[PRIVY COUNCIL.]

BELL TELEPHONE COMPANY OF CANADA . . . . . APPELLANT;

AND

VILLE ST. LAURENT . . . . . RESPONDENT.

J. C.* 1935 July 25.

ON APPEAL FROM THE COURT OF KING'S BENCH, QUEBEC (APPEAL SIDE).

Canada (Quebec)—Municipal Law—Municipal and School Taxes—Telephone Switchboard—Not "Immoveable by its Nature"—Incorporation with, or Adherence to, the soil—Civil Code, art. 376—Cities and Towns' Act (R. S. Q., 1925, c. 102), s. 521—Education Act (R. S. Q., 1925, c. 133), s. 249.

A telephone switchboard with associated equipment belonging to the appellant company and connected with its telephone system by wires and cables was so placed in premises of which the company was lessee as to rest on the floor without being attached thereto:—

Held, that the switchboard and its equipment, not being a structure incorporated with or adherent to the soil, or physically incorporated as part of a structure which was incorporated with or adherent to the soil, was not a structure "immoveable by its nature" within the meaning of "building" in art. 376 of the Quebec Civil Code. The test whether a structure is "immoveable by its nature" under that article is incorporation with, or adherence to, the soil, or physical incorporation as part of a structure so incorporated with, or adhering to, the soil. The question whether the structure of which it is claimed to be part—in the present case the poles, wires and cables of the appellant's telephone system—is commercially able to operate without its assistance is irrelevant, and it could not be said that the switchboard was physically incorporated in the structure composed of the poles, wires and cables of the appellant's undertaking,

Montreal Light, Heat and Power Consolidated v. *City of Westmount* [1926] S. C. R. 515; and *Montreal Light, Heat and Power Consolidated* v. *City of Outremont* [1932] A. C. 423, explained.

Observations of Rinfret J. in *Lower St. Lawrence Power Co.* v. *L'Immeuble Landry, Ltée.* [1926] S. C. R. 655, pp. 668, 670, approved.

Judgment of Court of King's Bench, Quebec (Appeal Side) (1934) Q. R. 57 K. B. 11, reversed.

APPEAL (No. 11 of 1935) from a judgment of the Court of King's Bench, Quebec (Appeal Side) (June 20, 1934), reversing

* *Present:* LORD ATKIN, LORD TOMLIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and LORD ALNESS.

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a judgment of the Circuit Court for the District of Montreal (June 28, 1933).

The appellant, the Bell Telephone Company of Canada, was the owner of, and operated in the Province of Quebec, a telephone system, part of which was situated within the territorial limits of the respondent, La Ville St. Laurent. That part of the appellant's property consisted of poles, wires, cables, etc., and of a telephone switchboard and associated equipment located in premises of which the appellant was tenant under a lease.

The action was brought by the respondent for the recovery of municipal and school taxes imposed upon the immovables of the appellant situated within the respondent municipality for the years 1926, 1927 and 1928. 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. The assessment upon which the taxes for 1928 were levied was for $45,000, the $20,000 in excess of the assessment for the previous years being due to the inclusion amongst the immovable facilities of the appellant of the telephone switchboard and associated equipment.

By their original pleadings the appellant contested the right of the respondent to recover any of the taxes claimed, but by a subsequent pleading confessed to judgment for all taxes claimed except those levied upon the assessment of the switchboard. The confession of judgment was refused by the respondent, and the only question remaining for determination was whether the appellant was liable to be assessed upon the value of the switchboard and liable for the taxes levied thereon.

The Circuit Court (Rivet J.), being of opinion that the switchboard was not immovable because it was not " incorporé au sol," and because it could be easily removed, held that it was non-taxable, and maintained the confession of judgment made by the appellant.

An appeal by the present respondent to the Court of King's Bench (Appeal Side) (Bernier, Bond, Galipeault, Walsh, and St.-Jacques JJ.) was allowed. The Court were of opinion

that the telephone switchboard in question did not form part of the building in which it was installed, and was not placed therein to complete the same, but in order to complete the telephone system of the appellant, which system was immovable property; that the switchboard was necessary to operate the telephone, being connected with cables placed in the soil, which cables were the property of the appellant; that the switchboard formed an integral and essential part of the appellant's system, and that without the switchboard, the poles, cables and wires would be of no use whatsoever. The appeal is reported in Q. R. 57 K. B. 11.

