JOHN P. LAWLESS.....APPELLANT; 1879.

AND

JAMES SULLIVAN, *et al*.....RESPONDENTS.

*Jan. 22.
*April 15.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Taxes—Foreign corporation—Branch Bank—"Income," as distinguished from "Net Profits"—31 Vic., Chap. 3, sec. 4 (N. B.)

L., manager of the Bank of B. N. A., a foreign banking corporation, having a branch in the city of *Saint John*, derived from such business during the fiscal year of 1875 an income of $46,000, but, during the same period, sustained losses in its business beyond that amount. The Bank, having made no gain from said business, disputed the corporation's authority to assess them under 22 *Vic.*, c. 37, 31 *Vic.*, c. 36, and 34 *Vic.* c. 18, on an income of $46,000.

Held: That under the Acts of Assembly relating to the assessing of rates and taxes in the city of *Saint John*, foreign banking corporations doing business in *Saint John* are liable to be taxed on the gross income received by them during the fiscal year; and that *L.* had been properly assessed. (*Henry*, J., dissenting.)

APPEAL from the decision of the Supreme Court of the Province of *New Brunswick* pronounced on a question submitted to that court under a special case.

Special case stated for the opinion of the court:

"1st. The Bank of *British North America* now is, and in, and prior and subsequent to the year 1875, was a corporation established in *London, England*, out of the limits of the Province of *New Brunswick*.

"2nd. The said bank, in and prior to said year 1875, had, and has since had, and now has an office or place

*PRESENT:—Ritchie, C. J., and Strong, Fournier, Henry, and Taschereau, J. J.

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of business within the city of *Saint John*, in the Province of *New Brunswick*.

"3rd. In and prior to said year 1875, *Thomas Maclellan* was the Manager of the said bank in the said city of *Saint John*, and carried on for said bank within the said city the business of banking by discounting notes and buying and selling exchange.

"4th. *John P. Lawless* is now the Manager of said bank in the said city of *Saint John*, and carries on business for said Bank within said city.

"5th. The fiscal year of the said bank, preceding the making up of the annual assessment for the city of *Saint John* for the present year 1876, commenced on the first day of January and ended on the 31st day of December, in the year 1875, both days inclusive.

"6th. The said bank, during the said fiscal year, sustained losses from the business transacted by it within the said city during said fiscal year, and on the whole year's business of the said fiscal year the said bank, in consequence of said losses, made no gain or profit, and none was made or received by or for said bank during said fiscal year.

"7th. But for the losses made by the bank in 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 said year would have amounted to forty-six thousand dollars; but the losses sustained by said bank on its business in 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.

"8th. The above-named *James Sullivan*, *John Wilson*, and *Uriah Drake* are assessors of taxes for the city of *Saint John* for the present year.

"9th. The said assessors have assessed the said *John P. Lawless*, as Manager of 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 said bank from the whole business of the fiscal year, and that as the losses of the business in the said city of 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 said city during said fiscal year, and therefore received no income from said business, and are not liable to be assessed as aforesaid.

11th. It is agreed between the assessors and the said *John P. Lawless*, as Manager of the said bank, to submit to the court the question whether, upon the facts as above stated, the bank or its manager are, or are not, liable to be assessed as aforesaid in the said sum of one thousand seven hundred and twenty-five dollars, under the Acts of Assembly relating to the assessing of rates and taxes in the city of *Saint John*. If the court find in the affirmative, the assessment is to stand; if in the negative, the said assessment is to be set aside, altered or varied, so as to make it conform to the decision of the Court upon the question submitted."

The Supreme Court of *New Brunswick*, Judge *Fisher* dissenting, decided in the affirmative.

Mr. *Weldon*, Q. C., for Appellant:—

The 12th section of the Assessment Act, 1859, provides that rates are to be levied and raised by an equal rate upon the value of the real estate situate in the city, and upon the personal estate of the inhabitants whereever the same may be, and also upon the amount of income or emolument derived from any office, place,

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occupation, profession, or employment whatsoever within the Province, and not from real or personal estate, of the inhabitants of the said city, including persons made or declared to be residents or inhabitants by any Act or Acts of Assembly now or hereafter to be in force relating to the imposition of rates, and also upon the capital stock, income or other thing of joint stock companies or corporations as hereinafter provided.

The 14th section provides that all joint stock companies or corporations shall be assessed under this Act in like manner as individuals.

The 15th section provides that the agent or manager of any joint stock company or corporation, established abroad or out of the limits of this Province, who shall carry on business for such company in the city of *Saint John*, shall be rated and assessed in like manner as any inhabitant upon the amount of income received by him as such agent.

The last section was subsequently repealed and new provisions enacted by 31 *Vic.*, c. 36, sec. 4, and 34 *Vic.*, c. 18.

The word "income" means gain from property, labor and skill; so defined in *Imperial* and *Worcester's* dictionaries.

But we have an interpretation given to the term "income," by the Legislature in Act 38 *Vic.*, c. 6.

If the contention of Respondents is right, then nothing could be deducted, not even expenditures, and the agent would be taxed in his representative capacity, and also taxed on that portion being his salary in his personal capacity.

It is said that, because the agents of fire insurance companies are to make returns of the net profits, etc., therefore the return to be made by other companies of "income," must mean something different from "net

profits," and that, because it is to mean something different, it must mean all the receipts without reference to expenditures; but the circumstance is overlooked that fire insurance companies are not to be assessed upon their whole income, but only on part, and this affords an explanation of the return required of fire insurance companies, viz., "of the net profits, etc.," because it is by this return that the assessors are to determine what is to be deemed the income of that portion of the business which is made ratable.

Mr. *Kaye*, Q. C., followed on the part of the Appellant:—

The meaning of the terms used by the Legislature has to be ascertained.

The first term is the word "income." This word has a well understood meaning, and as applied to the business of a year, it can have but one meaning, viz.: *the gain on the whole year's business.* It is what the business has *gained* at the end of the year over what it had at the beginning. In this case the bank has to make a return of "the income for the fiscal year." What is the meaning of the *fiscal year.* It means that then the bank could ascertain the balance of profit earned.

All moneys necessarily paid in earning the salary or profit are to be deducted before ascertaining the income. You cannot take the capital to make the income. An agent could not return that he had made any income when he had actually used part of the capital. This is the ordinary meaning of the word "income." If you take the meaning of the word "income" as meaning all the money that *comes in* without regard to what goes out, then, as regards a bank, you deprive the word of meaning. But, if you say the word "income" means the "profit that comes in," then this, having to be ascertained at the end of fiscal year, must be the balance

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remaining after deducting what has been paid out. If the word used is not ambiguous,—and the word "income" is not,—before you can limit or control it you must have express words for that purpose.

While there may be gross profits and net profits, there cannot be *gross income* and *net income* of a year.

Local banks are taxed on nominal capital; foreign banks on their profits.

How are we to determine whether it is a disadvantage to the local bank to be taxed on its capital? It may be an advantage in some years. At any rate, we have no figures upon which to base any argument, or to arrive at any result. We must, therefore, come back to the terms used by the Legislature in the Statute. The word "*income*" must mean the *gain* made by the bank and returned to the head office as such, at the end of the fiscal year. If the word is plain, is there anything in the proviso which cuts down the meaning. The words *net profits* are not used to distinguish that term from "income," but for a different object, viz., to limit the taxation on insurance companies to a portion of its business. Because, in the proviso, "net profits" is used, is it to be argued that the word "income" means gross income, a term which is never used?

Mr. *Thomson*, Q. C., for Respondents:—

The 15th section of the Act of 1859 (22 *Vic.*, cap. 37,) declares that "The agent or manager of any joint stock company or corporation established abroad, or out of the limits of this Province, who shall carry on business for such company or corporation in the city of *Saint John*, shall be rated and assessed *in like manner* as any inhabitant, upon the *amount of income* received by him as such agent." "*Like manner*" does not limit the mode or system of taxation; they are equivalent to "likewise."

