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* May 7.
* June 29.

MARITIME TELEGRAPH AND TELEPHONE COMPANY LIMITED..... APPELLANT.

AND

THE MUNICIPALITY OF THE TOWN OF ANTIGONISH ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Assessment and taxation—Telephone company—Personal property in town—"Actual cash value"—Basis on which assessors must estimate—Rule 2 of section 17 of The Assessment Act, N.S. Statute of 1938, chapter 2.

The appellant company provides telephone service throughout the province of Nova Scotia, including the respondent town. This appeal involves the municipal assessment of that town for 1939 in respect of the personal property of the appellant company within the municipality. The personal property consisted of certain central office equipment, switch board and testing apparatus, telephone poles, wires, cables, etc., some 300 telephone stations in residences and business places and equipment of various kinds. The total cost as installed from time to time amounted to $32,505.67. The *Assessment Act*, chapter 2 of the Nova Scotia Statutes of 1938 enacts by section 17, rule 2, that "all property liable to taxation shall be assessed

* PRESENT:—Crocket, Davis, Kerwin, Hudson and Taschereau JJ.

at its actual cash value, such value being the amount which in the opinion of the assessor it would realize if offered at auction after reasonable notice." The assessors of the municipality fixed the value of the personal property in question at $10,800. Then the appellant company, pursuant to section 28(2) filed a sworn statement "of the actual cash value" of the property at a sum of $3,200 and the assessors, by section 29, were bound to adopt such valuation. But the municipal clerk, as entitled by the statute, appealed to the "Assessment Appeal Court," which restored the assessors' valuation of $10,800. The appellant's appeals, first to the County Court and later to the Supreme Court of Nova Scotia *en banc,* were dismissed, the latter Court holding that in assessing the personal property of a telephone company within a town the "actual cash value" thereof was to be estimated on the value of the property as it stands, an integrated system ready to operate within the town, dissociated from the rest of the company's system outside the town, and not at "scrap-iron" value. By special leave of the last mentioned Court, granted on terms, the appellant appealed to this Court.

Held, affirming the judgment of the Supreme Court of Nova Scotia *en banc* (14 M.P.R. 387), that the appeal should be dismissed and that the assessment fixed by the assessors at $10,800 which had been confirmed by all the Courts below, should be maintained.

Per Crocket and Taschereau JJ.—The property should be assessed as it stands and not as discarded junk. Moreover, the decision of the assessors should not be disturbed, as it has not been shown that they made their valuation without fully appreciating their duty under the statute.

Per Davis J.—Although it has always been a difficult problem to fix the value of such personal property as part of a telephone system within a given municipality, the three municipal assessors in this case were practical men engaged in assessment work for many years; and when their valuation has been confirmed by three successive courts the assessment should not be disturbed unless it has been plainly demonstrated to the Court that some error in principle has been applied and has resulted in an excessive amount; and this has not been shown.

Per Kerwin and Hudson JJ.—There is some evidence that the appellant's personal property has been assessed at its actual cash value in accordance with rule 2 of section 17 of the *Assessment Act.* That value must be fixed without considering the property as an integral part of the appellant's system, and there is evidence from two witnesses that they had fixed the value on that basis. Therefore there should be no interference with the assessment.

APPEAL, by special leave to appeal granted on terms, from the judgment of the Supreme Court of Nova Scotia, *en banc* (1), affirming the judgment of the County Court, MacDonald (Allan) J., and maintaining an assessment made under the provision of the *Assessment Act* of certain property belonging to the appellant company.

(1) (1940) 14 M.P.R. 387.