The relevant statutory provisions, and the nature of the physical construction of the switchboard, appear from the judgment of the Judicial Committee.

1935. July 12. *Pierre Beullac K.C.* and *Roger A. Beullac* for the appellant. The right of the respondent to impose and levy the taxes in issue is conferred by s. 521 of the Cities and Towns' Act (R. S. Q., 1925, c. 102), and s. 249 of the Education Act (R. S. Q., 1925, c. 133). Those Acts contained no definition of the word "immoveable," and accordingly reference must be had to the Civil Code. He referred to arts. 374—382 inclusive. The Court of King's Bench had held the switchboard to be an "immoveable by its nature." It was either "immoveable by its nature" or not an immovable at all. The switchboard and the equipment rested on the floor of the premises by their own weight and were not fastened there with "iron or nails, embedded in plaster, lime or cement," (see art. 380 of the Civil Code), but on the contrary the whole of it could be removed without breakage or without destroying or deteriorating any part of the property in which they were located (see art. 380). For a thing to be immovable within the meaning of art. 376 of the Civil Code, direct contact must exist by the thing itself being incorporated in the soil, or by its being attached to a support itself embedded in the soil. Unless it could be said that the floors in the present case were there to support the switchboard there was no analogy between the floors of the premises and the poles acting as a

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support for the wires. There must be adherence to, or incorporation with, the soil. In *Bélair* v. *Ville de Ste.-Rose* (1), a bridge was held to be an immovable by its nature because it was a structure permanently affixed to the soil or bed of the river: in *Montreal Light, Heat & Power Consolidated* v. *City of Westmount* (2) "immoveable" was held to include gas mains, electric poles, wires, cables, etc., and *Montreal Light, Heat & Power Consolidated* v. *City of Outremont* (3) decided that gas mains constituted an immovable because they were "physically a construction fixed in the earth." The switchboard was not immovable by its nature. Reference was also made to *Lower St. Lawrence Power Co.* v. *L'Immeuble Landry, Ltée.* (4), and to Mignault, Droit Civil Canadien, vol. 2, pp. 400–1, 407.

Aime Geoffrion K.C. for the respondent. "Immoveable" in the relevant sections of the statutes imposing the municipal and school taxes must be regarded as having the same meaning as "buildings" ("bâtiments") within the meaning of art. 376 of the Civil Code. It has been decided in *Bélair* v. *Ville de Ste.-Rose* (1), in *Montreal Light, Heat & Power Consolidated* v. *City of Westmount* (2), and in *Montreal Light, Heat & Power Consolidated* v. *City of Outremont* (3), that the term "buildings" used in art. 376 of the Civil Code included not only a building proper, but also a bridge, gas mains, electric poles, wires, cables, etc. The switchboard formed an integral part of the telephone system of the appellant and was therefore part of a "building" and therefore an "immoveable" and as such taxable.

Beullac K.C. replied.

July 25. The judgment of their Lordships was delivered by

LORD THANKERTON. The present action was brought by the respondent on October 29, 1929, for the recovery of municipal and school taxes imposed upon the immovables of the appellant situated within the municipality of the respondent for the years 1926, 1927 and 1928. The taxes

(1) (1922) 63 Can. S. C. R. 526.
(2) [1926] S. C. R. 515.
(3) [1932] A. C. 423.
(4) [1926] S. C. R. 655.

imposed for the years 1926 and 1927 were levied upon an assessed value of $25,000 placed upon " poteaux, fils, cables et tout le systême " ; for the year 1928 the assessed value was increased to $45,000. It is agreed that the increase was due to the inclusion of the value placed upon a switchboard, with its associated plant, which the appellant had brought from another area, and had placed in premises of which the appellant was not the owner, but only a tenant under a lease, and which had been put into service on April 7, 1928.

