

HENRY P. TIMMERMAN..... APPELLANT; 1892  
 AND \*Nov. 14, 15.  
 THE CITY OF ST. JOHN..... RESPONDENT. 1893  
 ON APPEAL FROM THE SUPREME COURT OF NEW \*Feb. 20.  
 BRUNSWICK.

*Assessment and taxes—Tax on corporation—Railway companies—Statutory form—Departure from—52 V. c. 27 s. 125 (N.B.)*

By 52 V. c. 27 s. 125 (N.B.) the agent or manager of any joint stock company or corporation established out of the limits of the province who has an office in the city of St. John for such company or corporation may be assessed upon the gross income received for his principals with certain specified deductions therefrom, and to enable the assessors to rate such company or corporation the agent or manager is required, on May 1st of each year, to furnish them with a statement under oath in a form prescribed by the act showing such gross income for the year preceding and the details of the deductions; in the event of neglect to furnish said statement the assessors may rate the agent or manager according to their best judgment and there shall be no appeal from such rate.

The general supt. of the Atlantic division of the C. P. R. has an office for the company in St. John and was furnished by the assessors with a printed form to be filled in of the statement required by the act; the form required him to state the gross and total income received for his company during the preceding year as to which he stated that no such income had been received, and he erased the clause "this amount has not been reduced or offset by any losses" etc; the other items were not filled in. This was handed to the assessors as the statement required and they treated it as neglect to furnish any statement and rated the supt. on a large amount as income received. The Supreme Court of New Brunswick refused to quash the assessment on *certiorari*.

*Held*, reversing the decision of the court below, Fournier and Taschereau JJ. dissenting, that it was sufficiently shown that the company had no income from its business in St. John liable to assessment;

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

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that the supt. was justified in departing from the prescribed form in order to show the true state of the company's business ; and that the assessors had no authority to disregard the statement furnished and arbitrarily assess the supt. in any sum they chose without making inquiry into the business of the company as the statute authorizes.

*Held*, further, that the provision that there shall be no appeal from an assessment where no statement is furnished only applies to an appeal against over-valuation under C. S. N. B. c. 100 s. 60 and not to an appeal against the right to assess at all.

*Held*, per Gwynne J., that s. 125 of 52 V. c. 27 does not apply to railway companies.

APPEAL from a decision of the Supreme Court of New Brunswick discharging a rule *nisi* for a *certiorari* to quash an assessment on the appellant Timmerman as general supt. of the Atlantic division of the C. P. R.

The facts necessary for a proper understanding of the case are sufficiently set out in the above head-note and fully stated in the following judgments.

*Weldon* Q.C. for the appellants. By 33 Vic. ch. 46 (N.B.) the road in New Brunswick now leased to appellants is exempt from taxation and that act is not repealed. *Thorpe v. Adams* (1); *Taylor v. Oldham* (2).

The appellants are not brought within the letter of the law. *Partington v. Attorney General* (3).

*Jack* Q.C. for the respondent.

THE CHIEF JUSTICE.—I have read the judgment of my brother Gwynne and for the reason first assigned by him, namely, that the assessors acted illegally, I am of opinion that the appeal should be allowed ; on the second point, as to whether or not the act applies to railway companies, I express no opinion.

FOURNIER and TASCHEREAU JJ. were of opinion that the appeal should be dismissed.

(1) L. R. 6 C. P. 125.

(2) 4 Ch. D. 395.

(3) L. R. 4 H. L. 100.

GWYNNE J.—The questions raised by this appeal are the construction of the 125th section of the New Brunswick statute 52 Vic. ch. 27 and its applicability to the Canadian Pacific Railway Company. The section en-acts that :

