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| THE CORPORATION OF THE CITY OF SAULT STE. MARIE AND M. G. E. DANBY (*Defendants*) .... | APPELLANTS; | 1961 *June 12 Oct. 3 |
| AND | | |
| ALGOMA STEEL CORPORATION LIMITED (*Plaintiff*) ..... | RESPONDENT. | |

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Taxation—Assessment of railway tracks—Exemption claimed—System used primarily for transportation of company property within plant area—Meaning of "transportation system"—The Assessment Act, R.S.O. 1950, c. 24, s. 37.*

The plaintiff company, a manufacturer of iron and steel, in an action asked for a declaration that its rails were not liable to assessment by the defendant municipality. It was claimed that the combined effect of

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ss. 37 and 44 of *The Assessment Act,* R.S.O. 1950, c. 24, precluded the assessment of such rails, because they were part of a transportation system operated by the plaintiff. The primary function of the system was the transportation within the company's plant area of the company's own property, as an incident of its manufacturing operations. The trial judge and the Court of Appeal having held for the plaintiff, the defendants appealed to this Court.

*Held:* The appeal should be allowed.

As the result of an amendment to *The Assessment Act* in 1944 (Ont.), c. 7, the composite term "transportation system" replaced in the predecessor of s. 37 the words "tramways, street railways and electric railways" in subs. (1) and "electric railway" in subs. (4). Those words were not apt to describe a transportation system such as that operated by the plaintiff. They did describe those kinds of transportation systems which would be expected to operate on public highways.

The amendment did not have the effect of extending the scope of s. 37(4) so as to make it apply to an entirely different kind of transportation system. "Extraneous light" was cast upon the meaning of the words "transportation system" as used in that subsection, not only by the previous history of the subsection, but by the context in which the words were used in s. 37 as a whole. The words had a limited meaning and referred to a system which was operated to provide transportation as a service to the public, and not one which was operated, almost entirely, for the transportation by a company, on its own premises, of its own goods, as part of its manufacturing business.

*Union of South Africa (Minister of Railways and Harbours) v. Simmer and Jack Proprietary Mines,* [1918] A.C. 591; *Hurlbatt v. Barnett & Co.,* [1893] 1 Q.B. 77, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming a judgment of Hughes J. Appeal allowed.

*H. E. Manning, Q.C.,* for the defendants, appellants.

*P. B. C. Pepper, Q.C.,* and *W. R. Herridge,* for the plaintiff, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1], which dismissed the appeal of the appellants from the judgment at the trial. In the action, the respondent, as plaintiff, asked for a declaration that its rails were not liable to assessment by the appellant Corporation. The respondent claimed that an ingredient of $1,721,280 in its real property assessment and $1,032,768 in its business assessment were illegally inserted in the assessment roll for the year 1959, because those figures represented the value of railway tracks, constructed within

[1] [1960] O.R. 334, 24 D.L.R. (2d) 176.

the premises of the respondent, which were exempt from assessment because they were part of a transportation system operated by the respondent. The respondent claimed that the combined effect of ss. 37 and 44 of *The Assessment Act*, R.S.O. 1950, c. 24, precluded the assessment of such rails.

The respondent carries on the business of manufacturing iron and steel at its plant at Sault Ste. Marie. For the purpose of transferring materials from one part of its plant to another, and as part of its arrangement for receiving incoming ores and materials and dispatching finished products, the respondent has within its property, situated within the boundaries of Sault Ste. Marie, something over 49 miles of standard gauge railway track which connect with the tracks of the Algoma Central and Hudson's Bay Railway Company (a corporation which is a completely distinct entity from the respondent).

In addition, the respondent owns 1.3 miles of narrow gauge track not connected with the Algoma Central system and $1\frac{1}{3}$ miles of electrified track used for the transportation of coal in self-propelled cars. The electrified line has not been assessed.

