1892

*Nov. 14.

1893

*Feb. 20.

A. WELLESLEY PETERS (AGENT FOR THE STANDARD LIFE ASSURANCE COMPANY) ..... APPELLANT;

AND

THE CITY OF SAINT JOHN..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Assessment and taxes—Insurance co.—Net profits—Reserve fund—Deposit with Government for protection of policy-holders.

The amount deposited by an insurance company with the Dominion Government for protection of policy-holders may properly be deducted from the gross income of the company in ascertaining the net profits liable to taxation under the assessment law of the city of St. John (53 V. c. 27 s. 125 [N.B.])

The act requires the agent or manager of such company to furnish the assessors each year with a statement under oath, in a prescribed form, showing the gross income for the year preceding and the amount of certain specified deductions, the difference to be the net income, and if such statement is not furnished the assessors may assess according to their best judgment. W. furnished a statement in which, in place of the deductions of one class specified, he inserted, "an amount, equal to 75 per cent of the premiums received, as deposited with the Dominion Government for security to policy-holders." The assessors disregarded this statement and assessed the company in an amount fixed by themselves, and on application for *certiorari* to quash such assessment it was shown by affidavit that the deposit of the company was equal to about 75 per cent of the premiums.

Held, reversing the decision of the court below, Fournier and Taschereau JJ. dissenting, that the agent was justified in departing from the form prescribed to show the true state of the company's business; that the deposit was properly deducted; and that the assessors had no right to disregard the statement and arbitrarily assess the company as they saw fit.

*PRESENT:—Strong C.J., and Fournier, Taschereau, Gwynne and Patterson JJ.

1892

PETERS v. THE CITY OF SAINT JOHN.

APPEAL from a decision of the Supreme Court of New Brunswick refusing a writ of *certiorari* to quash the assessment upon the net profits of the Standard Life Assurance Company.

The appellant is agent at the city of St. John for the said company, and was assessed as such under 52 Vic. c. 27, s. 126, upon the net profits made by him as such agent during the year 1891. By the act the agent was required to furnish the assessors with a statement, in a prescribed form, showing the total receipts and specified deductions therefrom for payment of reinsurance, matured claims, &c., the difference to be the net profits. The appellant furnished a statement, in which he substituted for payment of matured claims an amount equal to 75 per cent of the premiums received, as deposited with the Dominion Government as security to policy-holders, as required by the Insurance Act (1). The assessors classed this amount with the net profits and assessed the appellant accordingly, and a writ of *certiorari* to quash the assessment was refused on the authority of *Ex parte Fairweather* when the same question was before the court and decided in favour of the assessment.

The present appeal is from the refusal to grant a *certiorari*, and the only question to be decided is: Is the amount deposited by an insurance company for the protection of policy-holders, as required by the Insurance Act, a part of the profits of the company?

Weldon Q.C., and *Bruce* Q.C., for the appellant. As to what are to be considered net profits see *Caine* v. *Horsfall* (2).

The latest case is *New York Life Assurance Co.* v. *Styles* (3), in which the case relied upon by the re-

(1) R.S.C. c. 124.

(2) 1 Ex. 519.

(3) 14 App. Cas. 381.

1892

PETERS v. THE CITY OF SAINT JOHN.

spondent, *Last* v. *London Assurance Co.* (1), is distinguished. See also *Gresham Life Assurance Soc.* v. *Styles* (2); *Kingston* v. *Canada Life* (3).

Jack Q.C. for the respondent. The agent in his statement departed so widely from the prescribed form as to entitle the assessors to disregard it. See *Ex parte Stanford* (4).

The form shows that the deductions were to consist only of moneys paid out by the company over which they entirely ceased to have any control.

As to whether or not this money is net profits see *Last* v. *London Assurance Co.* (1); *Russell* v. *Town and County Bank* (5); *Forder* v. *Handyside* (6); *Imperial Continental Gas Association* v. *Nicholson* (7); *Coltness Iron Co.* v. *Black* (8).