While in the defence as filed the appellant disputed liability for any of the taxes claimed, the appellant subsequently filed a pleading, confessing to judgment for all the taxes claimed except those levied in 1928 upon the increased value of $20,000 in respect of the switchboard. The confession of judgment was refused by the respondent. Accordingly the only question left in issue is in relation to the switchboard. On this point the appellant succeeded before the Circuit Court, but, on appeal to the Court of King's Bench (Appeal Side), the respondent was successful.

The power of the respondent to levy the municipal taxes is derived from s. 521 of the Cities and Towns' Act (R. S. Q., 1925, c. 102), which provides in part as follows :—

" 521. 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."

The school taxes are levied, under the authority of s. 249 of the Education Act (R. S. Q., 1925, c. 133), upon " all taxable property in the school municipality", which is identified with the subjects taxable in respect of the municipal taxes.

It has been decided by this Board in *Montreal Light, Heat & Power Consolidated* v. *City of Outremont* (1) that the word " immoveable " in s. 521 of the Cities and Towns' Act must bear the meaning given to it by the Quebec Civil Code, the material articles of which are as follows :—

" 374. All property, incorporeal as well as corporeal, is moveable or immoveable.

(1) [1932] A. C. 423, 435.

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" 375. Property is immoveable either by its nature, or by its destination, or by reason of the object to which it is attached, or lastly by determination of law.

" 376. Lands and buildings are immoveable by their nature.

" 377. Windmills and water-mills, built on piles and forming part of the buildings, are also immoveable by their nature when they are constructed for a permanency.

" 378. Crops uncut and fruits unplucked are also immoveable.

" According as grain is cut and as fruit is plucked, they become moveable in so far as regards the portion cut or plucked. The same rule applies to trees ; they are immoveable so long as they are attached to the ground by their roots and they become moveable as soon as they are felled.

" 379. Moveable things which a proprietor has placed on his real property for a permanency or which he has incorporated therewith, are immoveable by their destination so long as they remain there.

" Thus, within these restrictions, the following and other like objects are immoveable :

" 1. Presses, boilers, stills, vats and tuns ;

" 2. All utensils necessary for working forges, paper-mills and other manufactories.

" Manure, and the straw and other substances intended for manure, are likewise immoveable by destination.

" 380. Those things are considered as being attached for a permanency which are placed by the proprietor and fastened with iron and nails, imbedded in plaster, lime or cement, or which cannot be removed without breakage, or without destroying or deteriorating that part of the property to which they are attached.

" Mirrors, pictures and other ornaments are considered to have been placed permanently when without them the part of the room they cover would remain incomplete or imperfect.

" 381. Rights of emphyteusis, of usufruct of immoveable things, of use and habitation, the right to cut timber perpetually or for a limited time, servitudes, and rights of

action which tend to obtain possession of an immoveable, are immoveable by reason of the objects to which they are attached.

" 382. All moveable property, of which the law ordains or authorizes the realization, becomes immoveable by determination of law, either absolutely or for certain purposes. . . . . "

The switchboard in question is of the manual type known as No. 1-92 Jack. It is made up of seven sections, each of which consists of a cabinet containing an assembly of wires and electrical apparatus for connecting the telephone circuits of the subscribers either with one another or with trunk lines. It has certain ancillary equipment, such as a distributing frame, but this equipment affords no additional or separate argument. Apart from the actual physical connecting up of the cables and wires, which are led on to the premises, with the switchboard and its equipment, the latter are not in any way attached, but merely rest on the floor of the premises. On detachment of the physical connection with the cables and wires, the switchboard and its equipment are easily removable, without injury to the premises. As already stated, the appellant is only a tenant of the premises.

Accordingly, the respondent's claim is rested solely on art. 376 of the Code, and on the view that the switchboard is an integral part of that which is admittedly immovable —namely, the poles, wires and cables of the appellant.

The learned trial judge, on a review of the authorities, held that the only test was incorporation in the soil, and that the fact that the switchboard formed part of the telephone system of the appellant was not sufficient to make it become immovable by nature under art. 376 of the Code.

