

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Lawless v. Sullivan and others, from the Supreme Court of Canada, delivered 22nd March 1881.

Present:

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

SIR RICHARD COUCH.

The question to be determined on this appeal is whether the Appellant, as the manager of the Bank of British North America, in the city of St. Johns, in the Province of New Brunswick, was in 1876 rightly assessed by the Respondents, the then assessors of taxes for that city, in the sum of \$1,725 for the fiscal year, beginning on the 1st of January and ending on the 31st day of December 1875. The question is one of general importance, since it involves the principle upon which any incorporated Joint Stock Bank or other Company established out of the limits of the Province of New Brunswick, and any person doing business out of such limit, but having a branch or agency in the city of St. John's, is liable to be assessed under the Acts relating to the levying of rates in the said city.

The question was in the first instance submitted to the Supreme Court of the Province of New Brunswick upon a special case, of which the following are the material paragraphs.

" 6th. The Bank, during the fiscal year (1875), sustained losses from the business transacted by it within the city during

Q 4722. 2.—3/81.

A

the said fiscal year, and on the whole year's business of the said fiscal year the Bank, in consequence of the said losses, made no gain or profit, and none was made or received by or for the Bank during the said fiscal year.

"7th. But for the losses made by the Bank in the said fiscal year, arising during that year out of the business of the said Bank within the said city, the income derived from such business in the said year would have amounted to forty-six thousand dollars; but the losses sustained by the said Bank on its business in the said city during said fiscal year exceeded that amount, and left the Bank a heavy loser on its business of said year within said city.

"9th. The said assessors have assessed the said John P. Lawless as manager of the said Bank, in the present year, in the sum of one thousand seven hundred and twenty-five dollars for taxes claimed by the said assessors to be payable by the said Bank on forty-six thousand dollars income during the said fiscal year.

"10th. The Bank claim that the income on which the Bank is liable to be assessed is the gain, if any, received by the said Bank from the whole business of the fiscal year, and that as the losses of the business in the said city of the said fiscal year exceeded all the profits which the Bank, but for said losses, would have made, the Bank in fact made no gain from said business within the said city during the said fiscal year, and therefore received no income from the said business, and are not liable to be assessed as aforesaid."

The Supreme Court of New Brunswick, by a majority of three Judges to one, decided that the Appellant, as the agent for the Bank, was liable to be assessed for the year in question upon 46,000 dollars income, and accordingly that the assessment made by the assessors, as stated in the Special Case, was to stand.

Upon an appeal against this decision, the Supreme Court of Canada, consisting of the Chief Justice and four Puisne Judges, affirmed the judgment of the Supreme Court of New Brunswick, Mr. Justice Henry dissenting.

On an application for special leave to appeal against these judgments, this Board, considering the general importance of the question, deemed it right to advise Her Majesty to grant such leave.

The Provincial Acts relating to the levying,

assessing, and collecting of rates in the city of St. John's are the 22 Vict., c. 37, the 31 Vict., c. 36, and the 34 Vict., c. 18. It will be convenient to distinguish these statutes by the years in which they were passed, and to speak of them as the Act of 1859, the Act of 1868, and the Act of 1871.

The section of the Act of 1859, which dealt with what it will be convenient to call "foreign companies," *i.e.*, companies established out of the limits of the province, but carrying on business by an agent in the city of St. John's, was the 15th. It may be necessary to refer hereafter to the terms of this section with reference to some of the arguments that have been used in this case; at present, however, it is only necessary to state that it was repealed by the 4th section of the Act of 1868, which is the existing enactment that directly defines the liability to assessment of a foreign company or trader.

The enactment, so far as it is material to the present question, is in these words :—

"The 15th section of the St. John City Assessment Act of 1859 is hereby repealed, and in lieu thereof the agent or manager of any joint stock company or corporation established abroad or out of the limits of this province, or of any person or persons, whether incorporated or not, doing business abroad, or out of the limits of this province, who shall carry on business within the city of St. John for, or who shall have an office or place of business in the said city of St. John for any such company, corporation, person, or persons, shall be rated and assessed, in like manner as any inhabitant, upon the amount of income received by him for the same, as such agent; and for the purpose of enabling the assessors to rate such company or corporation, person or persons, the said agent or manager shall, when required in writing by the assessors so to do, furnish to them a true and correct statement in writing, under oath, setting forth the whole amount of income received for such company or corporation, person or persons, within the city of St. John, during the fiscal year preceding the making of the annual assessment."