The return is to be of "the whole amount of income received during the fiscal year." If the agent had returned that he had received *no income*, he would have committed perjury. The words "whole amount of income" cannot be synonymous with "net profits." The word "whole" excludes the idea of *net*.

But the proviso to 15th section clearly shows that the Legislature knew the difference between *income* and *net income*. They used "income," not as synonymous with, but as designedly contra-distinguished from "net profits."

Sec. 4, 31st *Vic.*, c. 26, did not re-enact the proviso as to insurance companies. As this was, no doubt, an oversight by which insurance companies were likely to suffer, the Legislature passed the Act of 1871 (34 *Vic.*, c. 18), which, after reciting that *doubts had arisen* whether under the wording of the fourth section of the Act of 1868 (31 *Vic.*, c. 38), "so far as the same relates to agents or managers of *fire and marine insurance companies, established abroad or out of the limits of the Province*, who shall carry on business within the city of *Saint John*," &c., enacted that the fourth section of 31 *Vic.*, c. 38, should not be applicable to such companies; and by section two such managers or agents were declared to be assessable on "net profits." Thus, again, the Legislature made a clear distinction between "income" and "net profits," and made such distinction *in favor of insurance companies only*.

Mr. *Weldon* says, according to our contention, the manager would be taxed twice. But is this different from the position of the Bank of *New Brunswick*? But this point has never been raised, and is not part of the special case.

Attention has been called to 38 *Vic.*, c. 36, 1875, in which it is alleged that a definition has been given to the word "*income*," which suits their views. I submit it

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does not; but I submit we have nothing to do with this Act. It relates to the Province, except *Saint John.* But the definition of word "income" in this Act (annual profits or gain) does not carry us any further.

I contend the word "income" means income without deducting expenditure. *Cooley* on Taxation (1), and cases there cited; *Attorney General* v. *Black* (2); *The Queen* v. *The Commissioners of the Port of Southampton, &c.* (3).

These Appellants do not pay upon their capital; and, if they succeed in their contention they would pay no taxes at all, although receiving the benefit of all municipal regulations. It is said, however, that their clerks pay on their income; but so do the clerks of the local banks. Where they can tax the *corpus*, they do so; where they cannot get at the *corpus*, they tax the income; and they tax the gross income because they believe it to represent the amount of capital employed. The term "income" ordinarily signifies gross income. You cannot interpret it, as if the word *net* or *clear* was before it. But when the Legislature uses the words "whole amount of income," and also words "net profits," it makes it clear that the word cannot be so interpreted.

Mr. *Weldon*, Q. C., in reply.

THE CHIEF JUSTICE:—

The Bank of *British North America*, a corporation established in *London, England*, out of the limits of the Province of *New Brunswick*, carried on, through its Manager, in the city of *Saint John*, the business of banking.

The fiscal year of the said bank, preceding the mak-

(1) P. 160. (2) L. R. 6 Exch. 78.
(3) L. R. 4 H. L. 449.

ing up of the annual assessment for the city of *Saint John* for the year 1876, commenced on the first day of January and ended on the 31st day of December, 1875, both days inclusive. The bank during such fiscal year sustained losses from the business transacted within said city during such fiscal year, and on the whole year's business, and in consequence of such losses made no gain or profit. But for such losses the income derived from the business of that year would have amounted to $46,000, but the losses sustained during that year exceeded that amount, and left the bank a heavy loser on the business of the year.

Plaintiffs were the assessors of taxes for the city of *Saint John* for the year 1876, and, as such, assessed the Defendant, as Manager of said bank, in the sum of $1,725, for taxes claimed by said assessors to be payable by the bank on $46,000 income during the said fiscal year. The bank claims that the income on which the bank is liable to be assessed is the gain, if any, received by the bank from the whole business of the fiscal year, and that, as the losses exceeded all the profits which the bank, but for such losses, would have made, the bank, in fact, made no gain, and so received no income from its business, and, therefore, are not liable to be assessed. The case agreed on by the parties submits to the court, as the only case for its determination, whether on these facts the bank or its Manager are, or are not, liable to be assessed in said sum of $1,725, under the Acts of Assembly relating to the assessing of rates and taxes in the city of *Saint John*, and it was agreed that "if the court find in the affirmative the assessment is to stand, if in the negative, the said assessment is to be set aside, altered or varied, so as to make it conform to the decision of the court upon the question submitted."

This case was argued before the Supreme Court of *New Brunswick*, and that court decided that the Defen-

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dant, as Manager, was liable to be assessed $1,725 for taxes, as claimed by the assessors to be payable by said bank on $46,000 income during the fiscal year of said bank, preceding the making up of the annual assessment for the said city for the year 1876, under said Acts of Assembly, and the assessment as stated was to stand.

From this decision the Plaintiffs now appeal.

The Statutes of the Province of *New Brunswick*, by virtue of which assessments are made in the city of *Saint John*, are the 22 *Vic.*, c. 37, intituled "An Act relating to the levying, assessing and collecting of rates in the city of *Saint John*," and the 31 *Vic.*, c. 36, and the 34 *Vic.*, c. 18, in addition and amendment thereof. The first principle we find put forward, in the Act of 1859, as the basis of taxation, is equality,—"all rates levied or imposed upon the said city shall be raised by an equal rate" upon the value of the real estate situate within the city; upon the personal estate of the inhabitants wherever the same may be; upon the amount of income or emolument derived from any place, occupation, profession, or employment whatsoever within the province; but not from real or personal estate; and, as to all local joint stock companies or corporations, upon the capital stock, income or other thing of such joint stock companies or corporations; and as to joint stock companies or corporations established abroad, or out of the limits of the province, the agent or manager, who shall carry on business for any such company or corporation in the city of *Saint John*, shall be rated and assessed, in like manner as any inhabitant, upon the amount of income received by him as such agent; and such agent, when required, is to furnish a true and correct statement in writing, under oath, setting forth "the whole amount of income received in the city of *Saint John* during the fiscal year of the company, preceding the making up of the annual assessment." With respect to insurance companies

abroad, the assessment is to be taken on a three year's average of the yearly "net profits" on insurance of property within the city; and the agents are to furnish the assessors with a statement in writing of the aggregate of such "net profits" for the three years next preceding that in which the assessment is to be made.

In this and in the subsequent acts, when any departure from the principle of an equal rate is permitted, the exemptions are specially provided for, as in sec. 14 of the 22 *Vic.*, c. 37, which declares that "nothing shall render liable to assessment the real or personal estate, income or other thing of the city corporation, or of any religious, charitable or literary institution." And so in sec. 16 of the 22 *Vic.*, c. 37, and sec. 5 of 31 *Vic.*, c. 36, which relieve stockholders of any joint stock company or corporation from liability to be rated, in respect of any property or income derived from such company or corporation; and as in the 14th sec. of 31 *Vic.*, c. 36, which provides "that nothing in the Act shall extend to authorize any assessment on any person or agent for the freight or earning of any vessel, steamboat or ship entering or clearing the port of *Saint John.*" So also in the 6th sec. of the 34 *Vic.*, c. 8, which wholly exempts life assurance companies or associations doing business in the city of *Saint John*, or their agents or managers, from taxation in said city. In each of these Acts we have a very clear distinction indicated between "the whole amount of income" in the case of non-resident corporations generally, and "the net profits" or "net proceeds," as the term is in the 5th sec. of the 34 *Vic.*, c. 18, on insurance of property within the city by assurance companies established abroad. This Act of 1859, though added to and amended by the 31 *Vic.*, c. 36, is not interfered with as to the equality required to be observed in levying the rates, and though sec. 15 is repealed, sec. 4 of 31 *Vic.*, c. 36, enacted in lieu thereof,