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Sec. 125.—The agent or manager of any joint stock company or corporation established abroad or out of the limits of this province, or of any person or persons, whether incorporated or not, doing business abroad or out of the limits of this province who shall carry on business within the city of St. John for, or who shall have an office or place of business in the city of St. John for, any such company, corporation, person or persons, shall be rated and assessed in respect of real estate owned by any such company, corporation, person or persons, in like manner as any inhabitant *and in addition thereto* shall be rated and assessed upon the gross and total income received for such company, person or persons, deducting only therefrom the reasonable costs of *management of the business*, such as office rent, salaries and wages paid, and contingent expenses of such agent or manager, and the whole amount of income after such reasonable deduction shall be ratable and shall be capitalized for assessment as personal estate in the manner following that is to say : Every dollar of such ratable income shall be held to represent and shall be valued at five dollars of capital, and the amount so capitalized shall be assessed at its full value as personal estate of the agent or manager for the purposes of assessment ; and the better to enable the assessors to rate such company or corporation, person or persons, 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, *setting forth the gross amount of income* and the particulars of deduction claimed therefrom for cost of management and showing the ratable amount received for such company, corporation, person or persons, during the fiscal year last preceding according to schedule B appended to this Act. In the event of any such agent or manager neglecting to furnish such statement on or before the first day of May as hereinbefore mentioned, or to answer under oath any inquiries of the assessors relating to such statement if furnished, the assessors shall proceed to rate and assess such agent or manager according to their best judgment and there shall be no appeal from such rate or assessment. For the purposes of this section the agent or manager shall be deemed to be the owner of the real estate and of the ratable income capitalized as personal estate and shall be dealt with accordingly, but he may recover from the company or corporation, person or persons he represents any assessment which he may be called upon to pay

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as aforesaid ; such assessment shall be made separately from any other assessment to which such agent or manager shall be liable. The provisions of this section shall not extend or apply to fire, marine, life, accident or other insurance companies or their agents or managers but they shall be rated as in the next following section, is provided.

The schedule B referred to in the above section, and inserted in appendix to the act, is as follows :—

STATEMENT of the real estate and income for taxable year 18 , of  
as agent or manager of

Gross and total income and amount received for  
during the fiscal year of , next preceding the  
first day of April. This amount has not been reduced or offset  
by any losses, debts or other liabilities, or by charges of any  
kind or other deductions whatever. In case of banking insti-  
tutions add, with the exception of interest paid or dues upon  
deposits held by.....

DEDUCTIONS.

Amount actually paid during the fiscal year preceding the first  
day of April for office rent of the agency of , in  
the city of St. John or, if the premises are owned by the com-  
pany, the rental value of the part occupied for the business of  
the agency.....

Amount actually paid during the fiscal year preceding the first  
day of April for salaries of agents, clerks and other employees  
of the agency in the city of St. John.....

Amount actually paid during the fiscal year preceding the first day  
of April for light, fuel, stationery, printing and other con-  
tingent expenses (in the rotation enumerated of the agency  
in the city of St. John).....

Ratable income.

Real estate within the city of St. John on the first day of April,  
making no deduction whatever from the full and fair value,  
by reason of any mortgage or other liability.....

Detailed description of real estate.....

.....

.....

At the foot is inserted a form of oath to be taken,  
and instructions for filling the blanks in the form,  
opposite the figure 4 of which is the following :—

“ At this point insert the word ‘ none ’ if no income, deductions or  
property are returnable.”

The assessors of the city handed one of these printed forms to H. P. Timmerman, the agent and superintendent of the Atlantic division of the Canadian Pacific Railway Company, for the purpose of his showing therein a statement of the ratable amount of income, if any there was, received by him for the company in the fiscal year 1891. This he did by inserting the word "no" before the words "gross and total," and the words "has been" after the word "amount" in the first line; and by drawing a line across and so erasing all after the words "first day of April," and by inserting an additional paragraph and the word "none" in the column for amount of income, if any, to indicate, as directed by the instructions at the foot of the form, that there was no income received by the agent. Opposite the items of deductions in the form he did not insert anything, and opposite the item for real estate he inserted, as directed by the instructions, the word "none," with the following explanation:—

The said company has no real estate in the city of St. John, nor any personal estate beyond office furniture; the cars of the said company run through and into the city the same as cars of other companies.

The statement as to income, so returned, read as follows:—

No gross and total income and amount has been received for this company during the fiscal year of the company next preceding the first day of April. In St. John the income of the company is derived from its railway from Fairville to Vancouver, and no statement of income or revenue is kept in St. John beyond the returns made to the head office of the company in Montreal of moneys collected on the Atlantic division, extending from Fairville to Megantic, in Quebec.