It is desirable here to note a distinction between the repealed section of the Act of 1859

and the substituted section in the later Act. The former was limited to foreign joint stock companies or corporations, whereas the latter is extended to all persons, whether incorporated or not, who, having their principal place of business out of the limits of the province, carry on business through an agent within the city of St. John. All are brought within the same category, and the principle of assessment defined by the section applies equally to all.

What then, upon the proper construction of the enactment, is that principle of assessment? The answer to this question depends upon the meaning to be given to the words, "the amount of *income*," and "the whole amount of income," received by the agent within the city of St. John during the fiscal year preceding the making of the annual assessment.

The Courts in Canada have in effect decided that "income" means all the items of profit on the transactions of a business during the fiscal year, without regard to any losses arising from the same business during that year. Their Lordships cannot think that this is a sound or reasonable construction of the enactment.

The most specific definition or description given by the Judges of what in their view is the income of a bank, within the meaning of the Act, occurs in the following passage of the judgment of the Chief Justice of the Supreme Court:—

"The income of a bank is its discounts, interest, premium on exchange, &c., and this is earned when received, and forms the income of the bank. If the bank makes bad debts on any business or transactions of the current year, or operations entered into in past years, that is a loss *pro tanto* of capital. This they may make up by borrowing money, or by calls on the stockholders, or so much of the lost capital may be replaced from 'income,' but it was in either case the capital invested that was really lost, not the income. In making up a profit and loss account, the bank would necessarily be debited with all interest paid, losses made, expenses incurred, or disbursements, in fact, all 'outgoings,' and credited with all interest,

earnings, or gains, and the balance would be the net loss or the net profit of the year, but certainly would not be the 'income' of the year."

Their Lordships are unable to agree with this view of what would and would not be the "income" of a bank. It must always be borne in mind that the tax is imposed on the income received during the fiscal year, and what therefore has to be ascertained for the purpose of assessment is the income for an entire year. There can be no doubt that, in the natural and ordinary meaning of language, the income of a bank or trade for any given year would be understood to be the gain, if any, resulting from the balance of the profits and losses of the business in that year. That alone is the income which a commercial business produces, and the proprietor can receive from it. The question is, whether the word "income" in the enactment to be construed is to be understood in a different, and what, for the purpose of taxation, would be a more onerous sense.

It was not and could not be contended on behalf of the assessors that "income" in the enactment meant all the takings or moneys received by a bank or in a trade from customers or otherwise; and it was not denied that it meant profits, in some sense of that word. The contention, as their Lordships understood it, was that the items of profit should be selected from the accounts, and the aggregate of these items treated as being the income of the year.

The learned Chief Justice says, "the income of the bank is its discounts, interest, premium on exchange, &c., and this is earned when received, and forms the income of the bank." He thus, in effect, treats every particular earning as irrevocably subject to taxation, so soon as it is received, though the period of assessment is postponed to the end of the fiscal year. But

Q 4722.

B

the Act does not impose a tax on each individual earning or gain, but on the income of the year, which can only be ascertained on taking an account for the whole year. The intention of the legislature should be very clearly shown to justify an interpretation of the word "income" which would require that, in the account for the year, the items of profit only should be included, and the losses excluded, although, but for the operations which occasioned the losses, the apparent profits could not have been made. A few instances will show how such an interpretation would operate. Suppose a bundle of bills are discounted, maturing, as would probably be the case, at different dates, there would at once be an apparent profit on the transaction in the discounts; but suppose some of the bills should be dishonoured, and that on the whole transaction the bank ultimately sustained a heavy loss, are the discounts received on the bills which were met to be regarded as taxable income, without regard to the loss the bank sustained on those which were not met? Again, suppose a bank, in order to increase its resources for lending and discounting, takes up money, say at four per cent., and, owing to a fall in the rate of interest, can only employ it at three per cent., is the amount which the bank receives for interest and on discounts at three per cent. to be treated as taxable income, without reference to the loss it has sustained by borrowing at the higher rate? Their Lordships cannot think that, on a reasonable construction of the Act, these questions ought to be answered in the affirmative.

It is unnecessary to multiply instances, though it is obvious that many others of a similar kind to those already mentioned, such as commissions received on transactions which result in losses to the bank, may occur in a banking business.

The Judges appear to have assumed that the losses made by the Bank in the present case arose from bad debts. This may have been so, but the special case does not specify the nature of these losses, which may have been of the kind above adverted to.