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in like manner declares that corporations established abroad, or out of the limits of the province shall be rated and assessed on the income received, and to enable the assessors to rate such companies or corporations, the manager is in like manner to furnish under oath in writing the *whole* amount of income received during the fiscal year, as in the Act of 1859. In this Act of 31 *Vic.* there is no reference to insurance companies, and, as the whole of section 15 of the Act of 1859 was repealed, the proviso contained in it in their favor was also repealed. This was evidently not intended by the Legislature, and to make this apparent the 34 *Vic.*, c. 18, was passed. This Act, after reciting that doubts had arisen as to the construction to be put upon the 4th sec. of the 31 *Vic.*, c. 36, so far as the same relates to the agents or managers of fire and marine insurance companies established abroad, or out of the limits of the province, who shall carry on business within the city of *Saint John*, or who shall have an office or place of business within the city for such companies, and that it was desirable that such doubts should be removed, proceeds to enact that the said fourth section shall not apply to agents of any fire or marine insurance companies so established, and so carrying on business, but that such agent or manager should be rated and assessed in like manner as any inhabitant, upon the amount of *net profits* made by him, as such agent, from premiums received on all insurances effected by him, in case of fire insurance, on property situate within the limits of the city, and, in case of marine insurances, wherever the subject matter of insurance may be; and, when required by the assessors, such agent is to furnish to them, within 30 days, a true and correct statement in writing under oath, setting forth "the whole amount of *net profits*" made by such company within the city of *Saint John*, from such premiums so received during

the fiscal year preceding the making up of the annual assessment.

Here we see the principle of a three years' average abandoned, and the assessment confined to "the net profits of the fiscal year preceding the making up of the annual assessment," as distinguished from "the whole amount of income" received for all other companies and corporations, during the fiscal year preceding the making up of the annual assessment. Now, if all outside companies and corporations were to be assessed only on net profits, what doubts could arise as to marine associations, or what necessity for any new enactment as to them, as they are to be assessed on all the business they do within the city of *Saint John*, wherever the subject matter of insurances may be. Inferentially, then, we have this enactment recognizing a clear distinction between "the whole amount of *income*" and "the whole amount of *net profits*."

Now, it is important to see how joint stock companies or corporations, other than those established abroad, or out of the limits of the Province, are dealt with.

By the 14 sec. of the 22 *Vic.*, c. 37,

All joint stock companies or corporations shall be assessed in like manner as individuals, and for the purpose of such assessment, the president, or any agent or manager of such joint stock company or corporation, *shall be deemed to be owner of the real and personal estate, capital, stock and assets of such company or corporation*, and shall be *dealt with*, and may be proceeded against accordingly; the principal place of carrying on the business and operations of any such company or corporation shall be deemed to be the place of inhabitancy of such company or corporation, and of such president, agent or manager, and such president, agent or manager shall, in regard to the real and personal estate, income or other thing of such company or corporation, be assessed separately and distinctly from any other assessment to which he may be liable, &c."

And, as we have seen, the individual stockholders are exempt in respect thereof. Under this section, it is clear that the real and personal estate, capital stock

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and assets of all corporations are liable to assessment, wholly irrespective of their gains or losses during the fiscal year. Their losses may have equalled or exceeded their gains, but that would not exempt them from taxation, for the law makes no distinction in the assessment on real and personal estate, whether it is actually productive or not; on the contrary, it is declared by sec. 12 of 22 *Vic.*, c. 37, that—

> For the purposes of this Act, the value of all real and personal estate and joint stocks, shall be deemed and taken to be, and shall be put down at one-fifth of the actual worth thereof as nearly as the same may be ascertained (1).

If foreign banks, then, can do business in the city of *Saint John*, and their losses, when made, are to exempt them, in whole or in part, from taxation, what a large pecuniary advantage is conferred on them over the domestic corporations, and how entirely in their case is ignored the legislative declaration that all rates levied and imposed in the city shall be raised by an equal rate. While, therefore, not only local banks and all other local corporations are taxed, wholly irrespective of profits, and whether the business of the fiscal year was profitable or otherwise, but likewise all resident inhabitants are thus taxed on all real and personal estate and joint stock, without reference to productiveness or unproductiveness, upon what principle of equality or uniformity in the taxation can foreign banks ask to be assessed only on "net profits," and to be exempt from all taxation in those years when their business may happen not to furnish any *net profits*, while the actual value of the property of every other home corporation and every citizen bears its equal share of the city burthens. While perfect equality in the imposition of taxes cannot, perhaps, be always expected, and while we cannot look for such a perfect

(1) See *Exparte the Bank of New Brunswick*, 1 Pugsley 265.

system of taxation as will not, under certain circumstances, produce unequal results, and, perhaps, injustice, we may fairly infer the Legislature contemplated equality and uniformity so far as practicable; and, I think, on the face of these acts, we have indicated a policy of equality and justice, and, as far as possible, a uniform rate on all property of the same description, and not such invidious exemptions and favoritism as would be the result if the defendants' contention should prevail; and when exemptions are claimed, and that this policy has been departed from, we have a right to expect that an intention so to exempt would be made apparent by clear and unambiguous language, as we have seen has been done in the cases before referred to; and, without such a clear indication of the will of the Legislature, I do not think a legal construction should be adopted that will compel one corporation or person, or one subject of taxation, directly to contribute, while other corporations or persons, and other subjects of taxation of precisely the same class, are entirely exempt.

I look on this tax as, in effect, a tax upon the capital of the bank employed in the city, as it would not be fair to tax the whole capital of the mother Bank, and it might be very difficult, if not impossible, to fix the amount of capital employed by the branch bank or agency, which may fluctuate from week to week.

The Legislature, not being able to get at the amount of capital to be taxed, appear to have adopted the principle of taking the gross income, as the basis for computing the tax, as showing the volume of business transacted during the year, and, as it were, approximately representing the capital employed generally throughout the fiscal year, thereby practically taxing the property or assets of the bank by the income derived therefrom, and thereby compelling these foreign corporations to con-

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tribute to municipal expenditure, and so bear their fair share for the valuable privileges they enjoy, and place them on an equal footing, as near as may be, with domestic institutions of a similar character. I cannot bring myself to think, that the Legislature ever contemplated that though private individuals and all local corporations should contribute to the municipal burthens, regardless of gain or loss, foreign banks alone should be a privileged class, and though enjoying, in common with similar home institutions, the protection and advantages derivable from municipal expenditure, they should, at seasons of depression, when *net profits* may not be earned, but when funds are generally most needed, escape all municipal burthens.

In another point of view, this tax as imposed may, I think, be said to be more in the nature of a franchise than a property tax. One peculiarity of taxes of this description is that they depend on the amount of business transacted, and the extent to which they have exercised the privileges granted in their charter without reference to the value of their property. Numerous instances of this description of tax are to be found in the American reports and works on taxation, such as a tax on the amount of deposits in lieu of all other taxes. But, apart from all this, I think the tax is imposed by the express language of the Statute.

By the 12th sec. of the 22 *Vic.*, cap. 37, it is declared that:

> All rates levied or imposed upon the said city shall be raised by an equal rate upon the value of the real estate situate in the city or district to be taxed, and upon the personal estate of the inhabitants wherever the same may be, and also upon the amount of income or emolument derived from any office, place, occupation, profession or employment whatsoever within the Province, and not from real or personal estate of the inhabitants of the said city, including persons made or declared to be residents or inhabitants by any Act or Acts of Assembly now or hereafter to be in force relating to the imposi-

tions of rates, and also upon the capital stock, income, or other thing of joint stock companies or corporations as hereinafter provided.

