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THE ROYAL BANK OF CANADA.....APPELLANT;

AND

THE TOWN OF GLACE BAY.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA

Assessment and taxes—Bank—Net annual income or profit—Municipal assessment—Business done in municipality—Assessment Act, 8-9 Geo. V, c. 5—Validating Act—Pending cases—Right of appeal.

By the Nova Scotia Assessment Act a bank doing business in any municipality may be taxed on the "net annual income or profit" derived from such business. In 1921 the branch of the Royal Bank at Glace Bay received a large sum on deposit by its customers which was remitted to the head office of the bank in Montreal and merged in the general funds there. Without regard to any use made of this money by the head office the branch was credited with interest at four per cent on the amount.

Held, per Idington, Anglin and Mignault JJ., Davies C.J. and Duff and Brodeur JJ. *contra,* affirming the judgment of the Supreme Court of Nova Scotia (56 N.S. Rep. 120), that the sum so credited, less the amount of any loss incurred in the other operations of the branch, constitutes the "net annual income or profit" of the bank derived from its business in Glace Bay which was liable to taxation.

Held, per Idington and Brodeur JJ., Anglin J. *contra,* that an Act of the legislature validating the assessment roll for 1921 and omitting the provision in former Acts of the kind that it would not apply to pending cases, takes away the bank's right to appeal in this case which was pending when the Act came into force.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) reversing the judgment of the County Court Judge in favour of the appellant in proceedings to set aside an assessment on the net income or profit of the bank derived from its business in Glace Bay in the year 1921.

The essential facts of the case are stated in the above head-note.

Jenks K.C. and *J McG. Stewart* for the appellant. The bank earned no income or profit in its business at Glace Bay during the year 1921. Such profit, if any, was earned in Montreal. See *Sulley* v. *Attorney General* (2); *Grainger* v. *Gough* (3).

Commissioners of Taxation v. *Kirk* (3) can be distinguished. In that case it was proved that profit was

PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) 56 N.S. Rep. 120.
(2) 5 H. & N. 711.
(3) [1896] A.C. 325.
(4) [1900] A.C. 588.

made from business partly done in New South Wales. Here no such profit has been or could be proved.

C. B. Smith K.C. and *McArthur* for the respondent. The legislation, by omitting from the Act validating the assessment roll of 1922 the usual provision that it would not apply to cases pending intended that it should so apply and the right of appeal in this case is taken away. See *Reg.* v. *Price* (1) per Cockburn C.J. at page 416.

The earnings from the deposits is derived from the business done in Glace Bay; *Commissioner of Taxes* v. *Kirk* (2); and the four per cent credited to the bank represents the profit.

THE CHIEF JUSTICE.—The substantial question to be determined in this appeal is the proper construction of section 4 of the First Schedule of the Assessment Act, 1918 (chapter 5, Acts of 1918) of Nova Scotia which reads as follows:

All banks and public or private banking companies and agencies of such banks and banking companies doing business within any incorporated town or municipality shall each be rated as holding one hundred dollars of personal property for every twenty dollars of net annual income or profit derived from the business done by them in the town or municipality where the same is assessed; provided, however, that the amount payable on account of such rating shall not be less than one hundred and fifty dollars.

The facts as I gather them from the case in appeal and the argument of counsel at bar are that the Royal Bank of Canada, having its head office at Montreal, maintains a branch in the town of Glace Bay, an incorporated town under the provisions of the "Town Incorporation Act" (1918 Acts of Nova Scotia, c. 4). This bank receives deposits, lends money and carries on the usual business of a branch bank. In the year 1921 the average daily excess of deposits over loans amounted to $727,000. The surplus of moneys so deposited and not required for the branch's purposes in Glace Bay were remitted to the head office of the bank in Montreal and there merged with similar remittances from other branches and with the general assets of the bank, and the fund so formed was lent or invested or otherwise dealt with by the head office of

(1) L.R. 6 Q.B. 411.
(2) [1900] A.C. 588.

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the bank in various places at varying rates of interest. No part of this fund was lent or invested in the town of Glace Bay during the year; nor had the Glace Bay branch any record or information as to the lending or other dealing with this fund. Leaving out of account the interest or income earned on the said central fund or on the monies remitted by the Glace Bay branch to head office there was a deficit of approximately $26,000 on the operations of the Glace Bay branch for the year 1921.

