

You can consider the coal sold. Will be in Cleveland and arrange particulars next week."

Now, did that make a definite contract between the parties,—a direct, unqualified acceptance of the terms offered? "You can consider the coal sold." Of course, that refers to the coal as offered upon the terms named in the telegram as to delivery, amount, price, etc. "Will be in Cleveland and arrange particulars next week." Does that operate as a limitation upon the forepart of this telegram? Does it mean to say, Your offer is accepted; we will take that coal,—consider the trade closed,—and next week I will be down to arrange for the shipment, the transportation from Cleveland and Toledo? or does it mean, You can consider that this offer that you have made will be accepted; that the terms of the contract—the details—will be arranged between us when I come next week? If it means the latter,—that there were details, particulars, to be arranged,—then there was no definite, final, irrevocable, absolute acceptance. If it refers (as was argued very forcibly) to the mere matter of arranging for the shipment, why, then, it is an outside matter; it is subordinate to the contract which was accepted by the forepart of the telegram. Of course, it is difficult to say positively what the parties intended; but it is a telegram from the proposed vendee to the proposed vendor, that he will come to the latter's place of business (Cleveland) and will arrange particulars. Naturally, you would think that that would refer to arranging with him (the vendor) the particulars.

Doubtless, as appears from the testimony given by Mr. Martin, (the only oral testimony,) the principal thing was the matter of transportation. But just see how the case stands in that respect. The defendant, as appears, had no transportation, and had to arrange for transportation. The proposition is, deliverable free on board at Cleveland or Toledo, in about equal monthly installments, bulk to go via Cleveland, but a portion must go by Toledo. Transportation must be arranged. Whether it was the duty of the vendor or vendee to arrange for the transportation, it *had* to be arranged for; transportation must be provided; and, obviously, from the testimony, that was the main thing which was in the mind of the defendant in going to Cleveland; so, Mr. Martin says, he told him. But whether that transportation could be secured for the greater portion at Cleveland,—whether it could be secured for 7,000 tons a month, or for only 5,000 tons a month,—was a matter as yet unknown. It was to be delivered in equal monthly installments, and I take it that, fairly construed, the delivery would commence when navigation opened, inasmuch as vessel transportation was contemplated. As that is said to be the first of April, or thereabouts, from that to the first of October would be five months, making a monthly installment of about 8,000 tons, "the bulk via Cleveland." Now, until the vendee had ascertained that he could make arrangements for transporting 7,000 tons, or any other definite amount, from Cleveland, could it be said that he had

intended to finally consummate the contract, and that the amounts to be delivered at Cleveland and Toledo, respectively, were left fully to the determination of the vendor; that the latter could say, on the first of April, here is 7,000 tons at Cleveland, and 1,000 tons at Toledo, and you must take that, whether or no you have been able to make any arrangement for the transportation of such a bulk or not. To what place was this to be transported? It appears from subsequent letters that part of it was to go to Duluth, and part of it to Milwaukee. Perhaps the season would open to Milwaukee earlier than it would to Duluth, and the vendee (none of these particulars as to the amount to be delivered at other places being settled) would place himself in the position that, on the first of April, desiring, perhaps, to make the first shipment to Duluth, he could not then ship it at all; or, at best, only certain proportions from Toledo and Cleveland, respectively. The transportation was unsettled; the exact amount that was to be delivered in either place was unsettled; the exact time, whether the first of the month or the middle of the month, was unsettled; the notice that was to be given of the arrival of the coal at Toledo or Cleveland was unsettled. These were all details, particulars, in the language of the telegram, which, if a contract had been once signed with those things unsettled, might, as counsel say, be within the control of the vendor; but, where there was only this proposition and answer by telegram, and those things unsettled, it seems to me that they are details and particulars which it may well be considered the party had in mind when he said: "I will come to Cleveland and arrange particulars next week." So that, while the transportation was the main underlying fact, yet the transportation affected these particulars; and when the defendant says, "You may consider the coal sold; will come to Cleveland and arrange particulars,"—he meant that if these particulars can be satisfactorily arranged the contract is consummated; and that he left those particulars to be settled by arrangements made at Cleveland.