By the 15th sec. repealed by 31 *Vic.*, c. 36, which substitutes other provisions:

The agent or manager of any joint stock company or corporation established abroad or out of the limits of this Province, who shall carry on business for such company or corporation in the city of *Saint John*, shall be rated and assessed in like manner as any inhabitant upon the amount of income received by him as such agent; and for the purpose of enabling the assessors to rate such company or corporation, 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 in the city of *Saint John* during the fiscal year, (of said companies) preceding the making up of the annual assesssment. * * * For the purposes of this section the agent or manager shall be deemed the owner of such income and shall be dealt with accordingly.

Provided, however, that the assessment on Insurance Companies, or the agent or manager of any Insurance Company established abroad, shall be taken on a three years' average of the *yearly net profits* on insurance of property situate within the said city, or for the whole period for which they may have been doing business in said city, not exceeding three years, such average to be obtained as follows, &c. * *

Provided further, that life insurance companies or their agencies shall be free from assessment under this Act.

Section 16, repealed by 31 *Vic.*, c. 36, sec. 5, enacted that:

No stockholder of any joint stock company or corporation liable to be rated under this Act shall be assessed in respect of any property or income derived from such company or corporation.

It has been very strongly and very ingeniously contended by the learned counsel for the appellant that the term "income" is not to be interpreted as meaning the gross income or receipts by the agent, but the gain or emolument derived by the agent during the year from the whole business of his principal in the city. That the term "income" has acquired a technical meaning, and is used to signify "gain or profit," and that this is also the popular meaning of the word "income."

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I think the term "whole income" must be construed to mean the gross income or revenue received by the bank on the business of the fiscal year preceding the assessment; or, in other words, the total amount the bank earned without reference to any outgoings; that the words "whole income" must be read in their ordinary meaning, as the whole incomings of the bank as opposed to net profits, net earnings, net income, clear income, or clear gain. The Legislature has in this Statute clearly distinguished between whole income and net profits, and has so clearly used those terms as contra-distinguished, that to read them as synonymous words would be quite unjustifiable.

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. 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.

The income, if applied to make up loss of capital by unfortunate investments, fire, or other causes, would be in effect an addition to capital, to be again employed as capital in the business of the bank. As was held in *Forder* v. *Handyside* (1), where defendants, who were

(1) L. R. 1 Ex. Div. 233.

assessed on the net profits, had, in accordance with the articles of association, set apart a sum of money for depreciation of buildings, fixed plant and machinery, and claimed, in making a return of the annual profits or gains, to deduct this amount, as the amount written off for depreciation of buildings, fixed plant and machinery; and, though a majority of the Commissioners were of opinion that persons in trade were equitably entitled to write off from their profits each year a sum for depreciation, and that the amount claimed was fair and reasonable, and decided in favor of the defendants, on a case stated for the opinion of the Court, it was held that such a deduction was contrary to the Statute, as the amount set aside was, in effect, an addition to capital.

In *Regina* v. *Commissioners of the Port of Southampton* (1), *Bramwell*, J., said:

It turns on the meaning of the word "income" in sec. 124 of 6 *Wm.* 4, c. cxxix. Does it mean all or four-fifths of what the Defendant received from the sources therein mentioned? I cannot reason myself into a doubt on the subject, though I must entertain much in deference to the opinion of those who think differently. "Income" is that which comes in, not that which comes in less an outgoing. The fifth the Defendants were liable to pay to the Plaintiffs was an "outgoing," not a diminution of income.

And Lord *Chelmsford* says:

It appears to me the word "income" here means the total amount of the rates and duties receivable by the Commissioners, without regard to any outgoings to which it may be subject.

And, after stating reasons that had been assigned, says:

One can hardly suppose that these considerations were at all in the view of the Legislature, and led to the use of the word "income" *in a different sense from its ordinary meaning.*

And in *Angell & Ames* (2):

The moneyed corporations of the State of *New York*, deriving income and profit, are liable to taxation on the capital, and it is held

(1) L. R. 4 H. L. 472. (2) 3rd ed., sec. 454.

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that, in ascertaining the sum to be inserted in the assessment roll, no regard is to be had, either to accumulations or losses, but only to the amount of capital stock paid in and secured to be paid, and that the word "income" means that which is received from the investment of capital, without reference to outgoing expenses; and the term *profits* means gain made upon any investment when both receipts and payments are taken into account.

Where a moneyed corporation is liable to be assessed on the whole nominal amount paid in and secured to be paid (after deducting statutory exemptions,) no deduction is to be made for losses of capital, nor for debts due.

Burroughs on taxation (1):

"Income." The gross revenue of an individual, whether it arises from rents of real estate, interest on money loaned, dividends on stocks, or compensation for personal services rendered in any trade, profession, or occupation, constitutes his "*income.*" * * * But such tax is never imposed upon all persons, nor upon the gross income, it is usually upon the annual income of persons, in excess of a certain amount, allowing deductions of various kinds.

Burroughs on taxation (2):

Where the tax is imposed on the annual *net* earning or income of a corporation, the income, after deducting necessary expenses, is the amount to be taxed; that portion of income devoted to repayment of capital is included as a part of the income and liable to the tax. A tax on net earnings or income, is on the product of business, deducting expenses only; no allowance is made for capital exhausted or waste of capital in business. But if the tax be upon "profits or income," it will not be construed to mean *net* profits or income.

A good deal of stress was laid on the words of the Statute, which says that corporations are to be assessed in like manner as any inhabitant. I think this provision "in like manner as any inhabitant" must be read as fixing merely the liability to be rated and assessed, and the liability being so established, then the law declares how the tax is to be levied, and makes provisions in reference thereto wholly different from those applicable to inhabitants. Whereas, if the words "in like manner" were to be held to apply,

(1) P. 159, sec. 82. (2) P. 161, sec. 82.

not only to the liability, but to the mode of levying the rate or assessment, then the clause should have terminated at the word "inhabitant," otherwise this incongruity would arise, that while in one part of the clause it is provided that joint stock company shall be rated and assessed in like manner as any inhabitant, the subsequent part of the section provides an entirely different mode, and whereby the assessment is to be on the *whole amount of income* received, a term entirely distinct from that used in reference to inhabitants.

In view of the policy of the act and the wording of the act, on principle and on authority, I think the decision of the majority of the Judges of the Court below was correct; that the Defendants have no cause to complain, and that the appeal should be dismissed with costs.

STRONG, J., concurred with the Chief Justice.

FOURNIER, J.:—

La question soulevée par le *special case* soumis du consentement des deux parties pour la décision de la Cour Inférieure, était de savoir si la Banque *British North America*, corporation établie à l'étranger, mais ayant un bureau d'affaires dans la cité de *St. John, N. B.*, peut être, d'après le "*St John City* Assessment Act 1859" et ses amendements, taxée sur le total de son revenu, ou seulement sur le montant des profits nets, réalisés après déduction faite des pertes subies durant l'année.

La 1ère sec. de l'acte ci-dessus cité impose à la Corporation de la cité de *St. John* l'obligation de fixer chaque année, pas plus tard que le 1er avril, le montant qu'il sera nécessaire de prélever pour les besoins de la cité pendant l'année.

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La 12ème sec. déclare que la taxe dans la cité de *St. John* sera répartie d'après un taux égal: 1o. Sur la valeur de la propriété mobilière et immoblière; 2o. Sur le montant du revenu ou émoluments de tout office, place ou occupation, etc.; 3o. Sur le capital, revenu ou autres propriétés des compagnies à fonds social ou corporations tel que ci-après pourvu. Pour les fins du prélèvement de ces taxes, la valeur de la propriété foncière est fixée au $\frac{1}{5}$ de sa valeur *actuelle* (réelle).