When preparing the assessment rates for the year 1922 the assessors of the town of Glace Bay assessed the bank in respect of "income" for $12,000. On appeal by the bank to the Assessment Appeal Court for the town of Glace Bay this assessment was confirmed. On appeal to the County Court for the district the appeal of the bank was allowed. From this decision the town of Glace Bay appealed to the Supreme Court of Nova Scotia in banco, and the latter court allowed the appeal.

The appellants here contend that the judgment below is wrong because the agency of the Royal Bank of Canada at Glace Bay did not derive any "net income or profit" from its business done in the town of Glace Bay; and because the income or profit, if any, in respect of deposits made in the town of Glace Bay and remitted by the Glace Bay branch to head office was derived where the monies were loaned or invested. (Such income or profit, if made at places in Nova Scotia where the Royal Bank maintained branches would be assessed there by the local municipalities.)

My construction of the above quoted section 4, is that such section authorizes the assessment of banks and agencies doing business in any incorporated town or municipality of Nova Scotia only, as expressed, on the "net annual income or profit" derived by them from the business done by them in the town or municipality making the assessment. The mere receipt of deposits in Glace Bay and their transmission to a head office for investment elsewhere than in Glace Bay would not of itself make the bank liable to the local municipality. Such liability could only arise under the section quoted in towns and municipalities in

Nova Scotia where a bank had loaned or invested its money and derived income or profit therefrom.

In other words the mere taking in and remitting of deposits by a branch to a head office, which is only an incidental step toward realizing income or profit, is not of itself sufficient to authorize an assessment under the section quoted. The intention of that section is, I think, simply and solely to authorize assessment upon income or profits derived by a bank from the business done by it in the town or municipality. Such income or profits cannot be said to be so derived except from loans or investments made in the town or municipality. If it were otherwise a bank might be taxed at its branch which received the deposits and also at each branch in the province through which loans or investments were made and income or profit derived therefrom. I cannot think the latter is the proper construction of this section.

For these reasons I would allow the appeal.

IDINGTON J.—I would dismiss this appeal with costs for the reason that the income of the appellant at its Glace Bay agency is exactly what the appellant has quite properly determined is the proper measure of its profits derived by carrying on the agency at Glace Bay.

The head office, in the language of its accountant at Glace Bay, is a borrower from that agency, as shewn by the following extract from his evidence:

Q. What did you do with it?—A. We had it in Glace Bay on deposit and it was controlled by our head office.

Q. What did you do with it?—A. It was transferred to head office.

Q. Any entry in the books about that?—A. No, there is no actual entry, they borrow the money from us.

Q. What do they pay?—A. The head office records only would show.

Q. You say they borrow that money from you, what do they pay?—A. They don't pay anything direct.

Q. In this statement where you showed a loss of $25,000 you showed no earnings for this $727,000?—A. No.

Q. You lent that to your head office for nothing?—A. Yes, the records are all kept at head office, that is in regard to loans of money.

Q. In other words you took $727,200 of the savings of the people in Glace Bay and transferred it to head office and lent it to them for nothing and then you say that you operated at a loss?—A. We did.

Q. Who pays your salaries?—A. Head office, at the end of the year it is debited to head office.

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Q. But don't they in any way give you credit for that $727,200?—A At the head office in Montreal at the end of every year they make up a general balance sheet for every branch.

Q. Have you got that?—A. They don't furnish us with a statement. We figure it up roughly.

All the arguments dependent on the ultimate result of such borrowing are beside the question.

If the appellant keeps track properly of such borrowings it will only be chargeable elsewhere with the earnings made on due allowance being made for the interest it has to pay depositors at Glace Bay. And on that basis its losses will be chargeable also and thus things be evened up. If what the banks have long estimated as profits from carrying on agencies as the business basis reason for carrying them on is adhered to and observed everywhere as it should be, justice will be done all around and no evil results arise. The admissions made seem to cover the whole ground if we have regard to what the parties concerned have to deal with and mean by the language used. I do not think we should attempt to impose upon business men our ideas of what income may mean; they clearly have another well founded in long practice. The mode of arriving at the basis for taxing personal property is certainly novel.