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The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

J. G. Rutledge K.C. and *C. B. Smith K.C.* for the appellant.

J. S. Roper K.C. for the respondent.

The judgment of Crocket and Taschereau JJ. was delivered by

CROCKET J.—The main ground, upon which the judgment of the Supreme Court of Nova Scotia *en banc* has been challenged on this appeal, is that the impeached assessment was not made on the basis of the break-up or sale and removal value of the constituent parts making up the personal property in question, in accordance with the principle of assessment laid down in *Bell Telephone Co.* and *The City of Hamilton* (1), over 40 years ago. All the five judges of the Nova Scotia Court, sitting *en banc*, agreed that the Ontario so-called "scrap-iron" rule was not applicable to the assessment of the appellant's poles, wires, cross-arms, cables, etc., comprised in the appellant's telephone system within the Town of Antigonish, under the provisions of rule 2 of s. 17 of the Nova Scotia *Assessment Act*. This section provides as follows:

> All property liable to taxation shall be assessed at its actual cash value, such being the amount which, in the opinion of the assessor it would realize in cash if offered at auction after reasonable notice, but in forming such opinion the assessor shall have regard to the assessment of other properties of its class in the Town or Municipality.

I think the Nova Scotia Court was right in so holding and dismissing the appellant's appeal from the judgment of the County Court Judge of the District (Judge Allan MacDonald), who, on appeal from the Municipal Assessment Appeal Board of the Town, confirmed the assessment of $10,800, made by the assessors of the town in respect of the appellant's personal property therein.

The above rule presents no difficulty when considered in its application to the assessment either of real estate or personal property in the sense in which these classes of property are ordinarily understood. There can be no doubt that it was intended to apply to both in the same

(1) (1898) 25 O.A.R. 351.

way, though it makes no mention of either real property or personal property. Its opening words are "All property liable to taxation shall be assessed," etc. No one has suggested that any of the property of the appellant company within the limits of the Town of Antigonish, real or personal, is not liable to taxation. The whole difficulty here arises from the fact that the assessed property, including poles, fixed in the ground, and the cables, wires, etc., attached thereto, connecting with their telephone instruments in stores, business and private houses, were all part of the integrated system extending to and operated by the appellant company throughout many other municipalities in the Province under its franchise, and that the appellant itself in the inventory of its property, which it produced on the hearing before the County Court Judge, listed and valued these as personal property on the footing of their having been completely severed from its system and discarded as mere junk. If the rule applies at all to the assessment of such property—and it has not been contested that it does—it is impossible, I think, reasonably to spell out of its language an intention that the local assessors, when determining its value for assessment purposes, must regard it, not in the form or condition in which the property then exists, but as though all the poles, cables, etc., had first been removed and stripped of all value except that which it might possess as a collection of junk.

While this rule unmistakeably makes the amount, which in the opinion of the assessors the property (whatever it may be) would realize in cash if it were offered at auction, the criterion for determining its "actual cash value" for assessment purposes, it lays down no other principle for the guidance of the assessors in determining that amount than that they "shall have regard to the assessment of other properties of its class in the town or municipality." If there be no other property of the same class in the town or municipality, as all the judges below seem to have held in the present case, the assessors in forming their opinion as to what any particular property would realize on such a hypothetical auction are left perfectly free to consider any and all factors or elements which their own common sense dictates to them as likely to influence the auction price obtainable therefor. This may

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seem to be a very uncertain and unsatisfactory standard for the determination of the "actual cash value" of any property for municipal assessment purposes, especially when it has to be applied to the poles, cables, etc., forming part of an integrated telephone or telegraph system covering a number of municipalities; but it is the only standard the Legislature has prescribed. In doing so it apparently could do nothing else than leave the determination of the amount likely to be realized on such a hypothetical auction to the judgment of the local assessors, unhampered by any other principle than that of the exercise of their own common sense.

If it be true that the property must be assessed as it stands, and not as discarded junk, as I think it must be and as all the Judges below thought it must be, the decision of the Board of Assessors cannot to my mind well be disturbed unless it is clearly shown that they made their valuation without fully appreciating that it was their duty to do so upon the basis of what they honestly believed the property would realize if it were offered for sale at such an auction. There is nothing in the record which even suggests that the Board had not a clear conception of its duty in this respect. The fact that in determining that amount the assessors regarded the property as an integral part of the appellant's entire provincial system, as it was then being operated, affords no ground for setting aside the assessment. Indeed with all respect, I cannot for my part see how the assessors, in appraising the property as it stood, could well do otherwise than regard it as such, for surely it was their duty to consider the existing condition of the property to be offered for sale, as well as all other matters which they might reasonably expect to affect its auction value.