La 14ème sec. déclare que les compagnies à fonds social seront cotisées de la même manière que les individus. (*in like manner as individuals.*)

La 15ème sec. déclare que l'agent ou gérant d'une compagnie à fonds social ou corporation établie à l'étranger, ou en dehors des limites de la province, faisant affaires pour telle compagnie ou corporation dans la cité de *St. John*, sera cotisé de la même manière que tout autre habitant sur le montant du revenu par lui perçu en sa qualité d'agent,

Shall be rated and assessed *in like manner* as any inhabitant upon the amount of income received by him as such agent.

La même section oblige les représentants de ces institutions à donner aux cotiseurs, s'ils en sont requis, un état correct et sous serment du montant total du revenu perçu dans la cité de *St. John*, durant la dernière année fiscale, précédant la confection du rôle annuel de cotisation.

Un proviso déclare que les compagnies d'assurances ne seront cotisées que d'après une moyenne des profits nets réalisés sur les affaires faites dans la cité pendant les trois dernières années. Le même proviso exempte les compagnies d'assurance sur la vie et leurs agences des taxes imposées par cet acte.

La sec. 16, exempte de taxes les parts des actionnaires dans les compagnies cotisées en vertu de cet acte.

La 15ème sec. de l'*Assessment Act* de 1859 qui avait

défini les différents modes de taxer les compagnies mentionnées plus haut, a été révoquée par la 31 Vict., ch. 36, sec. 4. Mais cette dernière section, qui comprend de nouvelles catégories de personnes et de sociétés, qui ne l'étaient pas dans la section révoquée, conserve dans leur entier les dispositions de la dite section 15, quant aux institutions étrangères faisant affaires dans la dite cité de *St. John*. La seule innovation est que le mot *income*, y est employé comme s'appliquant à toutes les compagnies indistinctement, omettant les mots *net profits*, qui dans la sec. 15 devaient servir de bâse pour l'imposition de la taxe sur les compagnies d'assurances.

L'obligation de fournir un état sous serment, s'il est requis, de tout le revenu perçu par les agents des compagnies étrangères est restée la même.

L'omission dans la sec. 4 ci-dessus citée de la distinction faite dans la sec. 15, entre les compagnies taxées d'après leur revenu, et celles qui ne l'étaient que d'après le montant des profits nets, ayant donné lieu de douter si les compagnies d'assurances jouissaient encore du privilége spécial que leur avait accordé la sec. 15, le statut 34 Vict., ch. 18, fut passé pour mettre fin à ces doutes. La 1ère sec. déclare que la sec. 4 de 31 Vict., ch. 36, qui avait donné lieu à ces doutes ne s'appliquera pas aux agents des compagnies d'assurance maritime et contre le feu établies à l'étranger ou en dehors de la province, faisant affaires dans la cité de *St. John*, ou qui auront un bureau d'affaires dans la dite cité pour telles compagnies.

La 2ème sec. remet les agents de ces compagnies dans la position que leur avait faite la sec. 15 (de l'acte de 1859), en déclarant qu'ils seront sujets comme tout autre habitant, *in like manner as any inhabitant*, à être cotisés sur le montant des profits nets, ("upon the "amount of net profits made by them") sur les propriétés

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assurées dans les limites de la cité. On est donc revenu aux dispositions de la sec. 15, concernant la distinction entre les compagnies d'assurance et les autres compagnies ou corporations étrangères. La sec. 4 qui établit cette distinction doit être considérée comme une interprétation législative des expressions *whole income* et *net profits* qui font le sujet de la difficulté en cette cause.

Les citations précédentes font voir que la législature a clairement établi différentes catégories de compagnies ou corporations, à l'égard de chacune desquelles elle a fait des dispositions spéciales quant au mode de les taxer, savoir: 1o. Les compagnies à fonds social ou corporations provinciales ayant un bureau d'affaires dans la cité de *St. John*, qui doivent être taxées (sec. 2) d'après le montant de leur capital; 2o. Les compagnies établies à l'étranger ou en dehors de la province faisant affaires dans la cité de *St. John*, qui doivent être taxées d'après la sec. 15, sur leur revenu, dont elles doivent déclarer le total aux cotiseurs; 3o. Les assurances maritimes et contre le feu taxées d'après un proviso de la même section sur le montant des *profits nets*, réalisés sur les propriétés assurées dans les limites de la cité; 4o. Les assurances sur la vie que le même proviso exempte de toutes taxes.

La distinction entre les divers modes de taxer ces différentes institutions, les unes sur le capital, comme les compagnies ou corporations incorporées dans la province, les autres d'après le montant de leur revenu entier, et d'autres enfin d'après le montant de leurs profits nets, ne pouvait pas être faite d'une manière plus claire et plus précise. Les mots "*whole income*" et "*net profits*" comportent en eux-mêmes un sens très clair et qui ne me paraît pas susceptible de laisser aucun doute sur l'intention de la législature. Ils me paraissent avoir été employés à dessein pour signifier

des choses différentes, et ils doivent ici recevoir la signification que leur ont donnée les statuts cités plus haut qui de plus sont conformes à la définition de ces deux expresssions donnée par *Cooley* on taxation (1) :

Income means that which comes in and is received from any business or investment of capital without reference to the outgoing expenditure. *Profits*, on the other hand, are understood to mean the net gain of any business or investment, taking into account both receipts and payments. Income as applied to the affairs of individuals, expresses the same idea that *revenue* does when applied to the affairs of government. *People* v. *Supervisors of Niagara* (1).

L'Appelant a prétendu que les expressions *in like manner as any other inhabitant*, signifiaient que la taxe imposée sur les compagnies serait la même que celle prélevée sur le revenu des individus,—que le revenu défini, d'après la sec. 12, 22 Vict., 37, comme suit: *Income or emolument derived from any office, place, occupation, profession or employment in the Province*, doit s'entendre seulement du revenu net, déduction faite des dépenses et pertes. Cette définition ne définit rien. En employant les mots *income or emolument* comme synonymes, elle laisse subsister la difficulté de savoir si, pour les fins de la taxe, il faut dans l'estimation des revenus d'une place ou d'un office en déduire les dépenses. Elle ne peut par conséquent servir de bâse à un argument pour résoudre cette difficulté puisqu'elle y est sujette elle-même. On ne peut non plus s'appuyer sur la définition du mot *income* donné dans l'*Assessment Act* de 1875, car cet acte concerne la province du N. B., et ne peut servir à l'interprétation des statuts spéciaux concernant la cité de *St. John*. Il faudrait pour cela y trouver une disposition spéciale qui n'existe pas.

Au contraire de la prétention de l'Appelant, je crois que les termes *in like manner as any other inhabitant*

(1) P. 160. (2) 4 Hill 20, affirmed 7 Hill, 504.

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n'ont été introduits que pour signifier que les compagnies ou corporations seraient, comme les individus, soumis à l'obligation de payer les taxes, et nullement pour déclarer que le même taux ou mode de taxer serait applicable dans les deux cas. Ceci me paraît résulter clairement de la sec. 12, déclarant que les compagnies ou corporations seraient taxées *as hereinafter provided.* C'est donc aux dispositions spéciales sur ce sujet, qu'il faut référer pour connaître quel est le mode établi quant aux compagnies ou corporations. Ces dispositions particulières, citées plus haut, font voir que les compagnies étrangères sont soumises à un mode particulier qui consiste à prélever la taxe sur le total de leur revenu.