I do not think any reference should have been directed and that the $12,000 result arrived at by the respondent's Court of Revision is correct.

The confirming legislation by the legislature, according to my view, should have been held effective unless there is a blunder therein, as Mr. Jenks submits, by using the term municipalities in one Act cited.

But there is another Act, passed in April, 1922, which seems to fit the case.

The judgment appealed from should be modified by striking out the reference and restoring the assessment.

DUFF J.—I think the appellant bank's contention should be sustained.

It is, perhaps, convenient to consider the enactment from the point of view of its application to the case of a branch deriving profit directly through lending the funds of the bank. It seems a reasonable application of the enactment

to hold that the profits derived from such loans made by the branch and received by the branch are profits derived directly from the business of the branch and assessable accordingly.

It is argued, however, that such a profit is the result of a series of operations beginning with the deposit or other borrowing and ending with the payment by the person to whom the loan has been made, and it is said that in order to ascertain the profits derived from the business of the branch it is necessary to decompose this profit derived from the whole series of operations, ascribing to each operation which forms a term in the series that part of the profit which ought justly to be apportioned to it. It is conceivable, no doubt, that a legislature might embark upon the design of taxing branch banks upon such a system. The probability, however, of such a plan commending itself to practical legislators seems to be rather remote and a consideration of the practical difficulties in the way of putting such a system into operation, coupled with the absence of any provision in this statute for machinery by which the necessary information could be collected, convinces me that a construction of the statute which would necessitate the ascertainment of the assessable profit by such a process would not give effect to the intention of the legislature.

Stress was naturally placed upon the circumstance that a book-keeping credit is allowed to the branch by the head office in respect of loans. This, it was argued, constitutes sufficient evidence that to the extent of this credit at least the bank is receiving profit from the business of the branch in question.

But the real question is not a question to be solved by evidence of that character. The Act applies not only to the appellant bank and to the particular banks mentioned in the evidence, but to all banks and banking corporations doing business in Nova Scotia, and the primary question is whether the statute contemplates a process of dividing the whole ultimate profit received by a given branch by ascertaining parts of it which should be considered to be severally derived from the different operations in the whole profit-earning series; and for the determination of that question the credits relied upon do not assist us.

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The respondents relied largely upon *Commissioners of Taxation* v. *Kirk* (1). That case, in my opinion, has no bearing upon the present question. There the real point was whether the ore was income derived or arising or accruing from mines held under lease from the Crown or from "some other source" in New South Wales. There was no difficulty in ascertaining the value of the merchantable ore shipped from the colony to the smelter, and no practical reason such as exists in this case forbidding the adoption of the construction which their Lordships of the Judicial Committee ascribed to the statute they were called upon to apply.

I should like to express my appreciation of the ability with which the appeal was argued on both sides.

The appeal should be allowed and the judgment of the County Court judge restored.

ANGLIN J.—This is an appeal from the judgment of the Supreme Court of Nova Scotia, allowing an appeal from the judgment of the judge of the County Court for District No. 7, whereby he set aside an assessment of the appellant for the year 1922 for $12,000 of personal property made under section 4 of the first schedule of the Nova Scotia Assessment Act of 1918, c. 5. That section reads as follows:—

> All banks and public or private banking companies, and agencies of such banks and banking companies, doing business within any incorporated town or municipality, shall each be rated as holding one hundred dollars of personal property for every twenty dollars of net annual income or profit derived from the business done by them in the town or municipality where same is assessed; provided, however, that the amount payable on account of such rating shall not be less than one hundred and fifty dollars.

The assessment of $12,000 is based on a net income or profit of $2,400 derived during the year 1921 by the bank from business done by its branch agency in the town of Glace Bay. The principal question on the appeal is whether the bank has shown that it did not derive such an income from its business done at Glace Bay, a subsidiary question being whether legislation, passed in 1922 (c. 35, s. 2) after the assessment had been upheld by the

(1) [1900] A.C. 588.

Assessment Appeal Court, and after notice but before hearing of the further appeal by the bank to the County Court judge, validating and confirming the assessment roll for 1922, precluded further prosecution of such pending appeal.