Bruce Q.C. in reply. As to variation from form see *Thomas* v. *Kelly* (9); *Kelly* v. *Kellond* (10); C. S. N. B. c. 118 s. 1 s.s. 16.

THE CHIEF JUSTICE.—I have read the judgment prepared by Mr. Justice Patterson, and for the reasons stated by him I am of the opinion that the appeal should be allowed.

FOURNIER J.—I would dismiss this appeal. I think the assessors took the proper course.

TASCHEREAU J.—I also dissent, and adopt the reasoning of Mr. Justice King in the court below.

GWYNNE J.—The question raised by this appeal involves the construction of a statute of the Province of New Brnswick, 52 Vic. ch. 27.

(1) 12 Q.B.D. 389; 14 Q.B.D. 239; 10 App. Cas. 438.
(2) 25 Q.B.D. 351; [1892] A.C. 309.
(3) 19 O.R. 453.
(4) 17 Q.B.D. 259.
(5) 13 App. Cas. 418.
(6) 1 Ex. D. 233.
(7) 37 L.T.N.S. 717.
(8) 6 App. Cas. 315.
(9) 13 App. Cas. 506.
(10) 20 Q.B.D. 569.

Reading it as applying to Life Insurance Companies, with which alone we are at present concerned, it enacts as follows :—

Sec. 126. The agent or manager of any Life or Accident Insurance Company, whether incorporated or not, doing business abroad or out of the limits of this Province, who shall carry on any such insurance business within the city of St. John or who shall have an office or place of business in the city of St. John for any such company or corporation, shall be rated and assessed upon the amount of *net profits* made by him as such agent or manager from premiums received on all insurances effected by him at the office or agency.

The subjects thus proposed to be assessed are the *net profits* realized by the company from the business transacted at their St. John office. The Standard Life Insurance Company, the one affected, is a company established in Scotland, having its head office in Edinburgh, and its chief office for the Dominion of Canada in Montreal. By the Canada Insurance Act, ch. 124, R.S.C., the company was obliged, as are all Life Insurance Companies formed or incorporated out of Canada and doing business in Canada, to take out a license from the Dominion Government to carry on such business, renewable from year to year, for which upon its first being issued the company was required by the statute to deposit and did deposit with the Government the sum of $100,000 in securities of the character mentioned in the statute, by way of security to the holders of policies issued in Canada. It is enacted by the statute that such securities are to be estimated at their market value at the time of their being deposited, and that if any should fall below such market value the company may be required to make a further deposit so that the market value of all the securities shall always be equal to the sum of $100,000.

The statute further enacts that every such company shall make annual statements under the oath of its chief agent of the condition of its Canada business in

1893

PETERS v. THE CITY OF SAINT JOHN.

Gwynne J.

forms to be furnished to the company by a Government officer called the Superintendent of Insurances, and that the company shall also make annual statements in a separate schedule of its general business in such form as such company is required by law to furnish to the Government of the country in which its head office is. Towards defraying the expenses of the office of the superintendent the company is further required to pay annually a sum in proportion to the gross premiums received by it in Canada during the previous year, for the purpose of realizing from all the companies together a sum not exceeding $8,000. The statute then declares that the assets within Canada of a company formed or incorporated elsewhere than within Canada shall be taken to consist of all deposits which the company has made with the Government under the provisions of the statute and of such assets as have been vested in trust for the company for the purposes of the statute in two or more persons resident in Canada, appointed by the company and approved by the Government. Then the statute provides that if it should appear from the annual statements, or from an examination by the superintendent, which he was authorized to make, of the affairs and condition of the company, that its liability to policy-holders in Canada, including matured claims and the full reserve or reinsurance value for outstanding policies after deducting any claim the company may have against such policies, exceeds its assets in Canada, including the deposit in the hands of the Government, the company shall be required to make good the deficiency. Then once in every year, or oftener in the discretion of the Government, the superintendent is required to value, or to procure to be valued under his supervision, the Canadian policies of all Life Insurance Companies licensed to transact business in Canada, and that such valuation shall be

based on the mortality table of the Institute of Actuaries of Great Britain and on a rate of interest at 4½ per cent per annum, and that if the reserve necessary to be held by the company in order to cover its liability to policy-holders in Canada, as calculated by the company, should fall materially below that as calculated on the above basis by the superintendent then the amount as calculated by the superintendent shall be substituted in the annual statements of the assets and liabilities of the company.

