

In the Privy Council

No. 100 of 1931.

ON APPEAL AND CROSS APPEAL FROM THE APPELLATE
DIVISION OF THE SUPREME COURT OF ONTARIO.

BETWEEN:

CITY OF EAST WINDSOR,

Appellant,

—and—

COUNTY OF ESSEX,

Respondent.

**RESPONDENT'S CASE IN THE MAIN APPEAL AND
APPELLANT'S CASE IN THE CROSS APPEAL.**

BLAKE & REDDEN,
17 Victoria Street, S.W. 1,
London, England.

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Appellant,

—and—

THE COUNTY OF ESSEX.

Respondent,

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THE COUNTY OF ESSEX,

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—and—

THE CITY OF EAST WINDSOR,

Respondent.

(Consolidated Appeals)

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

RESPONDENT'S CASE IN MAIN APPEAL AND APPELLANT'S CASE IN CROSS APPEAL

1. This is an appeal by the City of East Windsor and a cross appeal by the County of Essex from the judgment of the Appellate Division of the Supreme Court of Ontario pronounced on the 12th day of June, 1931, affirming a judgment of Rose C. J. H. C., dated the 15th day of January, 1931.
2. By an order of The Ontario Railway and Municipal Board made on the 5th day of March, 1929, the Town of Ford City, then a part of the County of Essex, was erected into a City under the name of East Windsor, the order to take effect on the 1st day of June following.
3. Under the provisions of Sec. 38 of the Municipal Act, R. S. O. 1927, Cap. 223, it became necessary to make, as the Statute simply puts it, "an adjustment of assets and liabilities between the corporations", and the section proceeds to provide that if the interest of the separated district in the assets of the corporation from which it is separated exceeds its proportion of the liabilities thereof, the corporation shall pay the excess and vice versa. The adjustment is to be made by agreement or in default by arbitration.
4. After several conferences it was, for the sake of convenience, arranged that so far as the annual levy for 1929 was concerned the corporations should carry on "as if the City had remained a part of the County until December 31st, 1929," and that after that date "and adjustment in other respects" should be

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p. 1. made as of the 1st day of June, 1929, and in case of failure therein an arbitration was to be had before the Senior County Judge. The arrangement was embodied in a written agreement.

p. 64. 5. The parties failed to agree upon an adjustment "in other respects" and in consequence an arbitration was had pursuant to the agreement and to the Statute before His Honour J. J. Coughlin, Senior County Judge, and an award was made and published on 1st day of August, 1930. By the award it was found that in addition to its liability in respect of certain debenture by-laws the City of East Windsor was indebted to the County in the sum of \$55,095.53, and interest was allowed upon this sum at the rate of five per centum per annum from the 1st day of January, 1930. 10

p. 68. 6. From this award the Appellant took an appeal and the same was heard by Rose C. J. H. C. who, taking time to consider the appeal, gave judgment on the 15th day of January, 1931, allowing the appeal in part and dismissing it in part.

p. 79. From this judgment both parties appealed and the same coming on to be heard pp. 81, 83. before the Appellate Division of the Supreme Court of Ontario and that Court after taking time to consider gave judgment on the 12th day of June, 1931, dismissing both appeals. It is from this judgment that the appeal and cross appeal are taken.

7. Apart from the question of interest raised in the cross appeals, the matters in controversy in both relate to highway construction by the County and the Province under the provisions of The Highway Construction Act, R. S. O. 1927, Cap. 54, passed in consequence of the increased traffic caused by the advent of motor driven vehicles. 20

8. Under that Act four kinds of roads are designated:-

(1) County roads, to be managed by a committee of the County Council and a road superintendent;

(2) County suburban roads, managed by a commission, and to the cost of which cities and separated towns must contribute;

(3) Provincial highways, to the cost of which counties must contribute, and, 30

(4) Provincial suburban highways, to the cost of which cities and separated towns must contribute.

The Province contributes to the cost of all of these roads.

9. For easy reference, the important sections of The Highway Improvement Act, so far as these appeals are concerned, are here set out:-

COUNTY ROADS

Sec. 12:

(1) Subject to the approval of the Lieutenant-Governor in Council as hereinafter provided the council of a county may by by-law adopt a plan of county road improvement and establish a county road system throughout the county by assuming roads in any municipality in the County and may include in such system such boundary line roads or portions thereof between the county and any other county, or between the county or a city or separated town, as may be agreed upon by the municipalities interested and the by-law shall designate the roads to be assumed or improved or intended to form or be added to the county road system. 40

(2) The by-law shall provide for the levying of a general annual rate upon

all the municipalities in the county and separated therefrom for municipal purposes.

COUNTY SUBURBAN ROADS

Sec. 35:

The Lieutenant-Governor in Council, upon application of the council of any county having or adopting a system of county roads under this Act, may direct that a commission or commissions be selected as in section 41 provided, in the case of each city or town separated from the county, and it shall be the duty of the commission or commissions to designate and define the suburban roads or portions thereof in the county system towards the construction and maintenance of which the city or town shall contribute.

Sec. 37:

(1) Subject to the provisions of the following sub-sections, expenditure upon all work upon suburban roads outside the limits of a city or town shall be borne by the County, city or town and the Province, in the proportion of twenty-five per centum by the county, twenty-five per centum by the city or town and fifty per centum by the Province.

Sec. 39:

(1) It shall be the duty of the council of each city or town to provide annually or from time to time an amount equal to that appropriated by the council of the county for construction and maintenance of such suburban roads, and such amount shall be a debt due to the county by the city or town.