This statement was sworn to by Mr. Timmerman as being full, true and correct according to the best of his knowledge and belief.

The statute gave authority to the assessors, in all cases coming within the contemplation of the sec. 125,

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to make any inquiries they might think necessary of every agent furnishing any statement, the better to enable them to make the assessment authorized by the section, which inquiries the agents of all companies or coporations liable to assessment were required to answer under oath. In the present case the assessors made no such inquiries of Mr. Timmerman, but treating his statement to be absolutely null by reason of the alterations made therein and its deviation from the precise letter of the form in the schedule B, they proceeded to assess the agent as in the case of neglect to furnish any statement, and what they did (as alleged in the factum of the respondent filed upon this appeal which is the only statement offered upon the subject), was to "make their assessment upon their estimate of actual profits, after deducting expenses at the city of St. John," of neither of which particulars had they before them any information whatever from which to make their estimate. In point of fact they arbitrarily, that is to say, without any apparent data to go upon, assessed the company in the name of their agent for \$140,000 income for the year, which amount, if capitalized in the manner mentioned in sec. 125, would have represented, and have been equivalent to, \$700,000 of personal estate of the company in the city of St. John assessable for municipal purposes.

Upon a rule to quash this assessment it has been maintained by the Supreme Court of New Brunswick upon the ground that the deviation in Mr. Timmerman's statement from the precise form given in schedule B constituted, within the meaning of section 125, "neglect to furnish" a statement as required by the section; and that, therefore, the company and their agent were deprived of all right to object to the assessment, and that the court had no jurisdiction to interfere with it.

Mr. Justice King in his judgment expressed the opinion that the striking out of the words in the form <sup>1893</sup> TIMMERMAN namely—  
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This amount has not been reduced or offset by any losses or other liabilities or by charges of any kind or any deductions whatever prevented Mr. Timmerman's statement from being a Gwynne J. statement made under the terms of the act He adds :

If Mr. Timmerman's statement had been in all respects substantially according to the statute I am not prepared to say that it would not have been conclusive upon the assessors who chose not to require further answer upon oath respecting the statement furnished, but for want of the distinct and positive allegation that the gross income as given viz., "none" had not been reduced or brought into that state by offsets or losses or liabilities or by charges of any kind whatever, it is impossible to treat the statement that there was no gross or total income as one that binds the assessors.

Mr. Justice Palmer was of opinion that the deviations from the form given in the schedule B left the assessors no alternative but to proceed independently and to make their assessment according to the best of their judgment from which there could be no appeal, and that the court had no jurisdiction to interfere. Then as to the point that the statute, as the appellants contend, did not apply to railway companies at all, or to the Canadian Pacific Railway in particular because no part of their line is within the city of St. John, Mr. Justice King said :

Every corporation established abroad is liable to be rated in the city of St. John if it carries on business in the city through an agent or manager or if through its agent or manager it has an office or place of business in the city. The Canadian Pacific Railway Company has an office of management in St. John and does business in the city. It does a railway and transportation business in St. John inwards and outwards for goods and passengers. It does this over the road of the St. John Bridge and Railway Company and also over the Intercolonial Railway. Its cars continually pass in, through and out of the city under its own management and control as fully as if the company owned the road.

Again he says :—

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It is true that the receipts at St. John for passengers and freight represent, in large part, compensation for services performed or to be performed outside of the province and either upon the company's road outside of the province or upon other roads ; but still there is a gross income received for or earned by the company and the share apportionable to the company is readily ascertainable by the methods known to the railway companies in settlement of their traffic accounts. In the same way it may be possible to approximate to the value of the business of the Canada Pacific Railway in the province. Certain it is, however, that the provisions of sec. 125 of 53 V. ch. 27 are very inadequate to the exact determination of this. The three heads of deductions particularized in the schedule are too narrow.