Now, it has been testified upon oath in the present case, and not disputed and, therefore, I take it as admitted or established as a fact, that to meet the requirements of the above Dominion statute and to create the reserve fund necessary to be held to cover the company's liability to its policy-holders in Canada 75 per cent of all the premiums received in any year upon all the policies issued in Canada is necessary to be appropriated to the creation and maintenance of such reserve fund. This being so it is obvious that no part of the premiums so required to be appropriated to the maintenance of such reserve fund can constitute net profits of the company and there is nothing to the contrary in *Last* v. *London Assurance Corporation* (1), or in any of the cases cited. We must, therefore, as it appears to me, proceed upon this basis as an incontrovertible proposition and as a first principle to be adopted in any calculation made for the purposes of the New Brunswick statute under consideration of the net profits, if there be any realized by the company from the premiums received at its St. John office in any year, that such 75 per cent of such premiums must of necessity be treated as appropriated and set apart for such reserve fund before the amount under the name of net profits the New Brunswick act subjects to taxation can by possibility be arrived at.

(1) 10 App. Cas. 438.

1893

PETERS v. THE CITY OF SAINT JOHN.

Gwynne J.

To assist the assessors in arriving at this amount so made liable to assessment the statute enacts that:—

The better to enable the assessors to rate such company under this section the agent or manager shall, on or before the first day of May in each year, furnish to the assessors a true and correct statement in writing under oath in form in the schedule E as appended to this Act setting forth the whole amount of gross income and the particulars of the deductions and losses claimed therefrom and showing the ratable *net profits* made by such company within said city during the fiscal year last preceding.

The form given under schedule E is as follows:—

Whole amount of gross income received in cash for premiums for life or accident policies (including all life, short term endowment or tontine) issued or renewed during the fiscal year of the company next preceding the first day of April at the agency of the company at the city of St. John.....

Amount of bills and notes taken for premiums for life or accident policies (including all life, short term endowment or tontine) issued or renewed during the fiscal year preceding the first day of April at the agency in St. John.....

DEDUCTIONS.

Reinsurance, rebate, return premiums, surrender values and bonuses actually paid during the fiscal year preceding the first day of April, on all life or accident policies issued at the agency of the company in the city of St. John.....

Amount paid during the fiscal year preceding the first day of April on matured claims whether by death or otherwise (deducting reinsurance if any), on life and accident policies issued at the agency of the company in the city of St. John.....

Agency commission on net premiums received during the fiscal year preceding the first day of April, at the agency of the company in the city of St. John.....

Fees of medical officers, salaries of canvassing agents and travelling expenses actually paid during the fiscal year preceding the first day of April, on business connected with the agency of the company in the city of St. John.....

Office expenses of the agency at the city of St. John, for the fiscal year preceding the first day of April.....

Amount of net profits.....

The agent of the company at St. John made a statement in the above form with an additional item inserted by him for appropriation of premiums for reserve fund for the protection of policy-holders.

For total income received from premiums during the year he inserted the total sum of $20,183.23.

Opposite the first of the above items of deductions, without saying how much for any and which of the particular subjects therein mentioned, he inserted the sum of $11,606.79.

Opposite the second item he inserted nothing but substituted therefor underneath the item the additional item of—

75 per cent of premiums deposited with the Government, for the protection of policy-holders..... $15,146.57

Opposite the third of the above items he inserted the sum of.....$1,171.23

Opposite the fourth of the above items he inserted the sum of..... 1,009.16

And opposite the words "amount of net profits," he inserted "none."

This statement he verified under oath, in form in schedule E as required by the statute, to be full, true and correct to the best of his knowledge and belief.

