

an unlawful representation of the source of the batteries is so doubtful that the granting of a preliminary injunction does not appear to be warranted.

Motion denied.

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CITY AND COUNTY OF SAN FRANCISCO v. MACKAY.

(Circuit Court, D. California. September 8, 1884.)

1. TAXATION—CONSTITUTION OF CALIFORNIA—DOUBLE TAXATION.

The constitution of California forbids double taxation of property.

2. SAME—PROPERTY OF CORPORATION—ASSESSMENT OF SHARES.

It would be double taxation to tax all the property of a corporation to the corporation, and then assess to each stockholder the shares of stock in it held by him, and such assessment to the stockholder will be void.

3. SAME—PRESUMPTION OF OWNERSHIP.

The constitution and laws of California require all property to be assessed and taxed to the owner; and as it is a legal presumption that all property of a corporation has been assessed to the corporation, in the absence of a showing to the contrary, an assessment of stock to a shareholder will be considered a double assessment, and void.

4. SAME—ASSESSMENT IN GROSS—VALIDITY.

*Seemle*, that an assessment in gross upon the aggregate of a great many thousand shares of stock in numerous corporations organized for a great variety of purposes, having no relation whatever to each other, and no common element of value, such as banking, mining, milling, lumbering, commercial, gas, moneys, solvent credits, etc., is void.

Action under California statute of April 23, 1880, to recover taxes for 1880–81, with penalties and interest.

*David McClure*, for plaintiff.

*B. C. Whitman*, for defendant.

SAWYER, J. This is an action to recover city and county and state taxes for the fiscal year 1880–81, together with 5 per cent. penalties, and interest at 2 per cent. per month, amounting, in the aggregate, to nearly \$500,000, of which aggregate about \$236,000 is the amount of the taxes originally levied.

The action is brought under the statute of April 23, 1880, prescribing a form of complaint, which requires the complaint to "describe the property as assessed." The description of the property in the complaint, and consequently "as assessed," is as follows:

"Seven thousand one hundred and twenty-five shares stock Nevada Bank; 3,200 shares stock Pacific Mill and Mining Company mining stock; 250 shares stock Pacific Wood, Lumber, and Flume Company; 1,000 shares stock San Francisco Gas Company; 47½ shares stock Giant Powder Company; 3,000 shares stock Virginia and Gold Hill Water Company; 937 shares stock Golden City Chemical Works; solvent credits, money; 39,570 shares of California Mining Company stock; 61,410 shares Consolidated Virginia Mining Company; 16,386 shares Ophir Mining Company; 15,718 shares Yellow Jacket Mining Company; Union Consolidated and Sierra Nevada Mining Company stock,—assessed at the valuation of \$10,680,000."

Defendant demurs on the ground, among others, that the complaint does not state facts sufficient to constitute a cause of action. The property taxed consists of stock owned by defendant in various corporations, organized for a great variety of purposes; and, under the first ground of demurrer, it is claimed that the stock, as such, is not taxable to the defendant under the constitution and laws of California, and that the tax is, therefore, unauthorized and void. The tax is also claimed to be void as a lumping assessment. The supreme court of the state, in *Burke v. Badlam*, 57 Cal. 594, held that the constitution of the state does not authorize or require, but, on the contrary, forbids, a double taxation of property; that it would be double taxation to tax all the property of a corporation to the corporation, and then assess to each stockholder the shares of stock in it held by him. This decision by the state supreme court, giving a construction to the state constitution, is controlling in this court. The corporation is the immediate, primary owner of all the property of the corporation, the right of the stockholders in it being only derivative and secondary. The constitution and the laws require all property to be assessed and taxed to the owner, and the legal presumption is, as held in the case cited, nothing to the contrary appearing, that all property of a corporation has been assessed to the corporation, the owner, and consequently that all the property of the various corporations whose stock has been assessed to defendant was duly assessed to the corporations issuing it for the year 1880-81. That being so, the assessment of the stock in question to defendant is, as to the amount assessed, a second or double assessment of the same property, and, as such, void.