In the Court of King's Bench, the following paragraphs of the judgment express succinctly the reasons for the contrary view taken by that Court :—

" Considérant que dans l'espèce, le tableau téléphonique susdit ne fait pas partie de la bâtisse dans laquelle il est érigé, et qu'il n'est pas placé là pour la compléter, mais qu'il y est pour compléter le système téléphonique, lequel est immeuble ; qu'il est nécessaire pour les opérations du système, étant relié

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aux câbles placés dans le sol, lesquels câbles sont la propriété de la compagnie de téléphone ;

" Considérant qui le dit tableau est une partie intégrante et essentielle du système de la compagnie défenderesse, que sans lui, il n'existerait que des poteaux et des câbles sans utilité, et que pour constituer le système, il faut nécessairement et essentiellement le dit tableau les poteaux et les câbles."

The basis of this conclusion is expressed in the leading opinion, which was delivered by Bernier J., who states that it must now be taken as settled that the whole system—telephonic, telegraphic or similar systems of power transmission—constitutes an immovable. The learned judge cites, as authority for that proposition, three decisions to which their Lordships will shortly refer.

It appears to their Lordships that the above proposition clearly involves, as distinct from consideration of the physical nature of the attachment and whether it amounts to incorporation in the soil, consideration of the purpose which the attachment serves. It is agreed, and indeed it is stated in the first paragraph above quoted, that the physical attachment of the switchboard to the premises is insufficient to make it immovable by nature.

The earliest of the three decisions is *Montreal Light, Heat & Power Consolidated* v. *City of Westmount.* (1) The only property owned by the appellant in that case within the municipality consisted of gas mains, located in the public streets, a system of electric poles, wires and transformers, almost entirely upon the public streets, and meters placed in the houses of the consumers in the municipality. The Supreme Court of Canada held that the gas mains, poles, wires and transformers were immovable, but that the gas meters were not. In delivering the leading judgment, Anglin C.J. stated (2) :—

" The sole question with regard to the statutory power to impose the taxes sued for—municipal and school alike—is whether the subjects of taxation in this instance are immovables within the meaning of that term as used in art. 5730 of

(1) [1926] S. C. R. 515. (2) Ibid. 520.

the R. S. Q., 1909. That question formed the principal matter of discussion at bar; but, while not free from difficulty, it would seem to be concluded adversely to the appellant by the decision of this court in *Bélair* v. *Ste.-Rose* (1) as to the gas mains and electric poles and wires, which, for the reasons there stated, must be regarded as 'buildings' (bâtiments) within the meaning of art. 376 C. C. and, therefore, 'immovable by their nature.' In that case three things were distinctly held: (*a*) that the scope of the word 'immovable' in art. 5730 (R. S. Q., 1909) is to be ascertained by reference to the provisions of the Civil Code, arts. 376 *et seq*: (*b*) that the word 'buildings' (bâtiments) in art. 376 C. C. is used in the sense of 'constructions'; (*c*) that it is immaterial to its taxability under art. 5730 that a construction is erected on land which does not belong to the person who owns the construction. There is no distinction in principle which would justify the taxation of the bridge in that case under art. 5730 as an immovable and warrant the exemption of the appellant's gas mains, and electric poles and wires in the present case as movables. The materials of which the structures—bridge and distribution systems alike—were comprised were all movables before being placed *in situ* and made part of such structures. Once incorporated in the structures, however, the materials lost that character; and the structures themselves took on the character of immovables.

"Nor does it appear to matter for the present purpose whether the immobilisation of the pipes, poles and wires be attributed to their physical connection with the land in or upon which they are placed, or with the buildings from which they radiate as parts of a distribution system. In either view they are immovables actually (in the sense of physically) situated in the municipality and thus 'come within the letter of the law' which confers the power to tax. *Partington's* case. (2) The immobilisation of the transformers may not be so clear. But they are usually attached to the company's

(1) (1922) 63 Can. S. C. R. 526.

(2) *Partington* v. *Attorney-General* (1869) L. R. 4 H. L. 100.

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poles and form an integral part of the system quite as much as the wires strung on the poles to carry the current."

It may be noted that the transformers so referred to were firmly tied by wires and metal braces to the posts supporting the electric wires.