This statement under oath made by the agent setting forth the whole amount of gross income received by him for premiums within the year and the particulars of deductions therefrom claimed by the company was required, as appears by the express terms of the statute, for the purpose of enabling the assessors to discharge their duty of arriving as accurately as possible at the true amount of *net profits*, if any, realized within the year from the premiums received at the St. John office. The statute further required the agent to answer under oath such inquiries as the assessors might deem it to be necessary to make to him relating to the

1893

PETERS v. THE CITY OF SAINT JOHN.

Gwynne J.

said statement made by him, for the like purpose of assisting them in making their assessment for the just and true amount of such *net profits*. They did not avail themselves of this power of making any inquiries of the agent relating to his statement, but having before them his statement upon oath they utterly disregarded the item inserted by him for 75 per cent of the premiums as an appropriation for the maintenance of the reserve fund and assessed the company, through their agent, for the sum of $6,300 as the amount of *net profits* realized by the company from the premiums received at their St. John office during the fiscal year terminating the 1st April, 1891.

How precisely they arrived at this amount we are not informed further than that they expunged and disregarded altogether the item of 75 per cent of the premiums for the reserve fund for the protection of policy-holders; and, in as far as we can see, what they did was to add together the three items of $11,606.79 and $1,171.23 and $1,009.16 amounting to the sum of $13,787.18 which they deducted from the sum of $20,183.23 whereby they found a balance of $6,396.05 from which they arbitrarily struck off the odd $96.05 and in this manner they arrived at the sum of $6,300 which they treated as *net profits* realized by the company out of their St. John business and as such rated them therefor through their agent.

Now the material questions which arise are :—

1st. Was it or was it not competent for the agent of the company, in the statement made by him for the purpose of setting forth the amount of deductions claimed by the company to be made from the total amount received during the year at their St. John office, and of thus showing the amount, if any there was, of "*net profits* made by the company within said city during the fiscal year last preceding" (in the words

of the statute), to insert the claim which he did for the proportion of premiums as absolutely necessary to be appropriated to the purpose of maintaining in perfect efficiency, as required by the Dominion Statute, the reserve fund to be held and maintained by the company to cover its liability to policy-holders in Canada?

2nd. Was it proper or competent for the assessors, when estimating the net profits made by the company during the year at their St. John office, to expunge wholly from their consideration an item so necessary to be taken into account for the purpose of arriving, with any degree of accuracy, at the true amount of *net profits*, if any, made at said office during the year?

In my opinion the former of these questions must be answered in the affirmative and the latter in the negative.

The form in schedule E must, I think, be regarded as intended to be merely a specimen or sample of the mode in which the agent should set forth the deductions claimed by the company, and as best calculated to show with accuracy whether in truth any *net profits* were made at this office in the fiscal year preceding, and the amount, if any, of such net profits. If the items in respect of which the deductions were provided for in the form given in the schedule E did not comprehend an item in respect of which the company claimed a deduction, and which was necessary to be considered in an inquiry whether there were or not any net profits made, and if any to what amount, such item, as it appears, must of necessity be supplied in order to enable the assessors to discharge their duty of arriving at the truth in such inquiry and to prevent their falling into manifest error.

So if there was any item mentioned in the form in schedule E, in respect of which money had been paid by the company, but which should not properly be, and

1893

PETERS v. THE CITY OF SAINT JOHN.

Gwynne J.

for that reason was not claimed by the company to be, deducted from the annual premiums received, upon an inquiry whether there were any, and if any, what amount of net profits realized within the year from such premiums, the statute cannot, I think, be construed as not permitting the agent of the company so to frame his statement as to omit any claim in respect of such item, and to substitute for such item another not mentioned in the form in schedule E, in respect of which the company did make a claim and which was absolutely necessary to be taken into consideration upon the inquiry into the amount of net profits, if any were made within the year from the premiums received. What the agent of the company did was to decline to make any claim for "amount paid during the fiscal year on matured claims," and to insert, instead of a claim upon that item, a claim of 75 per cent of the premiums received as a necessary appropriation to a reserve fund for the protection of policy-holders. For this action he had, in my opinion, a most sufficient reason, even assuming that a large sum may have been paid within the year on matured claims, namely, that for the purpose of determining with truth whether any *net profits* were made within the year from the premiums received by him within the year the company did not claim, nor was it proper that they should claim, any deduction from such premiums in respect of payments made by the company for matured claims, because matured claims were payable and paid out of the reserve fund then already realized from the premiums received in previous years and the investment thereof; but, in lieu of such item of deduction, the agent claimed for the company, as a proper deduction, the proportion of the annual premiums absolutely necessary to be appropriated for the purpose of maintaining in efficiency that reserve fund for the payment of claims, as they