The respondent owns and operates 14 standard gauge diesel locomotives, 2 small steam locomotives and some 570 freight cars, including hot metal ladles, slag cars, gondola cars, hopper and butt cars and from time to time hires additional cars for use in its plant. The respondent's tracks also serve the plants of Mannesmann Tube Company, Ltd., Dominion Tar and Chemical Limited and Algoma Contractors Limited, which companies are tenants of the respondent. The respondent's equipment is operated by a separate department presided over by a superintendent of transportation and staffed by a large and varying number of employees consisting of foremen, yard masters, locomotive engineers, switch men and personnel devoted to the maintenance and repair of rolling stock.

In order to facilitate the considerable traffic within the area, there are two marshalling yards within the respondent's premises and immediately outside those premises there is a marshalling and interchange yard of the Algoma Central and Hudson's Bay Railway Company. Rail traffic from and to the respondent's plant is handled over the lines of the

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Algoma Central Company. The locomotives and rolling stock of the respondent are not used for the delivery of materials from or the shipment of goods to the outside world. The respondent's cars, with the exception of tank cars, are used to carry materials around its yards and to and from one building to another. The tank cars are used mainly to remove sludge from the coke plant to a waste dump.

A relatively small amount of traffic passes over the respondent's tracks to the premises of the three tenants previously mentioned.

The Letters Patent of the respondent authorized it "to carry on the business of the transportation of passengers, goods, wares, merchandise, timber or coal, steel and iron, upon land and water".

The learned trial judge and the Court of Appeal, on the basis of this evidence presented by the respondent, no evidence being adduced by the appellants, held that the respondent did operate a transportation system, in fact, within the ordinary meaning of that expression, and further went on to hold that this was a transportation system within the meaning of the relevant provisions of *The Assessment Act*, R.S.O. 1950, c. 24.

The provisions of that statute on which the respondent relies are s. 37(4) and s. 44(2)(*a*) and (3).

Section 37 reads as follows:

37. (1) The property by subclause v of clause i of section 1 declared to be "land" which is owned by companies or persons supplying water, heat, light and power to municipalities and the inhabitants thereof, and companies and persons operating transportation systems and companies or persons distributing by pipe line natural gas, manufactured gas or liquefied petroleum gas or any mixture of any of them shall, in a municipality divided into wards, be assessed in the ward in which the head office of the company or person is situate, if the head office is situated in the municipality, but if the head office of the company or person is not in the municipality, then the assessment may be in any ward thereof.

(1a) This section does not apply to a pipe line as defined in section 37a.

(2) Where the property of any such company or person extends through two or more municipalities, the portion thereof in each municipality shall be separately assessed therein at its value as an integral part of the whole property.

(3) In assessing such property, whether situate or not situate upon a highway, street, road, lane or other public place, the same shall when and so long as in actual use be assessed at its actual value in accordance with section 33.

(4) Notwithstanding anything in this or any other section of this Act, the structures, substructures, superstructures, rails, ties, poles and wires of such a transportation system shall be liable to assessment and taxation in the same manner and to the same extent as those of a steam railway are under the provisions of section 44 and not otherwise.

Section 44 is the section which deals with the assessment of steam railways. Subsection (1) prescribes the information which a steam railway must transmit annually respecting its property. The relevant portions of subss. (2) and (3) provide as follows:

44. (2) The assessor shall assess the land and property aforesaid as follows,

(*a*) the roadway or right-of-way at the actual value thereof according to the average value of land in the locality; but not including the structures, substructures and superstructures, rails, ties, poles and other property thereon;

.....

(3) Notwithstanding anything in this Act, the structures, substructures, superstructures, rails, ties, poles, wires and other property on railway lands and used exclusively for railway purposes or incidental thereto (except stations, freight sheds, offices, warehouses, elevators, hotels, roundhouses and machine, repair and other shops) shall not be assessed.

There is no suggestion that the respondent is a steam railway company within the meaning of s. 44 of the Act and so the question in issue in this appeal is as to whether it operated a "transportation system" within the meaning of s. 37(4), so as to be entitled to the exemption from assessment of its rails, situated on its own lands, as provided in respect of steam railway companies in s. 44(2)(*a*) and (3).