The proposition expressed by Bernier J. in the present case appears to have been derived from the second paragraph above quoted, but, in their Lordships' opinion, the language of Anglin C.J. does not warrant such inference. He clearly predicates that the materials must be physically incorporated as part of the structure which is itself incorporated in the soil. He clearly held that the wires and transformers were physically incorporated with the poles. The poles were in fact embedded in the soil, but the learned Chief Justice was also ready to regard the whole physical system of pipes, poles and wires as one incorporated physical structure. The element of commercial usefulness of that structure with or without any of its component parts is not referred to by him at all. In their Lordships' opinion, that case gives no warrant for the proposition laid down by the King's Bench Court in the present case.

The second decision is *Lower St. Lawrence Power Co.* v. *L'Immeuble Landry, Ltée.* (1), in which, following the above decision, it was held that the pipes, poles, wires and transformers of an electric lighting system, erected in, and on, the public streets of a municipality were immovables; it was further held that the fact that they had been sold separately from the original generators, for the purpose of being later connected to generators belonging to the buyer did not cause them to lose the character of immovables. The opinion of the majority of the Court, which included Anglin C.J., was delivered in a very able judgment by Rinfret J., in which he reviews at length the judicial decisions and also the opinions of well-known jurists, from which he derives the following propositions (2):—

" La très grande majorité des commentateurs enseigne qu'il n'est pas nécessaire que la construction, pour être considérée

(1) [1926] S. C. R. 655. (2) Ibid. 668, 670.

comme immeuble par nature, soit fixée au sol à perpétuelle demeure. Il suffit que l'incorporation ne soit pas purement passagère et accidentelle. C'est le fait de l'attachement au sol que la loi considère. La condition de rigueur est que ' la construction, quelle qu'elle soit, fasse corps avec le sol ' ; qu'elle y soit ' cohérente', suivant l'expression de Pothier, ou ' adhérente,' suivante celle de Laurent. C'est toujours la régle : *Quod solo inaedificatur, solo cedit.* . . . . De même, les bâtiments ou autres ouvrages unis au sol sont immeubles par leur nature, qu'ils aient été construits par le propriétaire du fonds ou par un tiers possesseur ; et ce, dans le cas même ou le tiers constructeur se serait réservé la faculté de les démolir lors de la cessation de sa jouissance. . . . . Ce résau, d'après l'opinion la plus générale, est un immeuble par lui-même, en tant que construction adhérente au sol, et non pas seulement comme faisant partie intégrante de l'usine génératrice de l'électricité."

These passages, with which their Lordships are in accord, do not support the proposition of the Court of King's Bench.

The third decision referred to by Bernier J. is the decision of this Board in *Montreal Light, Heat & Power Consolidated* v. *City of Outremont* (1), in which the decision of the Supreme Court in the *City of Westmount* case (2), so far as relating to gas mains laid in the public streets, was challenged, but was approved of by this Board. The reasoning of the majority of the Supreme Court contained in the judgment of Anglin C.J. was held to be well founded, and Lord Tomlin, in delivering the judgment of the Board, said (at p. 436) : " What then is an ' immovable ' under the Civil Code ? A gas main laid in the earth is an ' immoveable ' in the sense that it is physically a construction fixed in the earth, though the individual pipes of which it is made up were moveable before they came to form part of the construction. . . . . The gas mains were never moveables, though constructed out of things which were moveables." This case likewise affords no support to the proposition of the Court of King's Bench.

In their Lordships' opinion, the existence of a building

(1) [1932] A. C. 423. (2) [1926] S. C. R. 515.

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which is immovable by its nature under art. 376 involves two things—namely, that you have a structure and that such structure is incorporated with, or adherent to, the soil. In the present case, the switchboard with its equipment, admittedly, is not itself incorporated with, or adherent to, the soil. Is it then part of a structure which is so incorporated or adherent? As shown by the cases cited, it must be physically incorporated as part of the structure. The question whether the structure of which it is claimed to be part, is commercially able to operate without its assistance is irrelevant, in the opinion of their Lordships, and, apart from that suggestion, it is clearly incorrect to say that the switchboard is physically incorporated in the structure composed of poles, wires and cables belonging to the appellant's undertaking.

Their Lordships agree with the reasoning of the Trial Judge, and they are of opinion that the judgment of the Court of King's Bench should be reversed and that of the Trial Judge restored, the appeal being allowed with costs to the appellant throughout. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Lawrence Jones & Co.*
Solicitors for respondent: *Blake & Redden.*