During the year 1921 the average daily excess of deposits with the Glace Bay branch over loans made through it was approximately $727,000. That amount was transmitted to the head office at Montreal to be used in the appellant's banking business. It is admitted that, including as an item of expense interest payable to depositors, the cost of operating the branch at Glace Bay for 1921 exceeded profits received by it during that year by the sum of $25,938.86. In arriving at this figure no account is taken of any part of the bank's earnings from the $727,000 deposits transmitted from the Glace Bay branch. It is also admitted that in preparing an annual return made to head office, known as "The Value of the Branch Return," the bank officials in charge of the Glace Bay branch took credit for a sum equal to 4 per cent on the $727,000 average excess of deposits transmitted by it during 1921 to head office, amounting approximately to $29,000. This was estimated to be the value to the bank of the work done by the Glace Bay branch office in getting in and forwarding the deposits. It is in evidence that a branch with large deposits and small loans is a very valuable branch. There is no evidence in the record that the getting in and forwarding of $727,000 of deposits for use in the general banking business of the bank was worth less to it than the $29,000 for which credit was so claimed in "The Value of the Branch Return."

Assuming therefore, as I think we may as against the bank, that the $29,000 for which credit was thus taken represents the proportion of the earnings made by the bank in 1921 through the use of the $727,000 fairly attributable to the business of getting in the deposits making up that sum and of transmitting them to head office—processes which formed a material part of what had to be done by the bank in earning whatever profits it made by the handling of the $727,000—it would seem to be a legitimate conclusion that the net income or profits derived from busi-

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ness done by the appellant in the town of Glace Bay in 1921 was at least $3,000—$29,000 less $25,938.86.

The learned County Court judge was of the opinion that it was not possible upon the evidence to find that any net profit or income had been derived by the bank from the business done by it at Glace Bay, since the particular money transmitted from that branch could not be traced so as to ascertain whether the use made of it by the bank had resulted in its earning any definite amount of profit. He accordingly reduced the assessment of $12,000 so that the amount payable on account of the rating under the first schedule of section 4 (c. 5, 1918) would not exceed the sum of $150, as prescribed by the statute. Mr. Justice Russell in the court *in banco* expressed a similar view. Mr. Justice Mellish, however, with whom Mr. Justice Chisholm concurred, thought that profits derived or losses suffered from deposits having been made at Glace Bay which were transmitted to head office must be taken into account in determining the annual profits of the business done there by the appellant bank and then an accounting would be necessary to ascertain the amount of such profits, if any. The case was accordingly remitted to the judge of the County Court for that purpose.

I agree with the learned County Court judge and the majority of the learned judges in the Supreme Court *in banco* that the passing of the statute validating and confirming the assessment rolls for 1922 did not prevent the prosecution of the appeal then pending. I should require a very clear expression of intention to determine rights presently pending before the courts—to supersede the provision conferring a right of appeal which the appellant was actually in the course of exercising.

On the merits I regard this case as not distinguishable in principle from that before the Judicial Committee in *Commissioners of Taxation* v. *Kirk* (1). Here, as there, part of the processes by which the income or profit made (out of the $727,000) was earned—part of the business from which that income or profit was derived—was carried on within the territory for which the assessment was levied.

(1) [1900] A.C. 588.

Adapting the language of Lord Davey in *Kirk's Case* (1) (p. 592):

> At first sight it seems startling that the ultimate result in the form of profit of business carried on in the municipality is not to some extent taxable * * * So far as relates to the processes of getting the deposits and forwarding them to head office the income was earned and the profits were arising and accruing in Glace Bay.

In *Kirk's Case* (1) ore was extracted and treated in New South Wales. It was then shipped abroad and sold abroad, the profits, of course, coming from the price obtained on such foreign sale. The question before the court was whether the respondent had any income taxable in New South Wales under the Land and Income Tax Assessment Act of 1895. By section 15 of that Act a tax was imposed on all incomes (1) arising or accruing to any person from any profession, *trade*, employment or vocation carried on in New South Wales; (3) derived from lands of the Crown held under lease or license; (4) arising or accruing to any person from any kind of property (except certain land), or from *any other source whatever*. Section 27 provided for the deduction of losses, outgoings and expenses. It was held that the respondent had *some* income taxable in New South Wales, (*a*) in respect to the process of extracting the ore as a step in the production of income arising from Crown lands held under lease (s. 3); (*b*) in respect of the treating or manufacturing process as a step likewise so productive and, if not within the meaning of the word "trade" in subsection 1, as certainly included in the words "any other source whatever" in subsection 4. Here the processes of getting in the deposits and forwarding them to head office similarly conduced to the earning of the income or profit ultimately resulting to the bank from the use of the money.