Now, the case that was cited from Barbour, it seems to me, is very closely in point. There the letter of acceptance was: "I will take 10,000 bushels of malt, deliverable at such a wharf, at such a price, describing the malt, etc. Will be up and see you next week." And the court said that, notwithstanding the distinct acceptance of the offer, yet it was followed by the statement that he would be up next week to see him, which, taken with a similar statement in a prior letter, carried with it the implication that he was to come to make an examination to see that the malt corresponded with the description in the letters of proposal and acceptance. Here the defendant says, "You can consider the coal sold." My brother NELSON suggested whether that was not of itself a qualified acceptance. It is not, "I accept your offer," but "you may consider the coal sold." It is not, perhaps, a natural expression when a definite acceptance of an offer is intended. It is more equivalent to this: "There is so little to be

settled, and I am so sure that all can be arranged, that you are safe in looking upon the sale as closed, and prepare to make your arrangements accordingly. You may consider—you may understand—that this contract is going to be consummated, and that I will come to Cleveland and we will fix it up.”

So it seems to me that the telegram carrying to the proposed vendor, a statement from the proposed vendee that he will come to Cleveland, to his place of business, and arrange particulars, carries with it a fair implication that the particulars are to be arranged before the contract is finally consummated. Then you go on a little further, and you find that he did go to Cleveland, and, turning to the testimony which Mr. Martin gave of that interview, it seems to bear out this interpretation. Mr. Saunders comes there, and, after some conversation about the telegrams, he said: “Your first telegram was too high, but I will give you another chance; so I sent you my second telegram.” And Mr. Martin says: “Well, the reason I put in my telegram of January 4th that a portion of the coal must go from Toledo, was because the railroad company had insisted upon that when I got the railroad rate from them on which I based this contract, on which I based this offer of coal to you. I thought, may be, that you might have thought that a little arbitrary, putting it in that way.” He said, “No, not at all.” He said, “We’ll take the coal on the basis and terms of your telegram of January the 4th.” That does not sound as though the contract had already been settled. “We’ll take the coal on the basis and terms of your telegram of January the 4th.” This implies a present and not a past contract. “I said to him, ‘Now, Mr. Saunders, I have had a great deal of trouble in getting this freight rate, and I don’t want any hitch to occur in lake transportation, in getting this coal off as specified, because it will involve us in trouble with the railroad companies.’ He said, ‘Oh, no; this is a ground-hog case.’ He said, ‘I’ve got to get the coal.’ I told him he must give us timely notice of the arrival of vessels, and he said he would. There was something said about his getting transportation on the lake by ore vessels. He said that one of his main objects in coming to Cleveland was to arrange for the lake transportation of this coal, and that he had been figuring with Cleveland vessel owners.” So it seems that one of the main things for which he had come was to arrange for lake transportation, and that he had made inquiries of Cleveland vessel owners, and after making such inquiries he comes, and then occurs the conversation in which he says, “We will take this coal upon the terms and basis of your telegram.” When he leaves (after some conversation as to a particular mode of transportation) he says, “I will return the following week,” but did not return. Mr. Martin writes to him on the 21st: “We learn with surprise that you are probably in St. Paul, as we expected from what you said that you would certainly stop here on your way back to draw up some sort of a memorandum of our contract, arranging for the

details, and also to see the party you speak of." Now, that plainly implies that Mr. Martin expected him to return, expected him to reduce to writing a memorandum of the contract between them, fixing and arranging these details; but it had not been done, and he is surprised that it has not been done. This language, of course, does not definitely prove that the telegrams had not consummated everything, but still carries very plainly, it seems to me, an intimation, an indication, that the parties then thought that these negotiations had got to be consummated by a definite contract. It is true that in other parts of this letter, as well as in subsequent letters of both Mr. Martin and Mr. Saunders, there is language which very plainly and unmistakably implies the making of a contract,—that a contract has been made. And yet that language must be taken as used after this parol talk, in which, as Mr. Martin testifies, Mr. Saunders definitely says to him, "We'll take the coal on the basis and terms of your telegram." Of course, if it refers to that, it does not help, it does not uphold, the contract, which must be in writing, and evidenced by the telegrams. It is explainable as referring to that talk between them. For if that talk was binding upon both parties, then there would be unquestionably a contract, because there was no proviso, no limitation.

