52, 1935

No. 11 of 1935.

In the Privy Council.

ON APPEAL

FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

BETWEEN—

THE BELL TELEPHONE COMPANY OF CANADA - - (Defendant) *Appellant*

— AND —

LA VILLE St. LAURENT (Plaintiff) *Respondent.*

CASE FOR THE APPELLANT.

RECORD.

1. This is an appeal from the judgment of the Court of King's Bench for the Province of Quebec (Appeal Side) dated June 20th 1934, reversing in part a judgment of the Circuit Court for the District of Montreal dated June 28th, 1933, and condemning the Defendant (the present Appellant) to pay to the Plaintiff (the present Respondent) the sum of $3155·25 for municipal and school taxes together with interest and costs. pp. 67-69. pp. 50-54.

2. The action was brought for the recovery of municipal and school taxes imposed upon the immoveables of the Appellant situate within the Respondent Municipality for the years 1926, 1927 and 1928. pp. 9-11.

3. The taxes claimed for the years 1926 and 1927 were levied upon the assessed value of $25,000 placed upon the poles, cables, wires and conduits of the Appellant.

4. The assessment against the Appellant upon which the taxes for the year 1928 were levied, was for $45,000 being $20,000·00 in
p. 14, ll. 25-28. excess of the assessment for the previous years. This increased valuation and assessment was due to the inclusion amongst the immoveable facilities of the Appellant liable to assessment, of a certain telephone switchboard, and associated equipment belonging to the Appellant and located in premises of which the Appellant was
p. 14, ll. 30-32. not the owner but merely a tenant under a lease.

pp. 11-12. **5.** While in the pleadings as filed the Appellant contested the right of the Respondent to recover any of the taxes claimed, by a
p. 13. pleading subsequently filed the Appellant confessed to judgment for all taxes claimed except those levied upon the assessment of the switchboard above referred to and which had been valued for assessment purposes at $20,000·00. The said confession of judgment was
p. 14, ll. 43-44. refused by the Respondent.

p. 14, ll. 25-28. **6.** As a result of such confession of judgment the only question remaining for determination in this action was whether the Appellant is liable to be assessed upon the value of the said switchboard and liable for the taxes levied thereon.

p. 54, ll. 38-48. **7.** The Circuit Court (Rivet, J.) upheld the contention of the Appellant and quashed Respondent's tax or collection roll for the year 1928 *quoad* the assessment of the Appellant's telephone switchboard valued at $20,000·00; gave judgment in favour of Respondent for the amount of Appellant's confession of judgment, to wit: $2,516·81 with interest at the rate of 6% per annum on $2,250 and at the rate of 5% per annum on $266·81 and costs up to the date of the confession of judgment, and dismissed the Respondent's action for the surplus, i.e., the taxes assessed against the switchboard and awarded the Appellant its costs for all proceedings subsequent to the date of its confession of judgment.

8. The Respondent appealed from this judgment to the Court of King's Bench (Appeal Side) complaining that its full claim should have been allowed and that Court (Bernier, Bond, Galipeault,
pp. 67-69. St. Jacques and Walsh, JJ.) maintained the appeal and condemned the Appellant to pay to Respondent the full amount sued for, with costs.

p. 15, l. 24. **9.** The switchboard in question is of the manual type known
p. 16, l. 5. as No. 1-92 Jack. It is made up of seven units or sections. Each unit consists of a cabinet containing an assembly of wires and electrical apparatus for connecting together the telephone circuits of the Appellant's subscribers as shown in the photographs (see separate documents, Exhibits D1 to D4). The number of units or

sections can be increased or reduced according to the exigencies of the service. p. 16, ll. 40-43. p. 18, ll. 4-10.

10. Associated with the switchboard is certain equipment consisting of distributing frame (see separate documents Exhibits D5 and D6), relays, rectifiers and ringing machines. p. 17, ll. 25-49. p. 18, ll. 11-25.

11. The switchboard and associated equipment are located in a house of which the Appellant is not the owner but which it occupies as lessee. They are there only temporarily pending the erection of a permanent Appellant-owned dial building in that district. p. 14, ll. 30-32. p. 15, ll. 26-28.

12. The switchboard and equipment were heretofore used in other exchanges and when no longer required they were transferred to and used in the central office in St. Laurent. The switchboard and the equipment rest on the floor of the said premises by their own weight and are not fastened there with iron or nails, embedded in plaster, lime or cement, but on the contrary the whole of it can be removed without breakage or without destroying or deteriorating any part of the property in which they are located. p. 17, ll. 13-15. p. 18, ll. 7-10. p. 18, ll. 40-43.