Une interprétation donnant à ces corporations le bénéfice de l'exemption de payer des taxes, tandis que les banques provinciales y seraient soumises, se trouverait en opposition directe avec la 12ème clause de l'acte ci-dessus cité déclarant que la taxe sera imposée d'une manière égale—"*equal rate.*" Ne pouvant pas connaître au juste le montant du capital employé par les banques étrangères dans leurs agences locales autrement que par le revenu qu'elles en retirent, c'est sans doute pour arriver à ne taxer que le montant du capital employé dans ces agences que la loi les oblige à déclarer leur "*whole income,*" pour servir de bâse à la taxe. De cette manière elles sont atteintes comme les autres banques—et comme elles, taxées dans le cas de profit comme dans le cas de pertes, sur le capital employé dans les agences locales. En adoptant cette interprétation, l'égalité et la justice, conformément au principe exprimé dans la sec 12, sont observées à l'égard d'institutions du même genre, qu'elles soient d'origines provinciales ou étrangères.

Les raisons ci-dessus exposées me paraissant suffisantes pour résoudre la question soumise, je ne crois

pas devoir entrer dans de plus amples considérations pour justifier la conclusion à laquelle j'en suis venu, savoir : que dans le cas actuel la Banque *British North America* a été légalement taxée sur le montant entier de son revenu, au lieu de ne l'être que sur le montant de ses profits nets.

HENRY, J. :—

The Appellant is agent and manager of the Bank of *British North America*, at the city of *Saint John, N. B.*, and as such was rated under certain assessment acts relating to the said city. By a majority judgment of the Supreme Court of *New Brunswick*, to which he had recourse, the tax upon him was decided to be legal, and from that judgment he appealed to this Court. We have, therefore, to consider the matter as presented by the acts in question, and decide as to his liability to be rated under them.

By sec. 12 of 22 *Vic.*, cap. 37 :

All rates levied or imposed upon the said city shall be raised by an equal rate upon the value of all real estate situate in the city or district to be taxed, and upon the personal estate of the inhabitants wherever the same may be, and also upon the amount of income or emolument derived from any office, place, occupation, profession or employment whatsoever within the Province, except from real or personal estate of the inhabitants of the said city, and, also, upon the capital stock, income, or other thing of joint stock companies or corporations *as hereinafter provided.* * * * And for the purposes of this act, the value of all real and personal estate shall be put down at one-fifth the actual worth thereof, as nearly as can be ascertained.

Section 14 provides that :

All joint stock companies, or corporations, shall be assessed under this act *in like manner as individuals.*

By section 15 :

The agent or manager of any joint stock company or corporation established abroad or out of the limits of this Province, who shall

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carry on business for such company or corporation in the city of *Saint John*, shall be rated and assessed *in like manner as any inhabitant* [which means *to the same extent*] upon the amount of the income received by him as such agent,

With a provision that:

The said agent or manager shall, when required in writing by the assessors so to do, furnish to them a true and correct statement under oath setting forth the whole amount of income received in the city of *Saint John*, during the fiscal year of said companies preceding the making of the annual assessments. * * *

Provided, however, that the assessment on insurance companies, or the agent or manager of any insurance company established abroad, shall be taken on a three years' average of the yearly net profits on insurance of property situated within the said city, or for the whole period they may have been doing business in said city, not exceeding three years.

By virtue, then, of those Acts the assessment was based on a rate of one-fifth the ascertained value of all real estate in the city, and upon personal estate of inhabitants, wherever the same might be, and of stock of resident joint stock companies or corporations. In the view I take of this case, depending as it does upon the construction to be put on sec. 4 of 31 *Vic.*, cap. 36, taken in connection with the repealed sec. 15 of 22 *Vic.*, c. 37 and 34 *Vic.*, c. 18, it matters not what rates the Legislature imposed upon resident joint stock companies or corporations; but I refer to the fact in passing; and it may be useful to remember that such is the case when discussing the argument founded on the inequality in the rate in years when the *net* income of non-resident companies or corporations, as it is termed, should be nothing, or very much too small, to equal the taxes paid by resident companies or corporations when rated on a different basis. We have not, from any evidence before us, the means to determine in that way what the Legislature meant when using the term "income," and, if we had, the Legislature has forbidden us to do it. By sections 14 and 15 of 22 *Vic.*, c. 37, the Legislature has directed that the resident,

as well as the non-resident corporations, shall be rated as individuals, the former on one-fifth of the value of their capital stock, and the latter on their income. I feel, therefore, wholly unauthorized, because forbidden, to inquire into any alleged inequality of taxation as between the resident and non-resident companies or corporations. That was a matter for the Legislature and not for us. If, indeed, there could be any doubt as to the meaning of the words, or if there was no provision assimilating the assessment on non-resident companies or corporations, we then, but only then, would be, not only allowed, but bound to draw an argument as to the meaning and effect of the term "income," when used and applied in reference to non-resident companies or corporations which are rated on a principle different from that applied to resident ones. When the Legislature says the non-resident companies or corporations shall be rated in like manner as individuals, upon what theory of construction or evidence can I say it did not mean so, and that a different principle should be interposed or substituted? For these reasons, I cannot feel authorized to found my judgment upon definitions founded on principles applicable to companies or corporations, when inapplicable to the cases of individuals. I consider, therefore, my duty is to ascertain the intentions of the Legislature when applying the term "income" *to an individual*, and upon that proposition to a great extent my judgment is founded.

To arrive at a result we must ascertain how the term "income" is used in regard to an individual.

The 12th sec. of 22 *Vic.*, c. 37, under which the tax is imposed, employs the words, "and also upon the amount of income or emolument derived from any office, place, occupation, profession, or employment whatsoever within the Province," excepting income or

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emolument from real or personal estate of the inhabitants of the city.

That "income," when employed as it is in the section, is made synonymous with "emolument" is an undeniable proposition, which needs no authorities or arguments to sustain. "Income" cannot, therefore, be deemed to mean anything which "emolument" cannot, in the fair and ordinary acceptation of the term, apply to.

What then is the meaning of "emolument" in its usual and ordinary acceptation. It comes from the participle (*emolumentum*) of the latin verb *emolo*, *molo* to grind, *originally* meaning toll taken for grinding. It is now, according to the *Imperial* Dictionary and other reliable authorities, understood: "1. The *profit* arising from office or employment—that which is received as a compensation for services, or which is annexed to the possession of office, as salary, fees and perquisites. 2. Profit, advantage, gains in general;" and according to the same dictionary, "emolumental" means "producing profit, useful, profitable, advantageous." According to *Webster's* dictionary emolument means: "1. The *profit* arising from office or employment—that which is received as a compensation for services, or that which is annexed to the possession of office, as salary, fees and perquisites. 2. Profit, advantage, gain in general—that which promotes the public or private good. 'Emolumental,' producing *profit*, useful, profitable, advantageous." "Emolument" is thus, in the *first* definition in both authorities cited, declared to be "the *profit* arising from office or employment," and not merely the gross amount of salary, fees or perquisites, but the balance remaining after deduction of the necessary expenses paid out in earning the salary, fees or perquisites.

In support of the principle just stated, I can confidently refer to the Imperial Income Tax Statute, 16th and 17th

Vic., cap. 34. It is intituled "An Act for granting to Her Majesty duties on profits arising from property, professions, trades and offices," and in the heading of each page it is called "Income Tax." Sec. 2, schedule E, provides that "every public office or employment of profit" shall be charged. Sec 51, however, provides for the reduction "in respect of any public office or employment, where the person exercising the same is necessarily obliged to incur the same" of the expenses of travelling, or of keeping and maintaining a horse, or otherwise "to lay out and expend money wholly and necessarily in the performance of the duties of his office or employment." The true meaning of the term *emoluments*, as applied to such an office or employment, either with or without any provision, such as in the last section contained, is that which would include only the balance remaining after the deduction of such necessary expenses. Schedule "D" imposes the tax in respect of annual *profits* or *gains* "from any profession, trade, employment or vocation." Sec. 50 provides for assessing *doubtful debts* due to any person, but in cases of insolvency only the amount of dividend likely to be received on any such debt. In making the returns provided for by the Act of the "profits or gains," the question of *doubtful* debts is provided, and, while really *bad* debts would be deducted in the estimate, persons making returns would have to charge themselves with the *doubtful* ones. This, then, is the principle of the Imperial "Income" Tax, and, under it, only the "profits" or "gains," after deducting bad debts, are taxed. It is the sound principle, for otherwise it would be a tax on *capital* and not on "income," and while a tax on capital, and to be paid out of it, no one could contend it would be derived from "emoluments," which, according to every authority, means "profits, advantages, gains in general."