should mature. This alteration in, and deviation from, the form given in schedule E was calculated to assist the assessors in arriving at the truth and to prevent their falling into error upon their inquiry as to the *net profits* which they had in hand, instead of to mislead them; and in chap. 118 of the Revised Statutes of New Brunswick it is expressly enacted that, "forms when prescribed" (in an act of the legislature), "shall admit of deviations not affecting the substance or calculated to mislead." In the light of this enactment it seems to be impossible to construe the 126th sec. of 52 Vic. c. 27 as enacting, by implication or otherwise, that no claim of deduction, however calculated and indeed necessary to enable the assessors to arrive with accuracy at the true amount of *net profits* made within the year, should be entertained or taken into consideration by the assessors unless they came under one or other of the items mentioned in the form in schedule E.

Such a construction, which would, in effect, be that a conclusion which, in point of fact, must necessarily be false shall be accepted as true, and as such be binding upon the company, cannot, in my opinion, be entertained.

It was competent for the assessors to make such inquiries as they should think necessary of the agent as to the particulars of the several items comprising the $11,606.79 set opposite to the first paragraph of deductions claimed in his statement, for the purpose of enabling them to determine whether any of them were covered by the item of 75 per cent of the annual premiums for maintenance of the reserve fund. Such inquiries would have been very reasonable and proper but none appear to have been made. As the case now stands we do not know whether or not any, and if any what, part of the above amount consisted of sums claimed in respect of each of the several subjects

1893

PETERS v. THE CITY OF SAINT JOHN.

Gwynne J.

mentioned in such first paragraph, or for some only, and which of them. It would no doubt be a matter of importance for the assessors to show whether any sums claimed in respect of such items were covered by the 75 per cent deduction, or should be charged against the remaining 25 per cent of the annual premiums; for example as to "reinsurance," we do not know whether any deduction was claimed for that item. If any was claimed it would have been, I apprehend, for premiums paid by the company upon the reinsurance by them of the lives or life of some persons or person insured by some or one of the policies which had been issued by the company through their St. John office. Now it seems to be, to say the least, questionable that such reinsurance premiums should be charged against, or deemed to be covered by, the 75 per cent of premiums received every year which is appropriated to the maintenance of the reserve fund because any reinsurance effected by the company was for their own indemnity only and might prove utterly valueless to them, as in the case of the insolvency of the party issuing the reinsurance policy, and reinsurance does not in any respect diminish the responsibility of the company upon the policy issued by them to the person originally insured and cannot, therefore, relieve them from the responsibility of maintaining in efficiency the reserve fund necessary to be held in order to cover the company's liability to policy-holders. So as to the item of "rebate;" if any claim for such item was made it would be necessary to be informed as to the transaction in respect of which the loss was suffered before it could be held to be justly entitled to be compensated at the costs or prejudice of the 75 per cent for the maintenance of the reserve fund for the protection of policy-holders. As to the item of claim, if any there was, "for bonuses actually paid during the fiscal year"

there could be no pretense whatever for treating this as covered by the 75 per cent of premiums received appropriated to the reserve fund, nor indeed can there, as it appears to me, be any reason or propriety in charging anything paid on such item as a deduction at all in the inquiry as to whether there was any, and if any what, amount of *net profits* made within the year.

"Bonuses actually paid" within any year—are not in any sense a charge upon the premiums in such year. They come into existence only as *profits* already realized from the successful investment of the premiums received by the company over a series of years in excess of the fund required to meet the estimate of liabilities for policies maturing. They are payable and paid out of such realized profits and are in no sense a charge upon the annual premiums received within the year in which they are paid, and should not be deducted from the premiums received in any year upon an inquiry as to the *net profits*, if any, made in that year. They are, however, enumerated in schedule E of the statute as if they constituted an item of deduction upon such inquiry.