But it is urged that the $727,000 having been blended with other moneys of the bank to form a common loaning fund it is not possible to tell what part of the earnings of that fund were derived from the use made of that particular money. It is doubtless true that the precise money sent in from Glace Bay cannot be followed and the particular investments of it traced. But the bank's annual earnings from its loaning fund are known and what pro-

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portion of them was fairly attributable to the use of the Glace Bay deposits as part of that fund is readily determinable. The bank is in a position to say what the taking in on deposit and the handing over of the $727,000 by the Glace Bay branch was worth to it by ascertaining to what percentage of the total loaning fund employed by it (of which the $727,000 formed part) its profits therefrom for the year amounted and apportioning, as its experience enables it to do, the percentage so earned between the branch obtaining and forwarding the money and the branches which subsequently dealt with it. On that basis it was apparently satisfied to allow what in current commercial language is termed a "spread" of 1 per cent over the cost of the money, i.e., the 3 per cent interest paid to depositors, and therefore to credit the branch bank with 4 per cent on the total average daily balance in hand representing deposits received from it.

It is further urged, however, that it is not possible to apportion the earnings of the $727,000 so as to know with any degree of certainty what proportion of them should be ascribed to the business done at Glace Bay. A sufficient answer seems to be that the bank has not found that obstacle insuperable. It has been able to estimate the proportion which would be so allowed and has fixed the amount at $29,000. It cannot reasonably complain if its estimate is adopted by the municipal assessor. The evidence as a whole does not impeach the accuracy of this estimate; on the contrary, it rather upholds its fairness and moderation. Expert bankers must be able to ascertain with at least approximate precision what the collection and forwarding of deposits by a branch is worth to a bank. They must, and they do, arrive at a conclusion on these matters, satisfactory to themselves at least, in order to determine as a matter of practical business the value of a branch office at which the deposits largely exceed the amounts loaned. As already stated, upon the evidence such branches are very valuable to the banks operating them. In the present instance on the basis of $29,000 credit taken by the Glace Bay branch in respect of $727,000 deposits "loaned" by it to head office, the net earnings, income or profits of

the branch for 1921 exceeded $3,000. The impeached assessment is based on an income or profit of $2,400. This margin of over 25 per cent would seem to be sufficient to cover any possible adverse inaccuracy in the bank's estimate.

With respect, therefore, I think a reference back to the County Court judge for the purpose of an accounting is unnecessary. The assessment should simply be restored to the figure at which it stood before the appeal to the County Court judge. With this modification the appeal should be dismissed with costs.

BRODEUR J.—This appeal is concerning the assessment of the income or business of the appellant, the Royal Bank. The law of Nova Scotia as passed in 1918 provides that the banks doing business in a town shall

be rated as holding one hundred dollars of personal property for every twenty dollars *of net annual income or profit derived from the business done by them in the town or municipality where same is assessed.*

The question which has been raised is whether the deposits which have not been utilized in the branch of the Royal Bank at Glace Bay but which have been transferred at the head office at Montreal should be considered in determining the profit made in the town of Glace Bay.

By virtue of the legislation of 1918, the bank was assessed upon the assessment roll for the year 1922 at a rate of $12,000 for its income and business. An appeal from that assessment was made to the assessment appeal court on the 28th of February, 1922, and was dismissed. On the 21st of March, 1922, an appeal was made to the County Court by the bank from the decision of the Assessment Appeal Court, and on the 23rd of June, 1922, the County Court judge heard the parties, and he rendered his decision on the 12th of October, 1922, allowing the appeal and quashing the assessment.

It should be here mentioned that when this assessment was before the County Court, viz., on the 13th of April, 1922, the legislature of Nova Scotia passed chapter 5 of the acts of 1922 declaring in section 2 that

the assessment rolls for the present year and the revisers' lists of electors completed this year are hereby legalized and confirmed.

It is now contended by the town of Glace Bay that the

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assessment complained of by the Royal Bank cannot be disturbed and has been legalized and confirmed.