This is the logical, legal result of the decision of the supreme court in *Burke v. Badlam*, if I correctly apprehend its import, and the complaint fails to show a cause of action on that ground. An absolutely void tax, certainly, can constitute no cause of action. I am also inclined to think the tax void as an assessment in gross—a lumping assessment—upon the aggregate of a great many thousand shares of stock in numerous corporations, organized for a great variety of purposes, having no relation whatever to each other, and no common element of value, such as banking, mining, milling, lumbering, commercial, gas manufacturing, powder making, chemical works, etc., moneys, solvent credits, etc. One would suppose that a party would be entitled to have each class of property, having different values, assessed by itself, so that he can determine whether it is properly assessed or not. An assessment in gross upon a great variety of classes of property, having no relation to each other, and no common element of value, like those described in this assessment, affords no means of knowing whether any particular part or class of it has been properly assessed or not. It gives him no means of correcting an improper assessment before the board of equalization, or otherwise protecting himself from extortion. The authorities on this point have

not been cited by counsel, and I have not looked them up myself, and consequently I shall not now decide it. While I do not find it necessary to definitely decide the point, in view of the conclusion reached on the other branch of the objection, I deem it a proper occasion to intimate a very decided impression against the validity of such an assessment. The demurrer is sustained. The plaintiff desiring leave to amend as to a portion of the tax, leave is granted.

HAMBLY v. DELAWARE, M. & V. R. Co., Substituted, etc.

(Circuit Court, D. Delaware. July 21, 1884.)

1. COVENANT—IMPLIED CONTRACT—CONDITION PRECEDENT—DAMAGES—PLEADING.

By articles of agreement under seal, dated May 8th, executed by H. and a railroad company, H. agreed to furnish labor and materials for laying ties and rails on the third division of the company's road, from their depot grounds at G. to the shore of the Delaware bay, near L., and on the projecting wharf or pier to be constructed in connection therewith,—about 17 miles in all; and the said third division was to be ballasted and finished by the first of August next, if the rails and ties could be had by that time. H. was also to build and construct the wharf in conformity with the specifications set out in the agreement. The work was to be begun within 30 days after signing the articles; all the piles of the wharf to be driven by the last day of July; and the said wharf and the whole of the said division were to be finished and completed by the thirty-first of October ensuing. It was further agreed that immediately upon signing the said articles the plaintiff should subscribe for \$150,000 of the capital stock of the company, certificates for which were to be issued to him in part compensation for his services, etc. On the twentieth of August, while H. was engaged in the performance of his contract, and was ready, willing, and able to carry on, prosecute, and finish the same in manner and form, etc., he was prevented by the company from so doing, and was wholly discharged; and thereupon he brought his action for a breach of the covenant. The declaration contains seven counts, to five of which the defendant demurred, alleging that the covenants declared on were not the covenants of the defendant, but were repugnant to the express covenants in the articles of agreement; also, that the plaintiff, having neglected or failed to subscribe for the stock, begin the work, or finish the third division at the times agreed on, could not maintain this action. *Held*, that the agreement on the part of the plaintiff to do the work, and on the part of the defendant to pay for it, raised an implied covenant on the part of the latter to permit the plaintiff to do the work; that the time stipulations were not conditions precedent, not being made so in terms, nor can they be implied, being only agreements of the plaintiff, for the breach of which he might be liable to damages, if the defendant could show any damages resulting therefrom. If plaintiff's delinquency in these particulars evinced an intention on his part to abandon the contract, and not perform it at all, it would be evidence on that issue; and abandonment would have authorized the defendant to consider the contract at an end, and to stop the plaintiff from further intermeddling with the road and pier. The defendant could have pleaded justification of the prevention and discharge of the plaintiff, and put in evidence his failure on the time stipulations, his want of reasonable diligence, etc., in support of such a plea.

2. SAME—DAMAGES.

Where one party agrees to perform a service or work which necessarily requires time and progress in the performance, and is to receive a compensation from the other party therefor, if the party for whom the service or work is to be done puts an end to the performance, either before its commencement or