The words "transportation system" are not defined in the interpretation section of the Act. They are used in certain sections of the Act in addition to those already cited. They first appear in s. 1(i)(v) in the definition of the word "land".

1. In this Act,

.....

(i) "land", "real property" and "real estate" include,

.....

(v) all structures and fixtures erected or placed upon, in, over, under or affixed to any highway, lane, or other public communication or water, but not the rolling stock of any *transportation system;*

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They appear next in para. 17 of s. 4, the section which recites the exemptions to the general proposition that all real property in Ontario shall be liable to assessment for taxation. The exemption mentioned in para. 17 is as follows:

> 17. All machinery and equipment used for manufacturing or farming purposes, including the foundations on which the same rest, but not including machinery and equipment to the extent that it is used, intended or required for lighting, heating or other building purposes or for producing power for sale, or 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, electricity or any property, substance or product capable of transportation, transmission or conveyance for the supply of water, light, heat, power or other service.

Section 6 of the Act deals with business assessments and reference is made to a "transportation system" in subs. (1)(*k*) and subs. 1*b*, both enacted in 1957 (Ont.), c. 2, which read as follows:

> 6. (1)(*k*) Every person carrying on the business of,
>
> (i) a telegraph or telephone company, or
>
> (ii) a *transportation system,* other than one for the transportation or transmission or distribution by pipe line of crude oil or liquid or gaseous hydrocarbons or any product or by-product thereof or natural or manufactured gas or liquefied petroleum gas or any mixture or combination of the foregoing, or
>
> (iii) the transmission of water or of steam, heat or electricity for the purposes of light, heat or power,
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> for a sum equal to 25 per cent of the assessed value of the land (not being a highway, lane or other public communication or public place or water or private right-of-way), occupied or used by such person, exclusive of the value of any machinery, plant or appliances erected or placed upon, in, over, under or affixed to such land.
>
> (1*b*) Where a manufacturer also carries on the business of a *transportation system* for the transportation or transmission or distribution by pipe line of crude oil or liquid or gaseous hydrocarbons or any product or by-product thereof or natural or manufactured gas or any mixture or combination of the foregoing, he shall not be assessed for business assessment as a manufacturer in respect of such transportation system.

There is some lack of precision in the use of the words "transportation system" in these various sections. In para. 17 of s. 4 and in s. 37(1) there is a suggested distinction between a transportation system and a system for

the transmission or distribution of oil or gas. On the other hand, the quoted subsections of s. 6 indicate that there is no such distinction. However, in s. 6(1)(*k*), perhaps out of abundance of precaution, a pipe line is specifically excluded from being considered as a transportation system in that subclause. Section 6(1*b*) deals exclusively with the transportation or transmission or distribution of oil or gas by pipe line. It does not appear that in any of the sections in which the words are used by themselves, without qualification, that they are intended to include a pipe line.

The words were first introduced into *The Assessment Act* in 1944 (Ont.), c. 7, and were used in an amendment to s. 44 of the Act, which was the predecessor of s. 37. In subs. (1) they replaced the words "tramways, street railways and electric railways". In subs. (4) they replaced the words "electric railway".

Prior to the amendment, those subsections of s. 44 read as follows:

> 44. (1) The property, by paragraph 5 of clause i of section 1, declared to be "land" which is owned by companies or persons supplying water, heat, light and power to municipalities and the inhabitants thereof, and companies and persons operating tramways, street railways and electric railways, and companies or persons transmitting oil or gas by pipe line, shall, in a municipality divided into wards, be assessed in the ward in which the head office of such company or person is situate, if such head office is situated in such municipality, but if the head office of such company or person is not in such municipality, then the assessment may be in any ward thereof.
>
> (4) Notwithstanding anything contained in this section or any other section of this Act, the structures, substructures, superstructures, rails, ties, poles and wires of such an electric railway shall be liable to assessment and taxation in the same manner and to the same extent as those of a steam railway are under the provisions of section 50 and not otherwise.

