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\*Feb'y. 25.

\*June 23.

*Ex parte* JAMES D. LEWIN.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

*St. John City Assessment Act, 1882 (45 Vic., ch. 59, N. B.)—Chartered Bank—Assessment on capital stock of—Par value—Real and personal property of Bank—Payment of taxes under protest.*

By sec. 25 of the Saint John City Assessment Act of 1882 it is provided that "all rates and taxes levied and imposed upon the city of Saint John shall be raised by an equal rate upon the value of the real estate situate in the city, and part of the city to be taxed and upon the personal estate of the inhabitants and of persons deemed and declared to be inhabitants or residents of the said city. \* \* \* \* \* And upon the capital stock, income, or other thing of joint stock companies, corporations, or persons associated in business." And after providing for the levying of a poll tax, such section goes on to say that "the whole residue to be raised shall be levied upon the whole ratable property, real and personal, and ratable income and real value, and amount of the same as nearly as can be ascertained, provided that joint stock shall not be rated above the par value thereof."

Sec. 28 of the same Act provides that "all joint stock companies and

\*PRESENT.—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry and Taschereau, JJ.

corporations shall be assessed, under this Act, in like manner as individuals; and for the purposes of such assessment the president, or any agent, or manager of such joint stock company or corporation shall be deemed and taken to be the 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."

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J. D. L., the President of the Bank of New Brunswick, was assessed, under the provisions of the above Act, on real and personal property of the bank valued, in the aggregate, at \$1,100,000. The capital stock of the bank at the time of such assessment, was only \$1,000,000, and he offered to pay the taxes on that amount which was refused. It is not disputed that the bank was possessed of real and personal property of the assessed value. On appeal from the Supreme Court of New Brunswick, refusing a *certiorari* to quash the said assessment.

*Held*, (Fournier, J., dissenting,)—That the real and personal property of the bank are part of its capital stock, and that the assessment could not exceed the par value of such stock, namely, \$1,000,000.

The Chamberlain of the city of Saint John is authorized, without any previous proceedings, to issue execution for taxes if not paid within a certain time after notice. In order to avoid such execution, the Bank of New Brunswick paid their taxes under protest.

*Held*,—That such payment did not preclude them from afterwards taking proceedings to have the assessment qualified.

**APPEAL** from the Supreme Court of New Brunswick refusing to make absolute a rule *nisi* for a *certiorari* to quash an assessment made by the city of Saint John upon the Bank of New Brunswick under the provisions of the "Saint John City Assessment Act of 1882," (1).

In 1883 an assessment was made upon the Bank of New Brunswick, under the "Saint John City Assessment Act of 1882," on a valuation, by the assessors of the city of St. John, of the real and personal property of the bank amounting to \$1,100,000, being \$42,200 real estate and \$1,057,800 personal estate. The sections of the Act 45 Vic., ch. 59, N.B., under the authority of

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the assessment was made are referred to at length in the judgments hereinafter given. The amount of the assessment was \$12,760, or 1·20 per cent. of the estimated value of the property.

At the time of such assessment, the par value of the stock of the bank was \$1,000,000, and Mr. Lewin, the president, gave notice to the chamberlain of the city, that he objected to the assessment on the ground that the property of the bank constitutes the joint stock of the corporation, and offered to pay a rating upon \$1,000,000, the par value of the stock. This offer the city would not accept, and the taxes were paid under protest, the bank being desirous of avoiding an execution to recover them.

A rule *nisi* for a *certiorari* to quash the rate was obtained by the bank, and argued in Michaelmas term, and a majority of the court ruled that the assessment was not an improper one and dismissed the rule. The bank then appealed to the Supreme Court of Canada.

*C. W. Weldon*, Q.C., for the appellants, cited on the question of the validity of the assessment: *Ex parte Bank of New Brunswick* (1). And on the question of payment: *Peysler v. Mayor* (2); *Tuttle v. Everitt* (3); *Mayor v. Riker* (4).

*Tuck*, Q.C., for the respondents, cited *Ex parte Lewin* (5); *Queen v. Wilson* (6).

RITCHIE C.J.—The appeal in this case is made by Mr. James D. Lewin, who was assessed as president of the Bank of New Brunswick, for the amount of certain taxes levied on the bank. Under the Assessment Act of the province the capital stock of the bank may be assessed up to its par value, but not beyond that. In this case the assessors have assessed the stock up to its

(1) 1 Pugs. 266.

(2) 70 N. Y. 497.

(3) 51 Miss. 27.

(4) 38 N. J. 225.

(5) 19 N. B. Rep. (3 P. & B.) 425.