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I have said that "Income" and "Emoluments" are employed in the section in question as synonymous, and being so used we are constrained so to apply the first term, when employed in any subsequent section of the same act. "Income," however, has a well understood meaning, and in the absence of any legislative construction that meaning must be given to the term. According to *Webster's* dictionary "Income" is "that gain which proceeds from labour, business, or property of any kind." * * * "The *profits* of commerce or of occupation." "Income is often used synonymously with revenue, but *income* is more generally applied to the 'gain' of private persons," and the same definition is given verbatim in the *Imperial* dictionary. In *Richardson's* dictionary it is stated to be the *profit* or *emolument*, the revenue coming in. Thus, for a stated period, income is, therefore, the *profit* or emolument derived from any commercial business or occupation for that whole period, and not for any portion of it, and not for any portion of the business but from the whole of it. If an individual, in the earlier part of the prescribed period should lose, say, a thousand dollars, but during the remaining part gains an equal sum, could it be said his profits, or income, or emoluments, from the business would be a thousand dollars? I maintain that, where there is no profit during the period, the fund on which the tax is directed to be levied is not in existence, and the tax is, in such a case, levied on capital. Such I cannot hold to have been the intention of the Legislature. The case states that the profits fell far short of the losses on the business *for the year*, and we must not, therefore, inquire further how either arose or occurred. The exact position is admitted by the case.

The 4th sec. of the 31st *Vic.*, cap. 36, which repeals the 15th sec. of 22nd *Vic.*, cap. 37, includes, with the agents of joint stock companies and corporations, "any

other person or persons, whether incorporated or not, doing business out of the Province, who shall carry on business within the city of *Saint John*, or who shall have an office or place of business in the city of *Saint John* for any such company, corporation, person or persons," and provides that all such agents "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." The agents of companies and corporations are, then, put on the same footing as agents of a branch of a mercantile house or manufacturer, doing business out of the Province. I hold that a construction inapplicable to the agent of such mercantile house or manufacturer would be just as inapplicable to companies or corporations. The Legislature has thought fit to direct that the latter should be taxed by the same language as the former, and I feel constrained to declare it to be so, irrespective altogether of the policy involved, feeling bound to leave that question where constitutional right places it.

Suppose, then, the case of the agency of a mercantile house or manufacturer, whose head quarters were in *Montreal*, being established at *Saint John*. A shipment of goods is made from *Montreal* of the value of $5,000, and the whole lost at sea or destroyed by fire, either *en route*, or after arrival at *Saint John*. Subsequently other shipments are made, and profit from them is realized of $4,000, and thus stood the profit and loss account of the agency at the end of the fiscal year. What would be the legitimate reply at head quarters to an inquiry as to the "income" derived from the agency, and what would be the reply to such an inquiry at head quarters anywhere under such circumstances? We (or I, as the case might be), derived no income from the agency, but sustained a loss of capital to the extent of $1,000. Would any one contend that, if the result was the same

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in regard to business carried on by a resident individual, he should be rated on the *income* of $4,000? I presume no one would attempt to impose such a rate, and although the Legislature expressly directs that the agents of non-resident companies, corporations, and "other person and persons" having agencies in *Saint John*, shall be taxed *in like manner as resident individuals*, we are asked to decide otherwise, in the face of the legislative provisions assimilating them in language the most plain and explicit, and in respect to the meaning of which there should be no doubt. Every person supplying fishermen, we know to be engaged in a precarious business from various causes; not the least of which is the bad debts they contract. A merchant, then, who is often paid in the produce of the sea, and makes a profit on its sale and on the goods supplied of, say, $3,000, but by loss of property and bad debts at the end of the fiscal year finds his assets $2,000 short of the capital employed, what would his income from the business be? And how long could he live on such income? When we hear of a person in business "living beyond his income," what do we infer? Why, that he is living beyond the *profits* of his business from which his support is derived, and that he is, consequently, either drawing upon the capital, or running into debt. That is the universal, and, I think, well understood application of the term, and as such should be applied. The case would be the same in respect of a person deriving his means of livelihood from a salary, fees, or perquisites, and the same answer would apply to both.

We are, however, referred to a proviso in the same section, by which agents of insurance companies are to be assessed on "a three years' average of the yearly *net profits*," and we are asked, therefore, to conclude that the Legislature did not use "income" as synonymous with,

but as designedly opposed to, net profits. In support, however, of that proposition the act itself furnishes no proof. I have, I hope, sufficiently shown that "income," as applied to the commercial transactions of a resident individual, does not mean the mere nominal profits of goods sold in great part on credit, and never paid for, or even for profits on cash sales, but to the balance of profit and loss in all departments of his business during the prescribed period, and that the Legislature so intended when the same principle was applied to the agents of "companies, corporations, or other person or persons." If such be the proper construction, then "income" and "net profits" mean exactly the same thing. The argument, at best, is but begging the question, because one must first establish the fact of the difference between "income" and "net profits" of a trade or business before he can say the Legislature did not use the terms synonymously. The Legislature in an Act, as well as an individual in a letter or other document, may in one place use a different term to express the same idea as is intended by a different term in another, and the mere fact cannot by itself be evidence for construction.

We are required to hold that "income," in relation to banks, must necessarily apply to and include the amount realized from discounts and other loans and premiums, or profits received from exchange, but (independent of the peculiar way the matter as to the profits and losses is stated in this case) why should the construction stop there? Why should it not include the income, that is all that *comes in* from every source? The answer is, that it only should be applied to what *comes in* as *profits*. To give weight to that argument, or rather to found it, the term *profits* must be invoked, and that to be *equitable* must not be *one sided*. It would be unjust to charge a bank with the nominal *profits* on one side of its account with an individual, when the whole would

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show they were only *nominal*, because, not only such nominal profits, but a portion of its capital, had been lost by the insolvency of its debtor, or in some other way; and, were the dealings of the bank in question all before us, I have little doubt that no small portion of what constitutes the $29,000 of profits would be found of that character. I make these remarks in passing, but not under the conviction that they are at all necessary in the general view I take of the case, in regard to the assimilating provisions of the several governing sections under consideration. Sec. 16 of the Act of 1859 exempts from taxation the property or income of a stockholder derived from his company or corporation. The only income he could derive would be in the shape of dividends, and those dividends would depend upon the state of the profit and loss account at the end of the fiscal year. The "income," in that case, could only come from *profits* after deducting all losses. How, then, can any one say that, instead of taxing the *profits* only in the case of the individual stockholder, by using the word "income," the Legislature, employing the same term, intended it to have a different application in respect of the whole of the stockholders *collectively*. In a word, that it should mean *profits* in the one case, and not in the other.

It is also contended, that the return of the "whole amount of income" required by the agent, as provided for by the two Acts, in case of non-resident companies, &c., shows that the term "income" must be taken to mean income without deduction of losses. "Income" *per se* is as comprehensive, when used as it is in the Statutes, as "whole amount of income." If the direction to the agent was merely to return a statement of the "income," a statement of a part only would not be a compliance with the direction. If, indeed, the Statute spoke antecedently of two different defined kinds of

income, or from different sources, and for some object it was necessary to have a return as to both, I could easily see that the words "whole amount" would have a significance and object wholly absent from the circumstances arising under the terms of the sections in question. It may be taken, in my opinion, as a caution and warning to agents to leave nothing out of their returns; but cannot, I think, to extend the meaning or application of the term "income" in the preceding part of that section, or to "income or emoluments" in section 12; and to give to the expression in question the application sought would, in my view, be overstraining the true meaning of the language of the provision, and, therefore, in opposition to the intentions of the Legislature as found by the words used.