In 1946 (Ont.), c. 3, the predecessor of s. 6(1)(*k*), which had contained the words:

> Every person carrying on the business of a telegraph or telephone company, of an electric railway, other than an electric railway owned or operated by or for a municipal corporation, tramway, street railway or incline railway. . . .

was replaced by a new clause, which commenced:

> Every person carrying on the business of a telegraph or telephone company, or of a transportation system, other than a transportation system owned or operated by or for a municipal corporation. . . .

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In 1947 (Ont.), c. 3, in para. 17 of s. 4, the words "transportation system" where they first appear in that paragraph, as previously quoted, replaced the words "railway company" and where they next appear, replaced the words "tramway or street railway".

In the same year the words "transportation system" replaced, in s. 1(i)(*v*), the words "railway, electric railway, tramway or street railway".

As was pointed out in the judgment of the Court of Appeal, the submissions advanced by counsel as to the rules of interpretation to be applied to amending provisions, are summarized in Halsbury, 2nd ed., vol. 31, p. 493, para. 626, as follows:

> 626. Mere amending provisions should not be interpreted so as to alter completely the character of the principal law, unless clear language is found indicating such an intention, and where a statute of limited operation is repealed by one which re-enacts its provisions in an amended form, it need not be presumed that its operation was to be extended to classes of persons hitherto not subject to them. Where, however, expressions of larger meaning are used in an amending statute than in the principal Act, it must be taken that they are used intentionally.

It is the contention of the appellants that the transportation systems contemplated by *The Assessment Act* are systems having to do with providing transportation for passengers (and possibly of commodities) as a service to persons other than the operator of the system. This, it is said, is manifested by the wording of the provisions of the Act and by the previous history of the sections in question. The appellants submit that the amendments, which introduced the words "transportation system" into the Act, should not be interpreted so as to alter completely the character of the law as it existed previously.

The respondent submits that the amendment of s. 37 involved the use of an expression of larger meaning and was made with the intention of enlarging the scope of the exemption conferred by that section. This view was accepted in the Courts below, which held that, in the absence of any statutory definition, and because of the obscurity of the meaning of the phrase, resort must be had

to recognized canons of construction. In this connection, the statement of Lord Haldane in *Lumsden v. Inland Revenue Commissioners*[1], was cited:

> The duty of a court of construction in such cases is not to speculate on what was likely to have been said if those who framed the statute had thought of the point which has arisen; but, recognizing that the words leave the intention obscure, to construe them as they stand, with only such extraneous light as is reflected from within the four corners of the statute itself, read as a whole.

They concluded that the words in question here should be given their literal meaning, and that, on that basis, the respondent did operate a transportation system within the meaning of s. 37(4).

The brief summary of the amendments, as a result of which the words "transportation system" appeared in *The Assessment Act,* shows that this composite term was used, in various sections, in replacement of the words "tramway", "street railway", "electric railway", "incline railway", "railway" and "railway company". In the section with which we are concerned, s. 37, they replaced the words "tramways, street railways and electric railways" in subs. (1) and "electric railway" in subs. (4). Those words were not apt to describe a transportation system such as that operated by the respondent. They did describe those kinds of transportation systems which would be expected to operate on public highways.

The question then is, did the amendment which has resulted in the words "transportation system" appearing in s. 37 have the effect of extending the scope of subs. (4) so as to make it apply to an entirely different kind of a transportation system?

With respect, I do not think that the amendment did have that effect. I have reached the conclusion that "extraneous light" is cast on the meaning of the words "transportation system" as used in subs. (4) not only by the previous history of that subsection, but by the context in which the words are used in s. 37 as a whole.

In subs. (4) the words used are "such a transportation system". In order to determine the kind of transportation system referred to in that subsection it is necessary to refer back to the previous subsections.

[1] [1914] A.C. 877 at 887, 84 L.J.K.B. 45.