Again he says :—

In *Russell v. Town & County Bank* (1), Lord Herschell defines the profits of a trade or business to be the surplus by which the receipts from the trade or business exceed the expenditure necessary for the purpose of earning the receipts.

Then he adds :—

This would indicate the line of inquiry, but in the case of a railway company whose line extends across the continent with connections over Canada and the United States the determination of it is a matter of difficulty, towards the solution of which the legislature has not furnished much help.

Again he says :—

In this province, by 33 Vic. ch. 46, the railway rolling stock, station houses and grounds and other property used in the running of trains of railway companies are exempt, but the actual profits derived from the running of the railway after deducting expenses are left ratable. It is in the dealing with actual profits in the case of long line of railway that it seems pretty obvious that the intervention of the legislature is needed if any uniformity is to be arrived at in local rating of income derived from the running of railways. The income derived by the Canadian Pacific Railway at St. John might (he adds) perhaps be roughly determined by first deducting from the gross or total receipts derived from its running the total amount of expenditure incurred in the earning of such receipts, and then by taking such proportion of the excess of receipts over expenditure as the gross receipts from freight and passengers at St. John bear to the gross receipts from freight and passengers over the entire line ; this would

not do more than give an approximate result but exact results cannot be expected.

However, (he says) in this state of difficulty as to getting at results the legislature having enacted that every foreign corporation doing business in St. John shall be rated in a certain way, and the agent or manager of the company not having made the statement such as he was required to make, in case he made any, the assessors had to do their best to arrive at a correct result.

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And after observing that counsel for the railway company withdrew any objection to the fact that in the assessment roll the amount assessed was placed under the column headed "income," instead of "personal estate," he concludes thus:—

Although the income, when capitalized, as it is styled, is to be placed in a column headed "personal estate," the rating is still in respect of income, and not of personal property. By 33 Vic. ch. 46, already alluded to, railway companies are not ratable in respect of personal property used in the running of trains. The only doubt shown is whether by this mode of taxing income it is not in effect a taxing of personal property, which by the above Act is exempt from taxation in the case of railway companies, supposing the Act 33 Vic. ch. 46 extends to the case of the Canadian Pacific Railway Company.

Mr Justice Palmer was of opinion that 33 Vic. c. 46 applied only to railway companies incorporated within the province, and so did not apply to the Canadian Pacific Railway Company, but he says that act does not exempt actual profits derived from the railway after deducting expenses. "This," he says, "would appear to be what the legislature has authorized to be taxed," and having regard to the condition of the Canadian Pacific Railway Company as proprietors of a railway of great length, extending across the continent and having connections with divers other railways extending over the United States and all Canada, he says that, in his opinion,

the just and equitable principle by which the property of such a corporation should be taxed would be by dividing it up in such a way as that each province should tax only the portion of the corporation property that was substantially used within it, and if the basis of assess-

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ment was such proportion then the proportion that the number of miles over which its cars ran within each province bore to the whole number of miles of the railway over which its cars ran, it appears to me, would be a just and equitable method of assessment, and if adopted by all the provinces through which the company's cars run, it would be assessed upon the whole value of the personal property, and no more.

Then he states what he considers to be what sec. 125 authorized to be assessed as regards the Canadian Pacific Railway Company, namely :—

The amount of money earned by the portion of the road controlled by the office and officers at St. John, from which should be deducted the cost of management.

And he adds :—

In my opinion the duty of the agent of this company was to make up the earnings of that portion of the road that was run under the management of the officers whose offices are at the city of St. John, without reference to where the money is collected, and deduct therefrom the cost of management, not of the operation but of the management, which practically would include the salary of the agent at St. John, the wages and the office expenses.

He would thus exclude all cost of the operation or working of the road and trains, that is to say, of the most material part of the expenditure necessary for the purpose of earning receipts. And he adds :

As in this case the agent has not furnished the statement according to schedule B appended to the Act there is no appeal from the rate or assessment ;

and he arrives at the conclusion that the assessors had no alternative but to do as they did and that if the company desire to escape from such a state of things—

they must take care to comply with the law by keeping a statement of the amount of money earned by that portion of the railway under the management in St. John no matter where collected and deducting therefrom the reasonable cost of the management of the business such as for office rent, salaries and wages paid and contingent expenses as such agent or manager. It may be doubtful (he says) whether the Act does not direct the assessors to assess the gross total income of the company no matter where earned but as such a construc-

tion would lead to the whole income of the company being taxed upon its property in every province through which it ran it would be so manifestly unjust that I would not like to be compelled to put such a construction upon it, and if that is the fair meaning of the words used by the legislature I am not at present prepared to give an opinion either one way or the other as to their power to make such a law.

