act of congress concerning national banks, which forbids the states from taxing these shares at any higher rate than other moneyed capital within the state, and that it also violates the provision of the constitution of Illinois concerning uniformity of taxation. The case was taken up on appeal to the supreme court of the United States, and a decision was rendered at the October term, 1880, affirming the decree of the circuit court, dismissing the bill. Mr. Justice *Miller* delivered the opinion of the court.

No one can be permitted to go into a court of equity to enjoin the collection of a tax until he has shown himself entitled to the aid of the court by paying so much of the tax assessed against him as it can be plainly seen he ought to pay; nor should he be permitted, because his tax is in excess of what is just and lawful, to screen himself from paying any tax at all until the precise amount which he ought to pay is ascertained by a court of equity.

The cases cited in the opinion were: State Railroad Tax Cases, 92 U. S. 575; Williams v. Weaver, 100 U. S. 539; Pelton v. National Bank, 101 U. S. 143; Cumming v. National Bank, Id. 153.

State Tax on National Bank Shares—Injunction.

EVANSVILLE NAT. BANK *v.* BRITTON, 25 Alb. Law J. 432. Cross-appeals from a decree of the circuit court for the district of Indiana, decided in the supreme court of the United States, April 3, 1882; Mr. Justice *Miller* delivering the opinion of the court.

The taxation of bank shares under the Indiana statute, without permitting the shareholder to deduct from their assessed value the amount of his *bona fide* indebtedness, as in the case of other investments of moneyed capital, is a discrimination forbidden by the act of congress. The decree of the circuit court perpetually enjoining the collector as to those shareholders who had proved in the case that at the time of the assessment they owed debts which should have rightfully been deducted, and dismissing the bill as to other shareholders, where no evidence was given that they owed any debts which could have been deducted from the value of the shares, affirmed; *Waite,* C. J. dissenting, and Mr. Justice *Gray* concurring in the dissent.

The cases cited in opinion were: Hills v. Nat. Albany Exch. Bank, *ante,* 93; Williams v. Weaver, 100 U. S. 539; Van Allen v. Assessors, 3 Wall. 573.

* This case reverses S. C. 5 FED. REP. 248.