13. The wires which form the Appellant's telephone lines in the Town of St. Laurent and which are located upon or under the streets and highways of said Town are carried into the premises of which the Appellant is tenant by means of underground conduits and there terminate upon the main distributing frame (see separate documents, Exhibits D5 and D6). p. 20, ll. 7-40. p. 20, l. 10.

14. The switchboard in question is similar to the many private branch exchange switchboards which the Appellant installs in subscribers' premises when a great number of lines are required. Some of these have more lines than are served by the switchboard here in question. p. 47, ll. 46-49. p. 48, ll. 4-50. p. 49, ll. 20-28.

15. The Respondent being entitled to tax the Appellant upon its immoveables only the main reasons given by the Trial Judge for his decision were :—

(a) That the switchboard in question, undoubtedly a moveable when brought into the premises, had not lost its character because of its connection with the telephone lines of the Appellant; p. 52, ll. 42-43.

(b) That in order to constitute an immoveable by nature within the meaning of the Civil Code of the Province of Quebec a construction or "bâtiment" must adhere to or be itself in contact with the soil; p. 52, ll. 47-48.

(c) That not being an immoveable within the above meaning the switchboard in question was not assessable. p. 54, ll. 33-34.

16. The main reasons given in the formal judgment in the Court of King's Bench were:—

p. 68, ll. 32-37. (a) That the telephone switchboard in question does not form part of the building in which it is installed and is not placed therein to complete the same but in order to complete the telephone system of the Appellant, which system is immoveable property; that said switchboard is necessary to operate the telephone system, being connected with cables placed in the soil, which cables are the property of the Appellant;

p. 68, ll. 39-43. (b) That the said switchboard forms an integral and essential part of the system of the Appellant, and that without the switchboard the poles, cables and wires would be of no use whatsoever; and, that in order to constitute Appellant's telephone system it is necessary and essential to have the said switchboard, the poles and the cables.

pp. 69-72. **17.** Bernier, J., gave as reasons for judgment:—

p. 70, ll. 14-16. (a) That telephone, telegraph and power systems are immoveables;

p. 70, ll. 44-48. (b) That it does not matter whether the switchboard be installed in a building belonging to a third party or in a building belonging to the Appellant; in either case it could be removed but the telephone system would be incomplete;

p. 71. (c) That the "switchboard" is necessary for the operation of a telephone system; it is one of its essential elements; it is connected with the cables placed in the soil and which belong to the Appellant;

p. 71, ll. 11-17. (d) The facts that the switchboard was in itself and prior to its being connected to the system, a moveable, and that it can be moved from one place to another on the system, do not take from it its immoveable character when and from the time it is installed for the purpose of supplying telephone service to the residents of the Town of St. Laurent; if removed from its actual location it will be necessary to install it in some other location.

p. 72. (e) That from the time the switchboard is attached or connected, by means of the cables or wires, with the system of which it forms part, whether it be placed in a third party's or in the Appellant's premises or merely fixed to a pole, it adheres to the poles and cables which themselves in turn adhere to the soil;

it forms a unit with the poles, cables and underground conduits, it is therefore an immoveable by nature.

18. Bond, J., concurred in the reasons of Bernier, J., p. 72.

19. Galipeault, J., gave no reasons. p. 73.

20. St. Jacques, J., gave the following reasons for judgment :— pp. 73-75.

That there is no legal justification for a distinction being made between the wires which form an essential part of the system and are immoveables for the sole reason that they are connected with the poles, themselves placed in the soil, and a special assembly of wires which constitute what we call a telephone switchboard and which itself undoubtedly forms an integral part of the system. p. 75, ll. 22-27.

21. Walsh, J., gave as reasons for judgment :— pp. 76-77.

(a) That the Appellant's telephone system in the Town of St. Laurent would not be complete without the switchboard; p. 77, ll. 29-30.

(b) That the switchboard has lost its character as a moveable, when it became incorporated in the system. p. 77, ll. 35-36.

22. The Appellant respectfully submits, that the Court appealed from, erred in holding that the switchboard was assessable as an immoveable.