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I have extracted thus largely from the judgment of the learned judges in the Supreme Court of New Brunswick for the purpose of showing the difficulty which the court entertained in determining what the section in question (assuming it to apply to railway companies) authorized to be assessed as the income of such companies, and of showing also the unanimity of opinion of the learned judges as to the utter inadequacy of the mode provided by the section for arriving with any degree of accuracy or justice at whatever it was as regards railway companies which, if anything, the section authorized to be assessed: and for the purpose also of showing that in this state of difficulty and doubt what the judgment of the court rests upon is, that the deviations from the form in schedule B in the statement furnished by the company's agent nullified that statement wholly and left the assessors no alternative but to act independently of it, as if none at all had been made, as they did, from whose assessment there is no redress, however monstrously extravagant the assessment may be, or whatever may have been the principle upon which it was made, although it is not suggested that they had, but on the contrary it is apparent that they had not and could not have had, any clear conception as to how they should proceed nor any data whatever to govern them in the exercise of their judgment in determining the amount for which, if any, the section authorized the company or its agent to be assessed.

I am unable to concur in this view. The New Brunswick statute for the construction of acts of the legis-

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 enacts that "forms" when prescribed in acts of the  
 legislature "shall admit of deviations not affecting the  
 substance or calculated to mislead."

Gwynne J. Now the words in the form in schedule B which  
 Mr. Timmerman erased, namely "this amount has not  
 been reduced, &c., &c." plainly, as it appears to me,  
 apply to a case in which some amount of income is  
 inserted in the column for that purpose as having been  
 received, and have no application, but on the contrary  
 are meaningless and unnecessary, in a case where the  
 statement is that no income has been received. The  
 form points to the possibility of there being no income  
 at all returnable as having been received for the direc-  
 tions at the foot of the form under the head "instruc-  
 tions for filling the above return" expressly direct the  
 party making the return to insert the word "none" in  
 the column for that purpose if there were no income  
 or real property returnable. With this direction Mr.  
 Timmerman complied, and his statement as made could  
 not have failed to convey to the assessors what it was  
 intended to convey and what it, in point of fact,  
 expressed, namely, that there was no income or property  
 returnable; the erasion of the words "this amount"  
 &c., &c., when in point of fact the agent denied that  
 any amount had been received, tended in truth to make  
 the return conformable to the actual state of things as  
 represented in the return and could not by possibility  
 mislead the assessors. The deviation, therefore, from  
 the form which was caused by the erasion was  
 authorized by the above provision in ch. 118 of the  
 Consolidated Statutes. It might have required explana-  
 tion if the assessors had asked for any, and upon  
 inquiries being made by them of Mr. Timmerman it  
 might have proved to be incorrect, but that the assessors

should be at liberty because of such deviation from the form to treat the statement as an absolute nullity, and to abstain from making any inquiries of the agent in explanation of the statement, and arbitrarily to assess the company and their agent at any rate they pleased without showing upon what data they proceeded, which is what they have done, and that the party so assessed should have no remedy whatever or means of redress, however monstrous and extravagant the assessment may be, is a construction which I do not think can be put upon the statute; the provision of the section that there shall be no appeal from a rate or assessment made by the assessors "according to their best judgment" in the case of an agent of a company neglecting to furnish a statement as required by the section has relation, as it appears to me, to the appeal for over-valuation given by sec. 60 of ch. 100 of the Consolidated Statutes of New Brunswick as to rates and taxes, and does not in any respect abridge the power of the court to do justice if the assessors appear to have proceeded in an arbitrary manner without any exercise of judgment, or to have made the assessment upon a wrong principle, or upon no principle, or for an amount so extravagant under the circumstances as to shock the sense of justice, under sec. 112 and the subsequent sections of the ch. 100 upon a motion for a *certiorari* to bring up an assessment with a view to its being quashed.