(2) For the purposes of this section the city or town shall have authority to raise from time to time such sums as may be required for construction by the issue of debentures, as in section 14 provided, but all sums required for the purposes of maintenance and repair shall be provided from the current revenue of the municipality.

PROVINCIAL HIGHWAYS

Sec. 52:

(1) The Lieutenant-Governor in Council, upon recommendation of the Minister may designate any highway or a system of public highways throughout Ontario to be acquired, constructed, assumed, repaired, relocated, deviated, widened and maintained by the Minister for Ontario as a provincial highway.

(2) Every highway constructed, designated and assumed in accordance with this section shall be known as a "provincial highway".

PROVINCIAL SUBURBAN HIGHWAYS

Sec. 61:

(1) The corporation of every county in which work of construction or repair and maintenance is from time to time carried out shall repay to Ontario twenty per centum of the expenditure made by the Department within such county, and each city or separated town shall repay to Ontario a like proportion of the expenditure made within the limits of the roads, designated as "provincial suburban" adjacent to the city or town.

Sec. 62:

(1) That portion of a provincial highway adjacent to a city or town which is separated from the county for municipal purposes or of direct benefit to

the city or town shall be designated a provincial suburban road and the corporation of the city or separated town shall contribute thereto as in section 61 provided.

(2) A provincial suburban road shall be designated by an engineer of the Department before or after construction, repair or maintenance by the Department has commenced, and notification of such designation shall be sent by the Department to the clerk of the city or separated town affected, and in default of appeal therefrom, as in subsection 3 provided, such designation shall stand confirmed.

(4) Where expenditure is incurred by the Department upon any provincial suburban road before the designation has been made by the engineer, such expenditure may be proportionately allocated to the city or separated town when the designation has been finally confirmed. 10

10. Attached to the award and made a part of it, are two schedules Nos. (1) and (2). In No. (1) are set out all the debenture by-laws in respect of which the Appellant was held liable by the Arbitrator. Five of these by-laws relate entirely to road construction. Four of these by-laws were passed and debentures were issued prior to June 1st, 1929, while the fifth No. 690 was passed and the debentures issued after, although the appropriation of the money was made before. The Appellant argued on the appeal from the award that because the County became solely entitled to these roads upon the separation that therefore it should be charged with and bear the whole liability remaining unpaid, and that in any event there could be no liability in respect of by-law No. 690. By the Judgment of Rose C. J. affirmed by the Appellate Division, the Appellant was held responsible under the four by-laws but not under the fifth. The respondent contends that in this last respect the judgment is wrong in law. In this appeal the Appellant contends that the judgment is wrong respecting the four by-laws and seeks a further reduction of \$47,732.78. 20

11. In schedule (2) is included as a liability an item of \$10,765.45 as the amount to be paid by the Appellant to the Respondent as its share of the amount allocated to the Respondent by the Province in 1930 for its highway construction in 1929. By the judgment of the Chief Justice and affirmed by the Appellate Court it was held that the amount was included in the words "current liabilities incurred" in paragraph 1 (a) of the agreement in respect of which the payment of the amount in paragraph 1 (b) was to be in full settlement. The Respondent contends that the judgment in this respect is wrong in fact and in law. 30

12. The total net reduction resulting from the appeal is \$45,457.75, the amount, apart from interest, involved in the cross appeal.

13. In the award the learned County Judge allowed interest on the sum found due, apart from debenture by-laws, from the 1st day of January at the rate of five per centum per annum. This provision was stricken out on the ground that the agreement having provided that (para. 3)—"After the final determination of the adjustment the parties hereto shall, as they become due and payable, discharge their respective obligations arising out of such final adjustment", and that no interest could be allowed on any sum until all matters were finally adjusted. 40

14. The Respondent contends that this provision of the agreement has no

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reference whatever to the payment of the Appellant's share of the annual County levy of 1929 as settled and adjusted by paragraph 1 (b) but that, on the other hand, the appropriate section of the Assessment Act, R.S.O. 1927, Cap. 224, Sec. 225, applies and reads as follows:-
 Sec. 225:

10 The treasurer of every township, town or village shall, on or before the 20th day of December in each year pay to the treasurer of the county all moneys which were assessed and by law required to be levied and collected in the municipality for county purposes or for any of the purposes mentioned in section 222, (Provincial levies), and in case of non-payment of such moneys or any portion thereof on or before the said date the township, town or village so in default shall pay to the county interest thereon at the rate of six per centum per annum from the said date until payment shall be made.

15. The Respondent therefore submits that, apart from the question of interest, the findings of the learned Arbitrator should be restored, and so far as relates to interest on the annual levy is concerned, the provisions of the Assessment Act should apply or that in any event the Arbitrator's allowance should be restored.

REASONS

- 20 1. The separation of the Appellant from the County of Essex carries with it an obligation to pay its share of the then existing liabilities.
 2. The proportion applied was fixed by agreement but based, quite properly, upon the equalized assessment for County purposes.
 3. The liability provided for by debenture by-law No. 690 was created before and was an existing liability at the time the separation took effect.
 4. Upon the separation the Appellant became liable, not through the County, but directly to the Province under the Statute for its share of the cost of provincial highway construction.
 5. The County having paid the debt upon the direct demand of the Province
 30 is now entitled to be reimbursed by the Appellant.
 6. The agreement between the parties as drawn cannot, and was not intended, to affect the rights of the parties in ways other than those specifically mentioned, and did not destroy the right to interest.
 7. The Statute providing for arbitration in such matters, gives no rule, principle, or guide, upon which the award is to be based, and, as it has been held, "the whole question, therefore, rests largely to the reasonable discretion of the arbitrator. With this in mind the award is to be considered and dealt with.

J. H. RODD.

R. S. RODD.

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