1950
*Mar. 21
*May 15

NORTHERN BROADCASTING COMPANY LIMITED ..... } APPELLANT;

AND

THE IMPROVEMENT DISTRICT OF MOUNTJOY ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Assessment and Taxation—Definition of "land", "real property", "real estate"—What constitutes "machinery" erected, or placed upon, or affixed to land—The Assessment Act, R.S.O. 1937, c. 272, ss. 1(i) (iv), 4(17) (am. 1947, c. 3, s. 4 (3)).

The appellant operates a radio broadcasting transmitter station. On premises, leased for a ten-year period, it erected a frame building in the basement of which it installed a transformer and on the first floor a transmitter. Each rested by its own weight only on the respective floors. The power required for broadcasting was carried from high voltage lines into the building to the transformer, by further wires to the transmitter, and thence by the same means to exterior broadcasting towers. A clause in the lease permitted the removal by the lessee of all buildings, fixtures and structures erected on the land.

*PRESENT:—Rinfret C.J. and Kerwin, Kellock, Cartwright and Fauteux JJ.

(1) (1921) 62 S.C.R. 599.

The respondent assessed both the transformer and transmitter under the general heading of "machinery and equipment". The assessment was appealed on the ground that neither the transformer nor the transmitter constitute "land", "real property" or "real estate" within the meaning of s. 1 (1) (iv) of the *Assessment Act* which provides that: "'Land', 'real property', and 'real estate' shall include: All buildings, or any part of any building, and all structures, machinery and fixtures erected or placed upon, in, under, or affixed to land."

Held: Affirming the decision of the Court of Appeal, [1949] O.R. 695, Rinfret C.J. and Kerwin J., dissenting, that both the transformer and transmitter were "land" within the meaning of the Statute and therefore assessable.

APPEAL from the judgment of the Court of Appeal for Ontario, Aylesworth J.A. dissenting (1), affirming a decision of the Ontario Municipal Board whereby the transformer and transmitter of the appellant was found to be assessable under the *Assessment Act*.

H. E. Manning K.C. and *Allan D. Rogers* for the appellant.

D. D. Carrick and *S. A. Gillies* for the respondent.

The dissenting judgment of the Chief Justice and Kerwin J. was delivered by:

KERWIN J.: By leave of the Court of Appeal for Ontario, Northern Broadcasting Company Limited appeals against a judgment of that Court confirming an assessment made by the Ontario Municipal Board upon an appeal to it by the Company under the provisions of the Ontario Assessment Act, R.S.O. 1937, c. 272.

The Company had previously operated a broadcasting system in Timmins, Ontario, but, in 1947, in accordance with prescribed regulations of the Department of Transport, it moved part of its system to a point some distance away in the Improvement District of Mountjoy. The Company there leased land for a period of ten years with successive rights of renewal for one year to a total of four, and upon it erected three towers and a frame main building containing a basement, a first floor, and residential accommodation for the resident engineer and his wife on the second floor. The Company's programmes originate in

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its studios in Timmins and are fed on special telephone wires to the new location and put into a transmitter and onto the towers which radiate the signal.

A transformer was brought into the main building after the latter's completion and there is a voltage regulator beside it on a wooden base, both of which are movable. The transformer, which is an integral part of the transmitter, is located in the basement and, as required by law, is installed in a concrete vault. The transformer rests on the floor and from it wires run through a conduit pipe projecting through the ceiling of the basement to connect with the hydro wires outside the building. Electrical power is fed through these lines to the transformer, which steps the voltage received down to that required by the transmitter.

The transformer is connected with the transmitter by wires which penetrate the ceiling of the basement. The transmitter is entirely demountable, having been brought in in sections. It is situated on the first floor of the main building and rests on a linoleum covering on the wooden floor. For its own protection and that of personnel, it is surrounded by a wire screen which is bolted to the floor and which at first was screwed to the top of the transmitter. At the time of the hearing before the Board the screws had been removed as they were not required but the bottom of the screen remained bolted to the floor. The transmitter is connected to the towers by No. 8 wires of six strands which constitute a transmission line suspended on poles. The connection of the wires to the transmitter is the ordinary connection and can be changed or moved.

All of this is what is described as "a tailor-made job", which, however, means only that it was done according to the specifications of the company's president and the engineers of the manufacturers of the equipment. The buildings are not substantial and it is expected that the towers, wires (or ground system), transmitter and transformer, will be obsolete before the expiration of the leases held by the Company. Under those leases the latter may remove any building, fixture or structures erected by it on the land.