When we consider that the only business carried on by the Canadian Pacific Railway Company within the city of St. John is that so much of the freight and passenger traffic, carried over its 6,000 miles of railway, as to reach their destination must necessarily pass through the city does so for the distance only of about three miles over railways over which the Canadian Pacific Railway Company has running powers, it is incon-

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ceivable that the assessors, in assessing \$140,000 for a year's net income as being received from such business, equivalent to \$280,000,000 net income on the whole 6,000 miles, could have proceeded upon any principle or upon any data, or in the exercise of any judgment. I am of opinion, therefore, that even if the section under consideration can be construed as applying to the Canadian Pacific Railway Company the assessment in the present case, which appears to have been made at the arbitrary will of the assessors, upon no principle whatever and without any data upon which to base their judgment, and in utter disregard, upon insufficient grounds, of the statement under oath made by the company's agent, cannot be maintained.

But the material question, namely, whether the section has any application to a railway company, still remains to be considered.

The utter inadequacy of the method provided by the statute for arriving at the net income of a railway company, for the purpose of subjecting it to assessment by a municipal corporation, affords in itself, without more, a strong argument that the legislature never could have contemplated railway companies as being within the purview of the section, and in my opinion, upon a sound construction of the statute, they are not. It may be laid down as a sound principle that the power conferred upon a municipal corporation to levy a tax upon any particular occupation, business or industry must be expressed in clear, unmistakable terms.

In the United States it is held that the general rule that the powers of municipal corporations are to be construed with strictness is peculiarly applicable to the case of taxes on occupations, industries, &c., and the authorities concur in holding that if it is not manifest that there has been a purpose by the legislature to give

authority for collecting revenue by taxes on specified occupations any exaction for that purpose will be illegal. See Cooley on taxation. (1)

Now the plain intention of the legislature in enacting the sec. 125 as to foreign corporations was, as it appears to me, to subject to municipal assessment only the net annual amount received by the agent of a foreign corporation who carries on, within the city of St. John, for the corporation, the business for the purpose of carrying on which the corporation was established, such net amount being ascertained by deducting from the gross amount received by the agent from such business so carried on by him his reasonable costs and charges attending his carrying on such business, as office rent, salaries and wages paid, and contingent expenses. The language of the section seems designed to cover the business of banking and all business of such a nature that, being carried on by the agent, is capable of being regarded as an independent business complete in itself as carried on within the city, and by deducting from the agent's gross receipts from which business the particular deductions specified will truly show the net annual amount of the receipts which is authorized to be assessed, and which when ascertained is to be assessed as the personal estate of the agent who carries on the business; but the language is wholly inappropriate to the business of a railway company. The business of the Canadian Pacific Railway Company, for example, which is carried on within the city of St. John, consists wholly of the freight and passenger traffic which is carried on the trains of the company across the fractional part of the system of the company consisting of the three miles or thereabouts of railway within the city over which the Canadian Pacific Railway Company has running powers. That traffic

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consists of freight and passengers conveyed, it may be, from the city of Victoria in British Columbia or from some points on the Canadian Pacific Railway between Fairville in the province of New Brunswick and Vancouver in British Columbia, or from some places in the United States with which the Canadian Pacific Railway has connections, it may be, from San Francisco, New Orleans, New York, Boston, &c., to some place or places in the province of New Brunswick, Nova Scotia or Canada east or north of St. John, or *vice versa*, or received at St. John to be conveyed to places outside of the city and of the province of New Brunswick to places along the line of the Canadian Pacific Railway and of its connections in the United States; or received at such places for delivery in St. John. Such being the nature of the Canadian Pacific Railway business carried on within the city of St. John it would be impossible to say how much of the gross receipts of the company received within the city, or whether received within the city or at other stations along its entire line, could be attributed to the transit over the short piece of railway within the city over which the Canadian Pacific Railway Company conveys such traffic. So, likewise, the deductions specified in the section, which are limited to expenditures within the city, have no application to the nature of the business of a railway company whose operations extend over the entire continent, and the proportion of whose annual income as attributable to being realized at each particular station along the entire system of the company is incapable of being determined by the method specified in the act, or indeed by any method unless, perhaps, upon the basis of a calculation of the proportion which the distance run over in any particular municipality bears to the whole mileage of the entire undertaking from which the net income, if any there