For these reasons I would dismiss the appeal with costs.

DAVIS J.—The appellant is a joint stock company which provides telephone service throughout the province of Nova Scotia, including the town of Antigonish. This appeal involves the municipal assessment of the town of Antigonish for the year 1939 in respect of the personal property of the appellant situate within the municipality. The personal property in question consists of certain central office equipment, switch board and testing apparatus, telephone

poles, wires, cables, etc., some 300 telephone stations in residences and business places and equipment of various kinds. The total cost of the materials as installed from time to time amounted to $32,505.67.

The *Assessment Act,* now consolidated without material change as ch. 2 of the Nova Scotia Statutes of 1938, provides by sec. 17, rule 2, that

> All property liable to taxation shall be assessed at its actual cash value, such value being the amount which in the opinion of the assessor it would realize in cash if offered at auction after reasonable notice but in forming such opinion the assessor shall have regard to the assessment of other properties of the like class in the town or municipality.

The assessors of the municipality fixed the value of the personal property in question at $10,800 and they gave notice in writing to the appellant corporation, as required by sec. 28 (1), "of the value at which they estimate" the personal property of the appellant. If such valuation is objected to, then by sec. 28 (2) the managers or agents of the corporation may within fourteen days furnish to the assessors a written statement under the oath of such managers or agents "of the actual value" of the property assessed. By sec. 29 the assessors shall then adopt the valuation sworn to and such valuation shall be binding, subject only to appeal by the clerk of the municipality under the provisions of the Act.

What purported to be, and appears to have been accepted as, a sworn valuation on behalf of the appellant as permitted by the statute was furnished by the appellant to the assessors. The amount given was $3,200. The municipal clerk, as entitled by the statute, appealed to the municipal appeal body constituted under the statute to hear assessment appeals and known as the "Assessment Appeal Court." That Court restored the assessors' valuation of $10,800. The appellant then appealed to the County Court. That appeal was dismissed. The appellant then appealed to the Supreme Court of Nova Scotia *en banc.* That appeal was also dismissed by the decision of the majority of that Court. By special leave of the last mentioned Court, granted on terms, the appellant appealed to this Court.

Counsel for the appellant sought before us to appeal against the condition of the order granting it leave to appeal (that the appellant should pay in any event to

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the respondent its costs of and incidental to the appeal to this Court) but the appellant took advantage of the order and cannot now object to the condition on which the order was granted.

It is to be observed, at the outset, though the point does not appear to have been taken, that the manager's sworn statement was not a compliance with the statute. It was not a written statement under oath "of the actual value" of the property. It was a statement guardedly limited to the oath of its maker "that the actual cash value of the personal property . . . is, for the purpose of taxation as defined in the *Assessment Act,* the sum of $3,200." However no objection was taken.

It is always a difficult problem to fix the value of such personal property as part of a telephone system within a given municipality. But the three municipal assessors were practical men engaged in assessment work for many years and when their valuation has been confirmed by three successive courts an appellant has a formidable task in seeking to escape from the assessment; it must be plainly demonstrated to the Court that some error in principle has been applied and has resulted in an excessive assessment. This has not been shown, in my opinion, and I would therefore dismiss the appeal with costs.

KERWIN J.—I would dismiss the appeal with costs. I agree with the Chief Justice of Nova Scotia that there is some evidence that the appellant's personal property has been assessed at its actual cash value in accordance with rule 2 of section 17 of *The Assessment Act:*—

> All property liable to taxation shall be assessed at its actual cash value, such value being the amount which in the opinion of the assessor it would realize in cash if offered at auction after reasonable notice but in forming such opinion the assessor shall have regard to the assessment of other porperties of the like class in the town or municipality.