The Company was assessed on behalf of the District in 1948 for taxation in 1949 at $100 for land and $27,500

for buildings. It appears that the assessor made up the latter sum by placing on the main building a value of $7,200; on the towers, a value of $3,000; on the ground system of wires, $1,200; on the transmitter, $15,600; and on the transformer $500. This assessment having been confirmed by the Court of Revision and the Company having appealed to the Board, the latter altered the assessment to $2,500 for the building and $11,000 for the towers, ground system, transmitter and transformer under the general heading of "machinery and equipment". The Company's appeal to the Court of Appeal was restricted to the last item and it did not there allege, as it did not before this Court, that the towers and ground system were not assessable. That leaves for consideration the transmitter and transformer.

Before referring to the relevant provisions of the present Ontario *Assessment Act,* the well-known fact should be noticed that prior to *The Assessment Act* of 1904 both real and personal property were assessable. By section 2(9) of the previous Act, R.S.O. 1897, c. 224, it was provided in part that " 'Land,' 'real property' and 'real estate' " respectively, shall include all buildings or other things erected upon or affixed to the land, and all machinery or other things *so fixed to any building as to form in law part of the realty.*" By the 1904 Assessment Act, personal property ceased to be liable to assessment but the definition section omitted the words underlined and inserted the word "placed". These changes have been carried forward to section 1(i) of the present Assessment Act, R.S.O. 1937:

"Land", "real property" and "real estate" shall include:

* * *

(iv) All buildings, or any part of any building, and all structures, machinery and fixtures erected or placed upon, in, over, under, or affixed to land:

* * *

Section 4 as amended, 1947, c. 3, s. 4(17) provides:

All real property in Ontario * * * shall be liable to taxation subject to the following exemptions:

* * *

17. All fixed machinery used for manufacturing or farming purposes including the foundations on which the same rests; but not fixed machinery used, intended or required for the production or supply of motive power including boilers and engines, gas, electric and other motors, nor machinery owned, operated or used by a transportation system or by

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a person having the right, authority or permission to construct, maintain or operate within Ontario in, under, above, on or through any highway, lane or other public communication, public place or public water, any structure or other thing, for the purposes of a bridge or transportation system, or for the purpose of conducting steam, heat, water, gas, oil, electricity or any property, substance or product capable of transportation, transmission or conveyance for the supply of water, light, heat, power, or other service.

Under this legislation, Hope J.A. in the present case, held that the transformer and transmitter fell within the statutory definition of "real property" as machinery placed upon land. Laidlaw J.A., agreed but added: "While in one sense the transformer and transmitter are movables they are nevertheless integral parts of the broadcasting plant. There was no intention whatsoever on the part of the owners when they installed those items of equipment, or at any time afterwards, to regard them as chattels but rather as part and parcel of the real property." Aylesworth J.A. dissented, being of opinion that the intention was to install the transformer and transmitter where they were installed for their beneficial and convenient use as machines and for no other purpose, relying upon the decisions of the Court of Appeal for Ontario in *Re City of Ottawa and Ottawa Electric Railway Co.* (1), and in *Re Ford Motor Co. of Canada, Ltd.* and *Town of Ford City* (2).

The first of these cases was concerned with an agreement between the City of Ottawa and the Electric Railway Company. Rose J. who delivered the judgment on behalf of the Court of Appeal, held that when the question is to determine whether a machine has become part of the realty for the purpose of assessment, the test to be applied is whether the intention is to improve the land, as when a central heating plant is installed, or whether the intention is to put the machine in a place where it can conveniently be used as a machine.

In the *Ford Motor* case, Middleton J.A., delivering the judgment of the Court, first decided that a gantry crane fell within the exemption of "fixed machinery used for manufacturing * * * purposes", provided for in paragraph 17 of section 4. It was therefore unnecessary, as he pointed out, to determine whether the crane should be

(1) (1922) 52 O.L.R. 664. (2) (1929) 63 O.L.R. 410.

regarded as "machinery and fixtures erected or placed upon * * * or affixed to land," but he was inclined to think that the crane was chattel property and in that connection adopted the view of Rose J. in the Ottawa case. Without calling upon counsel for the respondent, this Court [1929] S.C.R. 490, dismissed the appeal of the Town of Ford City upon the ground that the crane clearly fell within the exemption.

It is not suggested that the case falls within section 4(17) and specifically it is not claimed that the transformer and transmitter are used for manufacuring purposes, but a consideration of the paragraph is of assistance in determining the scope of the definition of real property in section 1(*i*). The opening leg of paragraph 17 exempts "all fixed machinery used for manufacturing * * * purposes." On the construction of 1(*i*) adopted by the Court of Appeal in the present case, machinery so used but not fixed would be caught by the words "machinery * * * erected or placed upon, in, over, under, or affixed to land." With respect, such a construction does not appear to be the proper one.