23. The right of the Respondent to impose and levy the taxes in issue in this appeal is conferred by Section 521 of the Cities and Towns Act (Revised Statutes Quebec, 1925, c. 102), which provides in part as follows :—

> "The council may impose and levy, annually, on every immoveable in "the municipality, a tax of not more than two per cent. of the real value as "shown on the valuation roll."

24. The Cities and Towns Act contains no definition of the word "immoveable", consequently in order to ascertain whether a telephone switchboard is an immoveable and accordingly liable to assessment under said Act, reference must be had to the Civil Code, Province of Quebec (Articles 376 *et. seq.*).

25. The Civil Code (Article 375) establishes four classes of immoveables to wit : 1o. by nature; 2o. by destination ; 3o. by reason of the object to which it is attached; 4o. by determination of the law.

26. A switchboard clearly could not be an immoveable by reason of the object to which it is attached because this class is limited to incorporeal rights in property (Article 381); nor could it be held to be an immoveable by determination of law because this

latter class is limited to moveable property of which the law ordains or authorizes the realization such as the capital of unredeemed constituted rents (Article 382).

27. The switchboard in question cannot be an immoveable by destination because it is not attached for a permanency to the premises in which it is located, nor has it been placed in said premises by the proprietor thereof (Articles 379-380). The Appellant is not the owner, but a tenant only of the premises in which said switchboard is located.

28. The said switchboard cannot be an immoveable by nature, because it is neither "land", nor is it a "building" within the meaning of Article 376 of the Civil Code.

29. In its judgment in the case of *Belair v. Ville de Ste. Rose* (63 S.C.R. 526) the Supreme Court of Canada decided that the word "buildings" as used in Article 376 of the Civil Code must be interpreted so as to include "constructions" and accordingly held that a bridge over a river resting on piers was an immoveable by nature because it was a structure permanently affixed to the soil or bed of the river. By a further decision in the case of *Montreal Light, Heat & Power Cons. vs. City of Westmount* (1926 S.C.R. 515) the same court extended its interpretation of the word "immoveable" to include gas mains, and poles, wires and transformers forming the electrical distribution lines of the Montreal Light, Heat and Power Consolidated, but on the authority of the decision of the Court of Limoges in France in *re Liquidation de la Société Générale de Papeterie vs. Delor* (Sirey, Recueil général des lois et des arrêts, 1888, Partie 2, p. 205), declined to so treat the meters located in its customers' premises. Finally this Honourable Board in its decision in *Montreal Light, Heat & Power Consolidated v. City of Outremont* (1932 A.C., 423) decided that gas mains constituted an immoveable because they were "physically "a construction fixed in the earth."

30. It is to be noted that in each of the above cases the objects which were held to be immoveables were by the manner of their construction directly embedded in the soil or affixed to supports embedded in the soil. It is therefore submitted that in order to constitute a "building" within the meaning of Article 376 Civil Code, the "construction" must be adherent to or be incorporated with the soil in such a manner as to cause the structure to become realty; and this essential element is lacking as regards the switchboard in question which after all is a piece of machinery, not incorporated into the building in which it is to be found but temporarily placed there by one who is merely a tenant of the premises.

31. Nor can it be contended that the requirement of adherence to the soil is met by the fact that the switchboard is connected with things such as underground cables. The object itself i.e. the switchboard must adhere to the soil. Without that element you cannot have an immoveable by nature.

32. Neither can it be said that the mere fact of an object being connected to a telephone "system" renders such object an immoveable; to so hold would necessitate the interjection of a new criterion in addition to those established by the Civil Code for distinguishing moveables from immoveables.

33. The argument advanced by Respondent that an object is immoveable by nature the moment it is an essential part of a "system" comprised of immoveables by nature, is contrary to and would destroy the whole economy of the Civil Code and the Code of Civil Procedure as to the rights and privileges upon different classes of property and more particularly the landlord's privilege upon the chattels brought upon the leased premises (Articles 1619-1994-2005 Civil Code) and the right to revendicate given to the owner of a chattel under 946 and fol. Code of Civil Procedure; thus if in the present case the switchboard is held to be an immoveable the Appellant's landlord would be deprived of his privilege thereon to secure his rent and the Appellant would be prohibited from revendicating the same.

34. The Appellant therefore respectfully submits that this Appeal should be allowed and the judgment of the Court of King's Bench (Appeal Side) reversed and the judgment of the Circuit Court restored for the following among other

REASONS.

(1) Because the switchboard in question is not an immoveable and therefore not taxable.

PIERRE BEULLAC.

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