be, is earned. The legislature of New Brunswick, by 33 Vic. ch. 46, has exempted from taxation in the several counties in the province through which railways shall pass the railway, rolling stock, station houses, grounds and other property used in the running of trains of all railway companies in the province. That this enactment extends to the railway companies running trains in the province whether incorporated by the provincial legislature or by the Dominion Parliament, and so to the Canadian Pacific Railway Company, cannot, I think, admit of a doubt, but whether it does or not is of little importance for none of the things above exempted is professed to be affected by the sec. 125 under consideration. But the statute 35 Vic. ch. 46 also enacted that the exemption provided by the act should not extend to actual profits. Now a railway being a great commercial artery, and as such one entire indivisible undertaking, the actual profits of such an undertaking can only be ascertained by taking an account of the whole of the business carried on throughout its entire length; and for this reason it is held in the United States that although railroads may be taxed for state revenue they are not subject to coercive severance or dislocation and cannot, therefore, be a fit subject for local taxation by the separate counties through which they run (1).

The question in the present case, however, is not whether the actual profits of the Canadian Pacific Railway Company realized from its undertaking can be so severed into parts as to define what proportion can be attributed to having been realized from the three miles or thereabouts of railway within the city of St. John over which some of the traffic of the company is conveyed in such a manner as to enable the provincial legislature to subject such proportion to municipal taxation by the city, but whether the sec. 125 of 52

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(1) See 3 *Bush* 648—35 Ill. 460.

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Vic. ch. 27 purports to invest the municipal council of the city of St. John with power to tax the Canadian Pacific Railway Company as for actual profits realized by it within the city of St. John from the business carried on therein, and that it does authorize an assessment of such profits is the judgment of the Supreme Court of New Brunswick as I understand it. I am of opinion, however, that it is impossible to attribute to the legislature by such language an intention to authorize for the purpose of municipal taxation a subdivision of the actual profits of the railway company, if any there were, into parts and the appropriation of one of such parts to the city of St. John as realized within the city. If that had been the intention of the legislature, assuming it to have the power, the process enacted for ascertaining the amount so realized within the city would have been appropriate to the purpose instead of being so utterly inappropriate for such a purpose as that provided by the act is. The legislature, by 33 Vic. ch. 46, has shown that it deals with railway companies in an especial manner and by name, and by that act has impliedly exempted all property of railroads from taxation except actual profit. In any legislation, therefore, intended to affect railway companies the legislature would naturally be expected to mention them, *eo nomine*, and to make such provision for attaining the purpose expressed to be contemplated by the act as would be suitable to the nature of railway business so as plainly to convey the intention of affecting the companies, and to prescribe a mode of doing so suitable to the nature of railway business and the purpose expressed in the act.

The language of sec. 125 is so utterly inappropriate to railway business that I am of opinion that the section cannot be construed as applying to railway companies and that this appeal must be allowed with costs and a rule absolute be ordered to be issued from the court below quashing the assessment with costs.

PATTERSON J.—I concur in allowing this appeal on the grounds discussed by my brother Gwynne.

On the first ground, viz., that the assessors were not justified in treating the statement made by the appellant as a nullity and proceeding arbitrarily to fix an amount as the income of the office without data on which to form a judgment, I cannot say that I feel any doubt.