(6) 21 N. B. Rep. 178.

par value, and have also assessed the real and personal estate of the bank. I think that the sliding scale intended by the Act was a sliding scale downwards and not upwards, and that the real and personal property of the bank are part of the capital stock of the bank. I am of opinion that the assessment is wrong, and that the appeal should be allowed. I agree with Mr. Justice Fraser in his construction of the statute, and I have nothing to add to what he has said. I do not consider that the bank has waived its right to object by paying the taxes. In New Brunswick they have a very summary way of collecting taxes. They issue a notice to the party, and if he does not pay within ten days they issue execution without any further notice to the party and without a judgment. This bank was threatened in this way, and those who controlled its affairs paid the taxes. I do not think that circumstance should prevent them going to the Court of Appeal, for it may be they would not have paid it but for the fact that they were liable to have their property seized.

STRONG J.— These are two appeals which, as they raised precisely the same questions, were argued together. The appellant is the president of the Bank of New Brunswick, and he complains that the bank, in his name as its president, was over-assessed by the assessors of rates for the city of St. John for the years 1882 and 1883 to the amount of \$100,000 in each year. Upon the application of the appellant the Supreme Court of New Brunswick granted rules *nisi* calling upon the assessors to show cause why a writ of *certiorari* should not issue to remove into the Supreme Court the assessment lists for the years mentioned with a view to the assessments complained of being quashed. These rules, after argument, were discharged, Mr. Justice Weldon and Mr. Justice Fraser dissenting from the judgment.

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As has been stated, the amount of the alleged over-assessment complained of was the same in each of the two years, 1882 and 1883, the only difference being that this sum in 1882 was made up of \$42,800 for real estate and of \$57,200 for personal estate, and in 1883 of \$37,000 for real estate and \$63,000 for personal estate; the \$100,000 thus arrived at being in each year added to the sum of one million dollars, the par value of the amount at which the capital of the bank is fixed by a statute of the Dominion.

The assessments were made under the authority of the "St. John City Assessment Act of 1882," (45 Vic., ch. 59).

The provisions of that Act material to the question which the court is called upon to decide are the 25th and the 28th.

The 25th section enacts that:—

All rates and taxes levied and imposed upon the city of St. John shall be raised by an equal rate upon the value of the real estate situate in the city and parts of the city to be taxed, and upon the personal estate of the inhabitants, and of persons deemed and declared to be inhabitants or residents of the said city, wherever such personal estate may be, and upon the income of inhabitants and of persons deemed and declared to be inhabitants or residents, as aforesaid, for the purpose of taxation, being the income derived and coming in any manner, except from real or personal estate actually assessed under this law, and upon the capital stock, income or other thing of joint stock companies, corporations or persons associated in business and otherwise as hereinafter provided, and shall be made and levied as follows, that is to say, there shall be levied a poll tax of one dollar upon all male inhabitants of the city of the full age of 21 years, not being paupers, for the purposes set forth in the first section of this Act, on each side of the harbour, and, after levying any other poll tax authorized by law to be included in the general assessment, the whole residue to be raised shall be levied upon the whole ratable property, real and personal, and ratable income, and joint stock, according to the true and real value and amount of the same, as nearly as the same can be ascertained, provided that joint stock shall not be rated above the par value thereof.

The 28th section is as follows:—

All joint stock companies and corporations shall be assessed under this Act in like manner as individuals, and for the purposes of such assessment the president or any agent or manager of such joint stock company or corporation, shall be deemed and taken to be the 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 appellant objects that to the extent of \$100,000, there have been double assessments, the sum of his argument being that the real estate and personal estate making up that amount form part of the capital of the bank, and that the maximum valuation which can be placed upon the capital is by force of the concluding words of the 25th section "provided that joint stock shall not be rated above the par value thereof," the amount at which the capital of the bank is fixed by statute, in other words its "par value" and not its actual market value.

Nothing can be better established by authority than that acts of this kind are, as against the subject, to be strictly construed, and there is to be no liability to taxation unless the tax is imposed by unambiguous language. And again we are to make every presumption against an intention to impose a double burden. It appears to be very clear that by the express words of the 25th section the assessment in the case of joint stock companies and corporations is to be on the capital stock.

Then the capital stock is not to be limited to the active capital, that in actual use for banking purposes, but includes also investments in real estate and in personal property as the rest or reserve fund in the present instance. That these investments and rests may have been additions to the original amount of the capital not positively authorized by statute can, it is conceived, make no difference; *de facto*, it is capital, and that is sufficient for the present purpose. It may, however,

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be incidentally remarked that there would appear to be nothing illegal in these investments and accumulations, although not directly authorized by statute; at all events the only persons who could possibly complain would be shareholders, who might perhaps insist that all net earnings should be divided as profits. But however this may be, there can be no question that reserve funds and investments in real estate form part of the capital and must increase the credit of the bank, and so tend to increase the value of the shares.

The real question in dispute is not, however, whether the funds and property, the value and the amount of which is represented by this \$100,000, is actual capital, but whether the capital, including these additions, is, for the purposes of taxation, to be taken at its actual or estimated value, or at the aggregate amount of the shares into which the whole statutory capital of one million dollars is divided. The answer to this must depend on the construction to be placed upon the concluding words of the 25th section: "Provided that joint stock shall not be rated above the par value thereof."