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Subsection (1) deals with the place in which a certain kind of land is to be assessed. The subject-matter of such assessment is "the property by subclause v of clause i of section 1 declared to be 'land' ". The kind of property mentioned is, therefore, "structures and fixtures erected or placed upon, in, over, under or affixed to any highway, lane, or other public communication or water".

Subsection (1) of s. 37 therefore deals with fixtures on public highways and communications, and it deals with property of that kind owned by certain classes of companies or persons; namely, those who

1. Supply water, heat, light and power to municipalities and the inhabitants thereof.
2. Operate transportation systems.
3. Distribute by pipe line natural gas, manufactured gas or liquefied petroleum gas or any mixture of any of them.

Classes 1 and 3 are clearly public utility operations which make use of highways for their pipes, poles, electric wires or electric conduits. In my opinion the kind of transportation system which would be making use of highways for its rails would be of like character; namely, a utility rendering service to the public.

Subsection (2) of s. 37 contemplates the kind of company which might have its properties extending through two or more municipalities, and its reference to "such company or person" relates back to the kind mentioned in subs. (1).

Similarly, when subs. (4) mentions "such transportation system" it means one which is operated by the kind of person or company referred to in subs. (1).

In my opinion, therefore, the words "transportation system", as used in subs. (4) of s. 37, have a limited meaning and refer to a system which is operated to provide transportation as a service to the public, and not one which is operated, almost entirely, for the transportation by a company, on its own premises, of its own goods, as a part of its manufacturing business.

In *Union of South Africa (Minister of Railways and Harbours) v. Simmer and Jack Proprietary Mines*[1], Lord Sumner, at p. 596, said:

> In the opinion of their Lordships, it is not a legitimate interpretation of mere amending provisions to hold that they completely alter the character of the principal laws, unless clear language is found indicating such an intention.

The interpretation which the respondent seeks to place on the amendment made in 1944 does involve a complete alteration of the character of the section, and, for the reasons already stated, I do not find clear language indicating such an intention.

The foregoing statement by Lord Sumner is the basis for the first portion of the principle enunciated in Halsbury, previously cited. The last sentence in Halsbury's statement, that "where expressions of larger meaning are used in an amending statute than in the principal Act, it must be taken that they are used intentionally", is founded on the words of Lord Esher, M.R., in *Hurlbatt v. Barnett & Co.*[2] In that case the change in wording in the amending statute clearly manifested an intention to extend the jurisdiction of the Court in respect of references to the official referee.

In the present case I agree that the words "transportation system" were used intentionally in s. 37. A composite term was used in subs. (1) to replace "tramways, street railways and electric railways". The application of subs. (4) had previously been limited to "electric railways" only. The amendment made it clear that the exemption in subs. (4) was not limited to that type of a transportation system. But, for the reasons already outlined, I do not find an intention to broaden the application of the section to the extent that the respondent contends.

It has already been noted that the respondent had the corporate power to carry on the business of the transportation of passengers or goods. This, however, does not assist in determining whether the transportation system which the respondent did operate fell within s. 37(4). For the reasons previously given I do not think that it did because of the fact that, complex as that system undoubtedly was,

[1] [1918] A.C. 591, 87 L.J.P.C. 117.
[2] [1893] 1 Q.B. 77 at 79, 62 L.J.Q.B. 1.

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its primary function was the transportation within the respondent's plant area of the respondent's own property, as an incident of its manufacturing operations. The respondent did not operate a transportation system for the provision of a service to the public.

In my opinion, therefore, the appeal should be allowed, the judgment at the trial should be set aside and the respondent's action should be dismissed, with costs to the appellants throughout.

*Appeal allowed with costs.*

*Solicitors for the defendants, appellants: Wishart, Noble & Nori, Sault Ste. Marie.*

*Solicitors for the plaintiff, respondent: McMillan, Binch, Stuart, Berry, Dunn, Corrigan & Howland, Toronto.*

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*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.