The language was as direct, unqualified, and unlimited as language can be: "We'll take the coal on the basis and terms of your telegram of January 4th." And so, the parties evidently not contemplating any subsequent trouble, considered this; spoke of it as though that oral talk consummated the contract. That, I think, explains the other language which is used in these subsequent letters, which obviously refers to a contract, and it does not necessarily go back to the telegrams which passed between the parties, and Mr. Martin's letter, in which he expressed surprise that Mr. Saunders had not stopped and drawn up a memorandum of a contract, arranging for these details, coupled with the facts stated in the telegram, that Mr. Saunders would come to Cleveland and arrange particulars, and back of that the fact that the lake transportation must necessarily have affected the amount of coal which was to be delivered at one place or the other; all seem to indicate that the parties could not have understood that all the details of the contract had been reduced to writing and agreed upon.

As I have said, when counsel first stated the proposition yesterday my impressions were the other way; that the language of the letters could only be taken as referring back to the original telegrams, and that whatever of ambiguity there might be in that last telegram must refer to outside matters, ancillary and subordinate to the contract. I have thus taken the opportunity to state in detail the conclusion to which, upon the authorities and my examination, I have come. Of course, it is a case of considerable magnitude, and one in which the amount in controversy is such that it can be easily taken to the su-

preme court; and if I have made a mistake in my conclusions in that respect, that court will correct it. Any shape that the counsel desire to put it in, in order to make the record clear for such review, they may pursue. Plaintiff's counsel duly excepted to the ruling.

CITY AND COUNTY OF SAN FRANCISCO *v.* MACKEY.

(Circuit Court, D. California. November 17, 1884.)

1. TAXATION—DOUBLE TAXATION—CONSTITUTION OF CALIFORNIA.  
Double taxation is prohibited by the constitution of California.
2. SAME—TAXING PROPERTY OF CORPORATION AND STOCK.  
To tax the property of a corporation to the corporation, and also to tax the stock representing the property to the stockholders, would amount to double taxation.
3. SAME—DOMESTIC CORPORATION—PROPERTY TAXABLE IN ANOTHER STATE.  
The Constitution and Political Code of California exclude from taxation in California, through the medium of its stock, the tangible property of a California corporation situate and taxed in the state of Nevada.
4. SAME—SITUS OF MONEY AND CREDITS.  
The *situs* of money and other solvent credits, for purposes of taxation, is the residence of the owner or creditor, in the absence of statute.
5. SAME—SOLVENT CREDITS OF NON-RESIDENT.  
The money and other solvent credits due from citizens of California to a citizen of another state, and not secured by mortgage or deed of trust, are not liable to taxation in California.

At Law.

*McClure & Dwinelle*, for plaintiff.

*B. C. Whitman*, for defendant.

SAWYER, J. This is a demurrer to the amended complaint in an action to recover city and county and state taxes for the fiscal year, 1880-81, assessed upon the capital stock of a large number of corporations and upon solvent credits. A demurrer to the original complaint was sustained on the ground that the assessment is void as being double taxation, and a violation of the state constitution. See opinion of the court, 21 FED. REP. 539. Leave to amend having been given, an amended complaint has been filed, and therein it is sought, by certain allegations, to obviate the objections to the original complaint, and to take the case out of the principle of the former decision. These new allegations are that the tax is assessed "on said shares of stock of companies severally incorporated under the law of, and having their principal offices in the state of, California; that the aforesaid shares of stock is and are, and each of them are, shares of stock of corporations whose entire tangible property was situated in the state of Nevada, and that the entire property of said corporation was not assessed for said fiscal year, 1880-1881." The allegation, "whose entire tangible property was situated in the state

of Nevada," at least as to several of the corporations named, is notoriously and manifestly not true in fact; as, for example, as to the Nevada Bank, the San Francisco Gas Company, and other companies located at San Francisco. But assume the allegation to be true, for the purposes of the demurrer, the question arises, do the averments quoted, in connection with the other allegations of the complaint, show a good cause of action? In my judgment they do not.