In the first place I am of opinion that this provision is not to be confined to the assessment of shares in the hands of individual holders, but applies also to the assessment of the corporate body itself in respect of its capital. As I have said before, the rule is that there is to be a strict construction against the burden of the tax, and it is also the rule that where there is an exemption or restriction, that it is to be liberally construed in favor of persons for whose benefit it is enacted. Now here the words "joint stock" are used generally, and not in any way restrained to "shares" in a joint stock or capital, but in their primary signification apply to an assessment of the capital of a joint stock company

as a whole, at least as obviously as to an assessment of the fractions or shares of such a whole.

Again, in the preceding part of the same section we find these words :

And upon the capital stock, income or other thing, of joint stock companies, corporations or persons associated in business and otherwise as hereinafter provided.

Therefore subsequent provisions which are in their nature applicable, are by this reference expressly made to apply to the assessment of the capital of corporations and companies, and this by itself is sufficient to entitle corporations to the benefit of the restriction contained in the proviso at the end of the same clause. This provision being thus applicable, the question is narrowed to this: What meaning is to be attributed to the expression "par value?" Apart from the well known meaning which these words have acquired in the language of commerce and finance, their abstract meaning is of course "equal value." Then, equal to what? The answer must of course be, equal to the nominal value of the shares. But having regard to the very general use of the expression with reference to capital of corporations held in shares, it, of course, means that the shares are to be taken to be of the same value as that for which they were originally and nominally issued. Therefore, as one of the 10,000 shares or fractions into which the capital is divided, is not to be assessed at any higher value than its nominal face value of \$100, so the aggregate capital represented by these 10,000 shares must, if there is any force in language, be subject to the same restriction. Thus, giving the section in question a strict verbal construction, the result at which I arrive is in favor of the appellants contention, and in statutes of this kind, this mode of construction is not merely permissible, but is made imperative, by authorities which cannot be questioned, and which are too

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well known to make it desirable to refer to them specifically.

When we come, however, to consider what the consequences of applying the mode of assessment adopted in the present case to joint stock companies, such as manufacturing companies whose whole capital may be invested in lands, buildings and plant, as put in the very clear and able judgment of Mr. Justice Fraser, we see at once that the construction contended for by the respondents cannot possibly be correct in view of the great injustice to which such an interpretation would lead.

This consideration alone, even if the words of the statute were much less favorable to the appellant than I think they are, would have led me to the same conclusion. I forbear from entering at length into this part of the case, because I entirely adopt the reasoning of Mr. Justice Fraser, which seems to me to have received no answer.

Lastly, it is said that the appellant is not entitled to the writ, as regards the taxes for 1882, for the reason that he voluntarily paid the taxes for that year, and consequently has no *locus standi* for the present purpose.

I do not think that this objection applies to an application of this kind made with a view to quash the assessment, even though it might be a defence to an action for money had and received.

If money is paid under pressure of an execution irregularly issued, or under threat of an execution on a judgment illegally or irregularly entered up, which execution it is in the power of the judgment creditor immediately to put in force, the money cannot, it is true, as long as the judgment or execution stands, be recovered back. But if the judgment be set aside, an action for money had and received will then lie, for there will be

nothing to justify its receipt. And it will be no answer to the application to set aside the judgment that the money has been paid, unless it appears that the payment was not induced by the pressure of the writ or of the threat of the writ, but was made voluntarily, that is in such a way as to indicate an intention to waive and abandon the right, afterwards to call the validity of the judgment in question. This motion for a writ of *certiorari* in order that the assessment may be quashed, I consider analogous, not to an action to recover the money, but to an application, to set aside the judgment. That the payment of the taxes involved any waiver of the right to call the legality of the assessment in question in this way, is negatived by the protest which accompanied it.

Whether, as regards an action for money had and received, a payment of taxes assessed in this way is subject to the same legal considerations as the payment of money recovered by a judgment, is a point which does not at present arise, and which need not therefore be further considered.

I am of opinion that both appeals must be allowed and the rules for the writs of *certiorari* made absolute in the court below.

FOURNIER J.—Was of opinion that the appeal should be dismissed for the reasons given by the court appealed from.

HENRY J.—I think the taxation to the extent of a million is all the city authorities are justified in imposing. The general assessment law provides for the taxation of real and personal property; but special provision is made for banks, namely, that they may be taxed up to the par value of their capital stock. It appears to me that this is intended to cover everything

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so far as banks are concerned, and to exclude the idea of taxing their real and personal property.

The law of the province lays down a particular mode in which banks shall be assessed, and when it mentions that particular mode, it prevents the general provisions with regard to taxation from operating in the case of banks. These remarks apply of course only to resident banks, foreign banks being taxed upon their income. I think that the taxation of the stock to the amount of one million dollars must be held to include all the taxes which can legally be levied on the bank, and that therefore the appeal should be allowed.

TASCHEREAU J.—I am of the same opinion, that the appeal should be allowed with costs.

*Appeal allowed with costs.*

Solicitor for appellant: *G. Sidney Smith.*

Solicitor for respondent: *W. H. Tuck.*

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