In the cases of merchants and traders, the difficulty of construing "income" as the Courts in Canada have done is as great, if not greater than in regard to banks. In the case of a foreign merchant, who carries on business in St. John by consigning goods to his agent for sale there, it may well happen that the sale of some of the goods may produce a profit, whilst a loss may occur on the rest of the goods of the same consignment, in consequence either of a fall in prices, the depreciation in the quality of the goods, or the insolvency of the buyers. So, a trader who keeps a general store may gain on some of the articles in which he deals and incur losses on others. In these cases, though the losses balanced or exceeded the gains, and consequently no income was or could be received from the business of the year, it would follow from the construction contended for by the Respondents that the gain on the particular sales which yielded a profit would still be subject to taxation. Such a construction implies, as already observed, that the tax would attach on each sale producing profit, which is not the ordinary or fair meaning of a tax upon the income of the fiscal year.

The Courts in Canada have referred to the general scheme and language of the Assessment Acts in support of the construction they have given to the provision in question. In the first place, it was pointed out, referring to Section 12 of the Act of 1859, that, by the scheme of the Act, the inhabitants of the city were rated upon

the value, not only of their real estate in the city, but also of their personal estate; and it was suggested that, inasmuch as foreign companies and traders could not be taxed on their property, the rate was imposed on the income received by them from business carried on in St. John's, as being a rough measure of the capital employed in such business. It was argued, as a consequence of this supposed intention of the legislature, that "income" must mean something different from and more than the gain on the balance of profit and loss, for otherwise, it was said, there would not be that equality of rating which the legislature had in view; but, even if the supposed intention could be safely inferred, it does not, by any means, lead to the consequence sought to be deduced from it. The 12th section of the Act of 1859 provides that the real and personal estate of the inhabitants shall be put down at only "one fifth of the actual worth thereof," and, by Section 10, all just debts may be deducted; so that, upon the assumption that a profit of 20 per cent. would represent average trade profits, a rate on income in the sense of gain or profit may have been reasonably considered as roughly corresponding with a rate of one fifth of the value of personal property; and this would probably be so, having regard to the provision that debts may be deducted from the total value of such property. In their Lordships' view, therefore, no material support to the construction placed on the word "income" by the judgment under appeal can be derived from the manner in which the personal estate of the inhabitants is to be rated.

With regard to the argument that if, in ascertaining income, the losses of the year are to be considered, it would happen, in the event of losses exceeding profits, that the foreign

company or trader would receive the benefit of municipal services without contributing to the expense of maintaining them, it is to be observed that this consequence is the natural and inevitable result of every tax or rate on income, in the sense of profits, derived from trade, and would certainly happen in all cases falling under the General Assessment Act of the province of New Brunswick, in which "income" is defined to mean "the annual profits or gain arising to any inhabitant from any trade, &c." Precisely the same result would occur in the case of the rate imposed upon one fifth of the value of the personal estate or capital of the inhabitants of St. John's, in the cases where the debts of the owners of such property should be equal to or exceed it. Such cases may obviously occur, since it too frequently happens that traders carry on business, often for a considerable time, after their estate is in this condition. In such cases there would of course be no assessable property.

Their Lordships have felt some difficulty in appreciating the view of the Chief Justice, that the bad debts of the current year are a loss "*pro tanto* of capital," and that, in such case, "it is the capital invested that is really lost, and not the income." Surely every banker or trader properly conducting his affairs, would, in the first instance, at least, charge losses to income, that is, in ascertaining the income of a year's business, would set the losses of the year against its profits. To treat profits as income and to charge losses to capital would be to enter upon a road leading very directly to financial ruin.

Another argument in support of the judgment appealed from, was founded on the use of the words "net profits" in reference to the rating of foreign insurance companies.

The 15th section of the Act of 1859, which first enacted the mode of assessing foreign companies, provided that the assessment on the manager of insurance companies, established abroad, should be taken "on a three years' average of the yearly net profits on insurance of property situated within the city." By the 2nd section of the Act of 1871, in lieu of the above-mentioned provision, it was enacted that the assessment should be "upon the amount of net profits made from premiums received on all insurances" effected in a certain manner. And by the 3rd section, the assessment, instead of being on an average of three years, was to be on the net profits of each fiscal year.