On the argument we were referred by the counsel of the Respondents to an American work (*Burroughs* on Taxation, 161.) I can find nothing in that work, or the cases therein referred to, to strengthen the contention that an individual in commercial business can be taxed under the term "income," or even a corporation, for anything beyond the net profits of the business. At page 160 that author says: "A declared dividend will furnish the measure of tax on income," and refers to a case, *Atlantic and Ohio Telegraph Company* v. *Commonwealth*. (1). I have referred to that judgment which, as the judgment of the Supreme Court of Pennsylvania, was, in 1870, delivered by *Thomson*, C. J., who says:

> By whomsoever the stock is held, the measure of the tax is upon the dividends declared.

And again:

> When a dividend is declared, that gives the measure and furnishes the rule for the tax.

The same author at the same page says:

(1) 66 Penn. S. R. 57.

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A profit on the investment or capital of the corporation is the measure of the tax, whether paid as dividends to stockholders or going to increase the capital,

and cited a case, *Commonwealth* v. *Pittsburgh, &c., R. R. C.* (1). I have read that case, and the judgment fully sustains the doctrine laid down. It was delivered in 1873, and quotes with approval what I have quoted from the judgment reported in 66 Penn. S. R. 57 ; and the Judge adds that :

When a corporation has actually made dividends from its profits or property without formally declaring them by adding them to the stock of the shareholders, or where it has declared dividends and returned them, whether earned or not, the sum thus added to the stock of shareholders, or the sum declared and set apart to him, becomes the measure of the tax. The legislative intent being to make the profit transferred by the corporation to its shareholders from its treasury or property the measure of the taxation of its capital.

I have also carefully examined the cases cited by the author, referred to and can find none in conflict with the position I have taken. I have likewise examined all the other American and the English cases cited, with the same result. At page 159, *Burroughs* says :

A tax upon all persons in proportion to their income is said to be the most equitable mode of taxation ; but such tax *is never imposed upon all persons, nor upon the gross income*—it is usually upon the annual income of certain persons in excess of a certain amount, allowing deductions of various kinds.

I have already said that, if any individual made a loss on his year's business instead of a gain, a tax on his gross revenue or earnings would indeed be, not on income, but on capital. According to all writers on political economy the gross revenue of an individual comprehends the whole annual produce of his land or labour ; the net revenue, what remains free to him after deducting the expense of maintaining his fixed and circulating capital ; or what, without encroaching upon

(1) 74 Penn. S. R. 85.

his capital, he can place in his stock, or spend upon his subsistence, conveniences, or amusements. His real wealth is in proportion not to his gross but to his net revenue. His "income" is, therefore, what he can add to his stock, or spend. So, in my judgment, should it be held under the Statutes in question in this case.

In *McCulloch's* edition of *Smith's* Wealth of Nations (1) the learned and philosophical writer says:

> The private revenue of individuals arises ultimately from three sources, rent, profit, wages. Every tax must finally be paid from some one or other of those three different sorts of revenue, or from all of them indifferently.

At p. 392—

> These (taxes) must be paid indifferently from whatever revenue the contributors may possess—from the rent of their land, from the *profits* of their stock, or from the wages of their labour.

I have shown that "income" in its well understood sense, as commonly used, means the annual profits of commercial business. I have shown the unjustness of any other construction, either as applicable to individuals or corporations, and, also, by the reference to the acknowledged authority on political economy just quoted, that to tax income regardless of the result of profit and loss would be against every equitable principle; and by the provisions of the Imperial "Income" Tax the Parliament of *Great Britain* has, by express provision, given a legislative construction of that term which excludes the construction of the Statutes in question asked for by the Respondents. I cannot construe sec. 15 of 22 *Vic.*, cap. 37, or sec. 4 of 36 *Vic.*, cap. 36, by the provisions of sec. 14 of the former, for by it a different mode of assessment is provided, and it cannot help in the work of the construction of the term "income" used in them, or in section 12 of the same Act. Section 14 is wholly independent of the sections 4 and 15 of the Acts mentioned, and they are equally

(1) Library ed., p. 371.

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so of it. The Legislature settled the policy of a different character for assessments under each, and we must construe each as if the other, or others, never existed. If it was the intention of the Legislature that the agents of non-resident companies, corporations, or persons should be taxed when their losses for the prescribed period exceeded their receipts in the shape of nominal profits or earnings, the language should, and I think would, have been much more explicit. If such was meant the legislation should have clearly shown it. Statutes for assessment are required to be plain and free from reasonable doubt. Except in very exceptionally bad times such as, not only in *Canada* but nearly all over the world, have been experienced for two or three years past, banks, as a general rule, always declare a dividend annually or semi-annually. Such, no doubt, was the case when the acts in question were passed. We can readily assume, therefore, that the circumstance of a bank being unable to declare a dividend was one not likely to be provided for, because unusual. We should not, therefore, construe such legislation as now under consideration from the position of a bank a year or two ago, which, from heavy losses at a time of unexampled depression, and when bankruptcy was so universal, makes large losses instead of profits during the prescribed period. The position being a very exceptional one, arising from the unusual general depression and consequent bankruptcy, we should not take it as one likely to be foreseen or provided for. I think it safer so to consider it than to make such an exceptional position the test for the construction of Acts passed so long before—under wholly different circumstances. By the provision in question the non-resident banks might pay some years more than the resident. I maintain that the tax in question, requiring payment out of capital and not from income or profits, would be against every

sound principle; and being so, I have no right to assume that in any case would the Legislature impose such a tax. It may be said that, even in such a case, the agent of a non-resident bank should pay some tax, and it is a reasonable one. That question is, however, I hold, not for us but the Legislature, and because it has not made provision for such a tax furnishes no reason why we should, by a false construction, confirm a levy the Statutes do not warrant. The rules for the construction of Statutes are pretty well understood, and I will, therefore, only refer to some of those quoted in the factum of the Respondents.

"If the words of a statute are plain they must be strictly followed, but if *they are ambiguous*, the whole context must be looked to for their explanation" (1). I think the words of sections 4, 12 and 15 are *per se* quite plain and easy of application, and, therefore, we are not permitted to consider "the whole context."

Words must be construed according to the plain ordinary meaning and in the largest ordinary sense which, according to the common use of language, belongs to them (2). In construing the words "emolument" and "income," I have done so according to their plain ordinary meaning, and that which according to the common use of language belongs to them.

"It is the duty of all Courts to confine themselves to the words of the Legislature, *nothing adding thereto, nothing diminishing* (3)." We must not import into an act a condition or qualification we don't find there. I have been solely guided by the words of the Legislature, and feel bound to be so, apart from the considera-

(1) Dwarris 196.

(2) Per Tindal, C. J., in *Hughs* v. *Overseers of Chatham*, 5 M. & G., at page 80; and per Maule, J., in *Borodaile* v. *Hunter*, 5 M. & G. 651; *Maillard* v. *Lawrence*, 16 Howard 260.

(3) Per Tindal, C. J., in *Everett* v. *Wells*, 2 Scott N. C. 531.

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tion of consequences or results, which I would not be justified in considering where "the words are plain" and convey definite ideas.

Entertaining such views, my judgment must be that the appeal should be allowed and the judgment below reversed.

TASCHEREAU, J., concurred with the Chief Justice and *Fournier*, J.

Appeal dismissed with costs.

Solicitor for appellant: *J. J. Kaye.*

Solicitor for respondents: *B. Lester Peters.*