There was a statement furnished in writing and under oath. It was, according to sec. 125, to set forth the gross amount of income and the particulars of the deduction claimed therefrom for cost of management. It set forth that there was no gross income. That may have been true or it may not. The explanation added may or may not have seemed satisfactory. Take either way of it. If it was true that there was no gross income attributable to the office in St. John there was a substantial compliance with the requirements of section 125. The answer might have been the bald statement "none" according to the form, but the substance of it is the information that there was no income. The added information by the agent of his reason for saying there was no income, although moneys were passing through his hands, cannot relieve the assessors of the duty which obviously would have existed if the answer had simply been the one word "none," and if that answer had been supposed to be untrue, of making the "inquiries relating to such statement" which section 125 speaks of, and then, if that course properly resulted from their inquiries, proceeding "to rate and assess such agent according to their best judgment."

The functions of the assessors are to some extent judicial, and the statute does not countenance the idea of a discretion so unrestrained as to be liable to abuse from caprice or prejudice or temper or other unjudi-

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cial influences. They cannot rate or assess *according to their best judgment*, without exercising their judgment upon some basis of facts. The expression "according to their best judgment," though plain enough in itself, may be treated as the common phrase "to the best of his knowledge and belief" was treated in the Court of Exchequer in *Roe v. Bradshaw* (1). Speaking of an affidavit in which those words occurred Pollock C.B. said :

But then it is objected that this is only an affidavit *to the best of the belief* of the maker. I think, however, that the man who makes such a statement imports that he is entitled to entertain the belief that he expresses, and that we must not take him to mean that the "best" of his belief is no belief at all.

And Bramwell B. said :

A man who swears to the "best" of his belief swears that he has a belief.

As to the very important point made by my brother Gwynne, that section 125 does not apply to railway companies, I agree with him in the reasoning on which he founds his opinion. This appeal may be disposed of on the other ground, so that this latter question need not be finally decided. I should prefer leaving it open for further discussion if it should again arise. We discuss it now without as full information as may possibly be supplied in some other case as to railway matters, and further discussion may possibly bring out considerations not now fully before us, tending on the one hand to support the view of the present respondents, or on the other hand to supply stronger reasons for holding that the section does not apply to railway companies, or at all events not to those companies which are under the legislative jurisdiction of the Parliament of Canada.

One point that will perhaps bear further discussion is the meaning of "income," as used in the section.

(1) L. R. 1 Ex. 106.

Does it mean all money received by the agent as agent for the company, not merely as the money belonging to the company, still less as the earnings of the company, but simply all money that passes through the agent's hands? That would seem to be what he is intended to set down in his return, deducting from it only what may be generally called office expenses. If this is what the section means by gross income we shall probably find that arguments will suggest themselves against the power of the provincial legislature thus to deal with a Dominion railway. The discussion of that question would follow some of the lines of the discussion in the Ontario Court of Appeal in *Leprohon v. Ottawa* (1). The Parliament of Canada authorizes a company to construct its line, or to use the line of another railway, in one of the cities and thereupon to conduct its traffic. Can the provincial legislature, in addition to asserting its right to tax all the property of the company which benefits by municipal expenditure, impose another burden on the company in the name of assessment for income, and thereby impair the value of the franchise granted by the Dominion? Whatever may be the correct answer to this question it is as well to leave it open for discussion.

There are manifest difficulties in the way of reading section 125 as intended to tax profits only—one being the fact that when profits, or net profits, are meant, as in the case of insurance companies under section 126, they are called net profits, although there is room to argue, by reading the statute in connection with 33 Vic. ch. 46 (N.B.), that it is not intended to tax any income except “actual profits derived from the running of any railway, after deducting expenses.” But understanding profits only as being the property or income meant to be taxed under section 125, we should have

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the same difficulty as in *Peters v. St. John*, created by the certainty that the taxable amount indicated by the form in schedule B is not profits, and we should again encounter the Railway Act (1), several provisions of which would have to be considered, as e.g. s. 120, which deals with dividends payable out of clear profits; s. 107, which declares what is meant in that statute by "working expenditure;" various forms of returns given in schedules to the act, and some other provisions, all demonstrating the fatuity of talking of the profits of an isolated agency, and strengthening the conclusion that section 125 cannot be intended to apply to railway companies.

I concur in allowing the appeal.

*Appeal allowed with costs.*

Solicitors for appellants: *Weldon & McLean.*

Solicitor for respondent: *I. Allan Jack.*