I am inclined to the view that the transmitter and transformer are not machinery as held by the Court of Appeal. Where is the line to be drawn? Would such articles as domestic washing machines and sewing machines be included in the term? However, assuming the transformer and transmitter are machines or structures or fixtures, some limitation must be put upon the words "erected or placed upon, in, over, or affixed to land." The test suggested in the *Ottawa Electric* case and approved in the *Ford Motor* case appears to be the proper one.

While, as pointed out by Laidlaw J.A., the transformer and transmitter are integral parts of the broadcasting plant, I am unable to agree with his statement that there was no intention on the part of the owners at any time to regard them as chattels. I think the intention, as evidenced by the terms of the leases of the land by which the Company might remove any building, fixtures or structures erected by it thereon, and also as evidenced by the manner of the placing of the transformer and transmitter on the land exhibit an intention to the contrary, that is, to regard them

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as chattels. The transformer, the voltage regulator and its base, and the transmitter were installed where they could conveniently be used as chattels.

The appeal should be allowed with costs here and in the Court of Appeal. However, the Company does not escape assessment for the towers and ground system. Section 86 of the *Assessment Act* (made applicable by subsection 3 of section 84 to appeals to the Board) provides for the correction of any omissions or errors in the assessment roll and, as this Court is to give the judgment that should have been given by the Court of Appeal, the matter should be remitted to the Board with a direction to assess, under the head of "Value of Buildings", the sum of $2,500 already fixed by the Board as the assessable value of the buildings proper, plus a fair and proper assessable value for the towers and ground system.

The judgment of Kellock, Cartwright, and Fauteux JJ. was delivered by:

KELLOCK J.: The question involved in this appeal is as to whether or not a transformer and a transmitter, located in a building on premises held by the appellant under lease and used for broadcasting purposes constitute "land", "real property" or "real estate" within the meaning of the Ontario Assessment Act, R.S.O. 1937, c. 272, s. 1, clause (*i*), and liable to assessment and taxation as such under the provision of that statute. It is not necessary to repeat the facts, and I accept the finding of the Municipal Board that both are not attached to the building apart from their own weight and the electric wires or conduits originating outside the building and passing to and from each to the broadcasting towers.

The statutory definition is as follows:

> 1. (i) "land", "real property" and "real estate" shall include:
>
> (iv) All buildings, or any part of any building, and all structures, machinery and fixtures erected or placed upon, in, over, under, or affixed to land;

The first question calling for consideration is as to whether or not the two items here in question are "machinery" within the meaning of the Statute. The appellant has referred us to certain dictionary definitions,

but apart from the Statute itself, it would be sufficient to refer to one definition given in the Oxford Dictionary:

> Any instrument employed to transmit force or to modify its application.

As an illustration, the following is given:

> By this singular power of transmitting pressure, a fluid becomes, in the strictest sense of the term, a machine.

I think that both the transformer and the transmitter are within the above definition. They are instruments employed either to transmit force or to modify its application, or both.

The Statute, however, furnishes its own dictionary. In paragraph 17 of section 4 which is an exempting provision from the general liability imposed by that section on "all real property" in Ontario, it is provided that fixed machinery used for manufacturing or farming purposes is not to be considered "land", but this does not apply to fixed machinery required for the production or supply of motive power including "boilers." Mr. Manning contends that unless moving parts are involved, the article, while it may be "apparatus" or "equipment", cannot be a machine. This contention would exclude a boiler which the statute expressly includes. By the same paragraph, the exemption is not to apply to machinery used by certain described persons "for the purpose of conducting * * * electricity * * * for the supply of power." A transformer used by a street railway company would clearly fall within this language, as would a transmitter used by a telegraph company. The transformer and the transmitter, therefore, are to be considered machinery within the meaning of the Statute.

The second question which arises is as to whether or not a machine merely "placed" upon land without having acquired the character of land at law, falls within the definition.

The Statute took its present form in 1904 by 4 Edward VII, c. 23, s. 2, para. 7(*d*). Prior to that time, the definition as contained in R.S.O. 1897, c. 224, s. 2, para. 9, was as follows:

> 9. "Land", "real property" and "real estate" respectively, shall include all buildings or other things erected upon or affixed to the land, and all machinery or other things so fixed to any building as to form in law part of the realty * * *

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The amended Statute of 1904 (now found in R.S.O. 1937, c. 272, s. 1(*i*) in common with the present Statute, reads:

> All buildings, or any part of any building, and all structures, machinery and fixtures erected or placed upon, in, over, under, or affixed to land.

I am content to assume that the Statute of 1897 was concerned only with fixtures at common law in the sense that they had become part of the realty.

Appellant says that no change was effected by the Statute of 1904. If this argument be sound, the dropping of the words "so fixed to any building as to form in law part of the realty" as applied to "machinery" is without significance and the insertion of the word "placed" serves no purpose save to render the Statute tautologous. To so construe the Statute would be contrary to settled principle.