It was argued that the words "net profits" appearing in these enactments raised a strong implication that the legislature meant by "income" something different from "net profits." This argument has undoubtedly some force, but is not of sufficient cogency to justify an interpretation being given to the word income, as applied to a commercial business, other than that which it naturally bears. The employment of different language in the same Act may, in some cases, help to show that the legislature had in view different objects, but a change in language cannot be relied on as furnishing a general rule of construction, and the weight to be given to such changes must depend on a view of the entire enactments in which they occur, and the degree of ambiguity existing in the language to be construed. The Act of 1859, in directing that insurance companies were to be assessed on an average of their profits for three years, made separate provision for them; and it may have been thought that, as these companies are not trading companies, and their receipts consist only of fixed and definite sums in the

shape of premiums, these sums might be considered and treated as the "income" of the companies, if that word had been used in the special legislation relating to them. In the Act of 1871 premiums are expressly mentioned; the assessment being "upon the amount of net profits made from premiums." On the other hand an argument favourable to the Appellants may be derived from these provisions. Why, it was asked, during the argument, should insurance companies be assessed upon their net profits only, and other foreign companies and traders, not on their net profits, but on the aggregate of the items of profit appearing in the accounts of the year, without reference to the cost and losses incurred in carrying on the business in which they were earned? The answer given to this question was that it may have been thought desirable for the protection of property in St. John's to encourage the establishment of branches of fire insurance companies in the city. But this answer is not an adequate one, for it would seem to be equally desirable to encourage foreign banks and other companies bringing capital to the city, to establish themselves in it. Besides the answer, such as it is, cannot apply to marine insurance companies, for they too are assessed on net profits only, "wherever the subject matter of insurance may be." It is to be observed that the consequence which would follow from the Appellants' construction of income, viz., that the Bank, in years of loss, would contribute nothing to the city, and which was held to furnish a reason against that construction, would indisputably happen, in years of loss, in the case of insurance companies.

Their Lordships have come to the conclusion, upon consideration of the Act in question, that there is nothing in the enactment imposing the

tax, nor in the context, which should induce them to construe the word income, when applied to the income of a commercial business for a year, otherwise than in its natural and commonly accepted sense, as the balance of gain over loss, and consequently they are of opinion that where no such gain has been made in the fiscal year, there is no income or fund which is capable of being assessed.

The extracts from writers on taxation, which were cited by the Judges and at the Bar, are not inconsistent with this conclusion.

The English cases which were referred to by the learned Chief Justice afford no support to the judgment appealed from. In the case of *Forder v. Handiside*, L. R. 1, Ex. Div. 233, it was held that, under the provisions of the English Property and Income Tax Act, 5 & 6 Vict., c. 35, sec. 100, Case I., Rule 3 (1), a Company carrying on the business of ironfounders could not deduct from the net profits of the year a sum of money which had been set aside, in accordance with the terms of its deed of association, as a reserve fund for the purpose of meeting the depreciation of buildings and machinery. It is clear that, under the English Act, losses connected with or arising out of any business during the year would form a deduction from the profits, and in the very case referred to the repairs of buildings and machinery were allowed, as being a proper deduction from the net profits. Their Lordships are at a loss to see how this case lends any support to the judgment, unless, indeed, the assumption of the Chief Justice that the losses of the business are to be treated as a loss of capital, and not of income, were tenable.

The observations of Lord Chelmsford and Baron Bramwell, in the case of *The Queen v. The Commissioners of the Port of Southampton* (L. R. 4, H. L. 5), were directed to the proper

construction of the word "income" in one of a series of special Acts relating to the port of Southampton. By one of these Acts it was enacted that certain dues and duties should be paid to the Commissioners of the Port, and directions were given as to their appropriation. By a subsequent Act creating a Dock Company in the port, whose operations might tend to diminish the revenue of the Commissioners arising from their dues and duties, it was enacted that the Dock Company should pay to the Commissioners such annual sum as should be sufficient to make up the annual income of the Commissioners from the dues and duties they were authorized to take and receive under the first Act. It is plain that income in the later Act meant the total amount of the dues and duties payable to the Commissioners under the former Act. The decision was to that effect, and that a particular outgoing could not be deducted. The observations cited were addressed to the language and meaning of these special Acts, and have no material bearing upon the construction of the Act now in question.

Their Lordships have not thought it necessary to consider the definite deductions to be made from profits, since the special case neither raises this question nor contains the materials for deciding it. When an inquiry of this kind has to be made, it may be found that income in the Act now in question cannot be construed otherwise than as it is defined in the General Assessment Act of the Province (38 Vict., c. 6, sec. 4), though that Act may not authoritatively govern the construction.

In the result, their Lordships will humbly advise Her Majesty to reverse the judgments appealed from, and in lieu thereof to declare and order that, upon the facts stated in the special case, neither the Bank, nor its Manager, is liable

to be assessed in the sum of \$1,725 or any part thereof, for the fiscal year 1875, under the Acts relating to the assessing of rates and taxes in the city of St. John. The Respondents must pay the costs of this appeal to Her Majesty.