Upon the whole, then, the proper conclusion appears to me to be that the assessors erred in expunging from the statement of deductions claimed by the company and from their consideration the item claimed by the company as for appropriation to the maintenance of the reserve fund and that, therefore, the conclusion at which they arrived of there having been *net profits* realized to the amount of $6,300, or to any amount, was erroneous. I am of opinion, therefore, that the appeal must be allowed with costs, and that the rule in the court below be ordered to be made absolute with costs.

1893

PETERS v. THE CITY OF SAINT JOHN.

Patterson J.

PATTERSON J.—The taxation of personal property, and more particularly the taxation of income, for local municipal purposes has never struck me as defensible on any principle which is at once sound and intelligible. I have often had occasion to express this opinion. Nearly all the inequalities, some of them sufficiently glaring, incident to our system of municipal taxation are connected with the assessment of personal property; and when one looks at the gross assessment of any of our cities the amount which comes from personal property seems much out of proportion to the inequalities, the injustice and the litigation arising from making property of that description the subject of municipal assessment.

We have in the present case one phase of the ever-recurring difficulty.

The local agent or manager in St. John of a life insurance company is to be

> Rated and assessed upon the amount of net profits made by him as such agent or manager from premiums received from all insurances effected by him.

It is to use words without meaning to talk of net profits made by a local agent from premiums received from insurances effected by him. The agent makes no such profits.

The agent is to furnish a statement to the assessors setting out certain particulars. He is to specify the amount of cash and notes received for premiums during the year, and is to make deductions for outlays according to a form prescribed by the statute.

Now I could understand a law which said that the gross amount received for premiums should be taxable as the personal property of the company or the agent. Such an enactment would be open to obvious objections but it would be intelligible.

1893

PETERS
v.
THE CITY OF SAINT JOHN.

Patterson J.

I could also understand a declaration that the gross amount of premiums, less certain specified deductions, should be the taxable amount. That would be an arbitrary mode of imposing the burden but it would also be intelligible. That is what the respondents in effect contend has been done here, and it is the view acted on by the court below.

If the enactment had been simply to the effect of what I have stated it might appear arbitrary and open to objections more proper for consideration by the legislature than by the court, but being a plain enactment there would be no choice as to our duty to enforce it.

But the statute does not profess to fix, arbitrarily, the balance of the items it specifies as the figure at which the net profits are to be assessed. It professes to tax only net profits, and we must read the law which imposes a tax with reasonable strictness.

My brother Gwynne has discussed the question of the deduction of 75 per cent from the premiums received and I need not follow or repeat that discussion. I do not think that by making that deduction, as made by the agent in his return to the assessors, the statement becomes a true profit and loss account, nor do I think that such an account could be made without going farther afield than this statute contemplates, and perhaps farther than the local legislation could demand. Still, the 75 per cent having to be set apart before profits can be declared by the company as payable to its shareholders it is proper to bring it into the account.

All that we have at present to decide is that the agent is not necessarily confined to the items detailed in the schedule but may properly include in his return any receipts or outlays which bear on the question of what are net profits of his agency.

We must give effect to the expressed object of the statute—the governing object—which is to tax net

1893

PETERS v. THE CITY OF SAINT JOHN.

Patterson J.

profits only, and not an amount arbitrarily ascertained by the manipulation of the items specified in the schedule form. If the intention should be to fix the amount by that line and rule method the legislature can say so and drop or modify the reference to net profits.

The result cannot be considered satisfactory or quite in accord with one's ideas of logic and precision, but it is an outcome of the attempt, which has always seemed to me to be a hopeless attempt, to frame a symmetrical system of local municipal assessment which includes as subjects for taxation intangible personal property and incomes.

I agree that we should allow the appeal.

Appeal allowed with costs.

Solicitors for appellant: *Weldon & McLean.*

Solicitor for respondent: *I. Allan Jack.*