Prima facie, therefore, the words "erected", "placed" and "affixed" do not connote the same things, and the word "placed" at least must connote something less than is involved in the word "affixed."

With respect to "placed", I do not think it is used in the Statute as equivalent merely to "brought upon" so as to take in mere personal property which is intended to be shifted about at will. It involves the idea of setting a thing in a particular position with some idea of permanency. Thus, merely to bring a gas engine and portable saw upon premises would not be to "place" them upon the land within the meaning of the Statute, any more than would be the case with a table, or a chair, or a typewriter, or similar articles.

"Placed" is defined in the Shorter Oxford Dictionary as

> to put or set in a particular place, position or situation.

In the context of the Statute, I think the Legislature must be taken to have had in mind the including of things which, although not acquiring the character of fixtures at common law, nevertheless acquire "locality" which things which are intended to be moved about, do not.

It is noteworthy that the Statute does not say "all buildings" *simpliciter,* any more than it says "all machinery." If only buildings which become part of the land at common law are to be considered as falling within the statutory definition, there are many cases of buildings which might well be outside the Statute. All buildings are

not necessarily fixtures at law, *vide*: *Blanchard* v. *Bishop* (1); *Phillips* v. *The Grand River Mutual Fire Insur. Co.* (2), per Armour J. as he then was, at 353; *Bing Kee* v. *Yick Chong* (3). It has also been held that even the word "fixtures" does not necessarily connote things affixed to the freehold (see per Parke B. in *Sheen* v. *Rickie* (4). I do not think the intention of the legislature was to merely make assessable buildings which at law become part of the land, and I therefore think that the change in the wording of the Statute should be given its *prima facie* effect.

It is to be remembered that when the Statute of 1904 was passed, the assessment of personal property was abolished. Prior to the change it was unimportant for assessment purposes whether a given thing had become real or continued to be personal property, as both were assessable. In my opinion, the change in the definition of "land" made by the new legislation indicates an intention which the language used connotes on its face, namely, that the Legislature did not intend to abolish but to continue the assessment of chattels which, although not fixtures at law, nevertheless were not things intended in use to be moved from place to place.

I therefore conclude that it is sufficient in the present case to bring the two articles here in question within the meaning of "land" in the Statute, that they are heavy articles placed each in one particular spot with the idea of remaining there so long as they are used for the purpose for which they were placed upon the premises.

Mr. Manning contends that to give this meaning to the Statute involves an absurdity when paragraph 17 of section 4 is considered. It reads as follows:

> All fixed machinery used for manufacturing or farming purposes, including the foundations on which the same rests; but not fixed machinery used, intended or required for the production or supply of motive power including boilers and engines, gas, electric and other motors, nor machinery owned, operated or used by a transportation system or by a person having the right, authority or permission to construct, maintain or operate within Ontario in, under, above, on or through any highway, lane or other public communication, public place or public water, any structure or other thing, for the purposes of a bridge or transportation system, or for the purpose of conducting steam, heat, water, gas, oil,

(1) (1911) 2 O.W.N. 996.
(2) (1881) 46 U.C.Q.B. 334.
(3) (1910) 43 Can. S.C.R. 334.
(4) 5 M. & W. 174 at 180.

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electricity or any property, substance or product capable of transportation, transmission or conveyance for the supply of water, light, heat, power, or other service. R.S.O. 1937, c. 272, s. 4, par. 17; am. 1947, c. 3, s. 4(3).

It is said that on the above view of the Statute, machinery used for manufacturing or farming purposes which is "fixed" (i.e. according to the argument, fixtures at law) is not to be considered as part of the land, while machinery not "fixed" (similarly mere personal property) would be considered real estate. I do not think this contention is sound, as in my opinion the word "fixed" in paragraph 17 is not used in the sense of excluding everything which has not become a fixture at law, but as involving the idea connoted by the word "placed" with which I have already dealt, namely, as having acquired locality. While "fixed" by itself may normally involve something in the nature of attachment, it is, according to the Shorter Oxford English Dictionary, also used as the equivalent of "placed", and if the Statute is to be construed as a consistent whole, as it should, (*Cartwright* v. *Toronto* (1)) the word should be given this meaning in paragraph 17. This was essentially the view of the majority in the Court below. The view to which I have come was not put forward or considered in *Town of Ford City* v. *Ford Motor Co.* (2). The decision of this Court was that the crane there in question fell within the provisions of the exempting clause.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Zimmerman, Blackwell and Haywood.*

Solicitors for the respondent: *Caldbick & Yates.*

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(1) (1914) 50 Can. S.C.R. 215 at 219.

(2) (1929) 63 O.L.R. 410; [1929] S.C.R. 490.