Article 13, § 1, provides that "all property *in the state* \* \* \* shall be taxed," etc. It does not authorize the taxation of property *not in the state*. And section 10 of the same article provides that "all property \* \* \* shall be assessed in the county, city, and county, town, township, or district *in which it is situated*." And the statute follows the constitution in this respect. Pol. Code, § 3628. They do not authorize an assessment, except at the *situs* of the property. And section 3627 of the Political Code, as it stood in 1880, (St. 1880, p. 6,) when this assessment was made, recognizing this principle of the constitution and laws, and the inadmissibility of double taxation, provided, with reference to the stock of corporations having their principal place of business in this state, that "the proportionate value of the capital stock of corporations \* \* \* having their principal place of business in this state, for the purposes of assessment and taxation, shall be its market value, deducting therefrom the value of all property assessed to them in this state *or elsewhere* of which such capital stock is the representative." Thus the constitution does not authorize the taxation, in California, through the medium of its stock, of the tangible property of a California corporation situate and taxed in the state of Nevada; but, by stating what property should be taxed, and limiting it to property within this state, and limiting the assessment to the particular district in which the property is situated, by plain and necessary implications, excludes it from taxation. So, also, the provision of the Political Code cited, in express terms, excludes taxation, through the medium of the capital stock of the corporation, of all the property of the corporation of which the capital stock of the corporation is the representative assessed, either in this state "*or elsewhere*."

Now, all the tangible property of all these corporations, according to the allegations of the complaint, which, for the purposes of the demurrer, are taken to be true, is situate in the state of Nevada, and beyond the jurisdiction of California, and, presumably, nothing to the contrary being shown, was taxed under the laws of Nevada to raise revenue for the purposes of the state and local governments of that commonwealth. The laws of Nevada, of which this court takes notice, require all property in that state to be taxed. It is true that to the allegation, "whose entire tangible property was situated in the state of Nevada," is added, "and the entire property of said corporations was not assessed for said fiscal year, 1880-1881." But this is only an allegation that it was not assessed in California

for "said fiscal year." The state of Nevada had no relation to said fiscal year 1880-81, for which the assessment sued for was made, and the allegation is limited to the particular assessment for the particular fiscal year upon which the suit is brought. No other is even alluded to in the complaint. This allegation as to the property not assessed must also be construed with reference to the other allegations of the complaint, and as referring only to the tangible property of the corporation alleged to be situate in the state of Nevada. It is not, therefore, an allegation that the property was not assessed "elsewhere," or that any other property of the corporation was not assessed; and, doubtless, no such allegation could be truthfully made. It must be presumed that the allegation was made as favorable to the complainant as the facts would justify. Such is always the legal presumption in respect to the allegations of pleadings. It is clearly insufficient, in this particular, to take the case out of the rule heretofore adopted in this case, and as established in *Burke v. Badlam*, 57 Cal. 594, as to all property situated in this state; and that situate and taxed "elsewhere" is not taxable at all; and also insufficient to bring it within the terms of the constitution, and the statute authorizing the assessment of the tax. The property, as such, alleged to be not taxed, is without the jurisdiction of the state, and cannot be lawfully taxed as tangible property at all in the state of California. It cannot be reached as tangible property, and it is sought to reach it through a taxation of the shares of stock representing it of the corporation organized and existing within the jurisdiction of California. But this interest, as a share of the capital stock, is incorporeal and intangible, and it has no *situs* apart from the person of the owner. The defendant appears by the record, and that fact is now incontrovertible, to be a citizen of the state of Nevada. It is on that ground alone that this court has jurisdiction of this case. In the absence of any averment to the contrary, he is presumably a resident of the state of which he is a citizen. There is no averment to the contrary, and we all know, as a matter of fact, that an averment could not be truthfully made that defendant was a resident of California during the fiscal year 1880-81. We all know, as an historical and publicly notorious fact, that defendant was not a resident of California during that fiscal year. It is as publicly notorious and well known a fact in California and Nevada as that President Arthur was not a resident of California during that year.

The interest of defendant in the capital stock of the corporation being incorporeal and intangible, and having no *situs* apart from the person of the owner, and he being a non-resident, without the jurisdiction of the state, and the tangible property of the corporation, of which the capital stock is the representative, being also situate outside of the state, it was not, without some express constitutional or statutory provision making it so, if any such valid provision there could be, subject to the jurisdiction of the state, or to taxation within