That value, as stated by the Chief Justice, is to be fixed without considering the property as an integral part of the appellant's system. There being evidence from two witnesses who had fixed the value on that basis, we should not interfere with the assessment.

HUDSON J.—The appellant's personal property in the town of Antigonish was assessed for $10,800. From this assessment the appellants appealed to the Judge of the

County Court for District No. 6 and such appeal was dismissed. The appellants then appealed from that decision to the Supreme Court of Nova Scotia *en banc* and that Court also dismissed the appeal.

The assessment was made under the authority of rule 2 of section 47 of *The Assessment Act,* as amended, which reads as follows:

> All property liable to taxation shall be assessed at its actual cash value, such value being the amount which in the opinion of the assessor it would realize in cash is offered at auction after reasonable notice but in forming such opinion the assessor shall have regard to the assessment of other properties of the like class in the town or municipality.

The appellant provides telephone service throughout the province of Nova Scotia, including the town of Antigonish, and it has in the town a building used as a central station from which the telephone system is operated. The assessment of the building is separate and does not come into this controversy.

The contention of the appellant is that on a proper valuation its assessment would be the actual cash value of its poles, wire, cables and other items of a similar character, wholly dissociated as an integrated part of the whole plant and that when so dissociated the personal property is of a very inconsiderable value.

The value of this plant in the books of the company is placed at $32,505.67 but, due to depreciation through the years, this value has now been reduced by the company to somewhat over $3,000 and the company contends that this is the only amount for which it could properly be assessed.

The appeal before the County Court judge was in the nature of a hearing *de novo.* After taking evidence the learned County Court judge came to the conclusion that the assessment was proper. As to the argument on behalf of the company, he stated:

> It is only such personal property of appellant as is situated within the town that may be assessed. But I think consideration of appellant's provincial franchise as excluding the right of a purchaser to operate, or of its earning or non-earning capacity within the town are beside the question in determining assessable value under the Act. And although there is some evidence on these matters I think the proper basis of valuation is to consider what should be the sale value of the personal property as it stands as an integrated system having a definite object and purpose and not taken apart with value limited to each constituent

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part. An auomobile, for example, would be so valued. To constitute personal property it is not necessary that it should be reduced to its constituent parts.

It may thus be regarded as a going concern not, indeed, in the ordinary commercial sense where goodwill in a purchase is an element to be considered, but as a system built for a definite purpose and capable of subserving that purpose.

A majority of the Court *en banc* consisting of Chief Justice Chisholm, Smiley and Carroll JJ. were substantially of the same opinion as the County Court judge, although Chief Justice Chisholm was careful to point out that he gave his judgment

> because I find in the case some evidence that the value of the personal property of the appellant company has been rated at the cash value as defined in rule 2 of section 17 of the *Assessment Act*, namely, the actual value which in the opinion of the assessors it would realize in cash if offered at auction after reasonable notice. Two of the witnesses fixed that value without considering the property as an integral part of the whole system of the company. Only on that basis, in my opinion, should the assessment be made. If it were intended to assess the property as part of a larger system, one would have to look for a more definite statutory direction.

Mr. Justice Graham agreed in the main with the views expressed by the majority of the Court but was of the opinion that the evidence did not show the value of the property and that the matter should be sent back for rehearing. On this point Mr. Justice Archibald concurred with Mr. Justice Graham.

It seems to me that the learned County Court judge and the learned judges in Appeal are correct in their interpretation of this section, always bearing in mind the considerations mentioned above by Chief Justice Chisholm.

On the point of adequacy of the evidence, I do not feel that this Court should now interfere with the concurrent findings of the trial judge and the majority of the Court *en banc*. For this reason, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. E. Rutledge.*

Solicitor for the respondent: *J. S. Roper.*