A similar statute has been passed for years by the legislature of Nova Scotia. It is evidently intended to prevent actions instituted against the assessment rolls from being a serious obstacle to the good administration of the municipality.

It is certainly a very wise provision and permits the municipalities to carry on their business in a regular way. They can with such legislation go on with the fixing of the rate of local taxation and with the collection of their taxes.

It has been argued that this confirming statute covered only the irregularities of procedure in making the assessment roll and would not confirm some substantial injustice. If some provisions of the Assessment Act, viz., sections 61 and 171 did not already declare that all defects and errors or irregularities on the part of the municipal authorities are cured, this contention that the law did not refer to illegalities or substantial injustices would have a great deal of strength. But if the legislature has thought fit, as it has done, to pass the confirming legislation in question, we must give it some meaning and some effect, as the Interpretation Act of Nova Scotia says that every enactment shall be deemed remedial (ch. 1, R.S.N.S. [1900] s. 23, s.s. 2).

In former enactments of this legislation by the legislature a provision was inserted in order to exempt pending cases from the application of the law. But in this year, 1922, which is under consideration, no such reservation was made and we must then read the statute as having a general application.

The assessment roll having been declared valid by the legislature, I am bound with regret (for I am convinced that the assessment of the bank was not legal) to maintain the decision of the Supreme Court *en banc* with costs throughout and to declare that the assessment roll has been legalized and confirmed.

MIGNAULT J.—This is an appeal by special leave of the Supreme Court of Nova Scotia against a judgment of that court reversing the judgment of the County Court for Dis-

trict No. 7, which had set aside the respondent's assessment of the branch of the appellant bank at Glace Bay, N.S., at $12,000 for net income during 1921.

The assessment was made under the Nova Scotia Assessment Act (ch. 5 of 1918), section 4 of which reads as follows:

4. All banks and public or private banking companies, and agencies of such banks and banking companies, doing business within any incorporated town or municipality, shall each be rated as holding one hundred dollars of personal property for every twenty dollars of net annual income or profit derived from the business done by them in the town or municipality where same is assessed; provided, however, that the amount payable on account of such rating shall not be less than one hundred and fifty dollars.

As shown here, the bank is rated as holding $100 of personal property for every $20 of net annual profit or income derived from its business in the assessing municipality, so that a rating of $12,000 is based on an annual net income of $2,400.

The contention of the appellant is that in 1921 its business at Glace Bay was conducted at a loss. The accountant states that its total deficit was $25,938.86, but although he charges to expenses interest on deposits amounting to $22,206.63, he admits of no revenue from a sum exceeding $700,000 deposited with the bank and which he says was used and controlled by the head office.

In the admissions signed by the solicitors of both parties it is however stated that the average daily deposits of the bank at Glace Bay during 1921, exceeded the average daily loans and money required for operating expenses by approximately $726,200 and that this surplus of deposits was transferred to the head office of the bank at Montreal; that the head office credited the Glace Bay branch in its annual return known as "the value of the branch return" with interest at 4 per cent on the sum so transferred, viz., approximately $29,000 for the year 1921. The accountant of the branch in his testimony said that the head office borrowed this surplus of deposits from the branch office.

It appears to me that when the branch bank charged in its expenses $22,206.63 for interest on deposits it should have treated as revenue the 4 per cent credited to it by the head office. The latter invested, no doubt at profit, the

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amount it thus borrowed from the branch office, and its credit of 4 per cent shews that it considered that this percentage represented the share of the branch in this profit. Adding $29,000 to the receipts of the branch office would more than justify the rating of $12,000 complained of.

In view of the admissions of the parties I think the cases cited by Mr. Jenks are without application. It is also unnecessary to determine under these circumstances whether the confirmation by the legislature, by chapter 5 of the Acts of 1922 of the assessment rolls of the year took away the appellant's right to complain of the assessment.

I would dismiss the appeal with costs, but would modify the judgment appealed from by striking out the provision for a reference back to the County Court judge. I find in the record all the evidence necessary to sustain the assessment which should therefore be confirmed.

Appeal dismissed with costs.

Solicitor for the appellant: *Colin Mackenzie.*
Solicitor for the respondent: *D. A. Cameron.*