Privy Council Appeal No. 100 *of* 1931.

The Municipal Corporation of the City of East Windsor - - *Appellants*

v.

The Municipal Corporation of the County of Essex - - *Respondents*

The Municipal Corporation of the County of Essex - - *Appellants*

v.

The Municipal Corporation of the City of East Windsor - - *Respondents*

(*Consolidated Appeals*)

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND DECEMBER, 1931.

Present at the Hearing :

VISCOUNT DUNEDIN.
LORD MERRIVALE.
LORD THANKERTON.
LORD RUSSELL OF KILLOWEN.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD THANKERTON.]

Prior to the 1st June, 1929, the Town of Ford City formed part of the County of Essex for municipal purposes. By order of the Ontario Railway and Municipal Board dated the 5th March, 1929, Ford City was erected into and incorporated as a City under the name of East Windsor, and it was provided that the order should take effect on the 1st June, 1929.

It thereupon became necessary to have an adjustment of assets and liabilities between the City of East Windsor (hereinafter called "the City") and the County of Essex (hereinafter called

"the County") in terms of Section 38 of the Municipal Act (1927), R.S.O., cap. 233, which provides as follows :—

"(1) Where a district is erected into a village or town, or is detached from one and annexed to another local municipality, there shall be an adjustment of assets and liabilities between the corporation of the municipality from which the district becomes or is detached and the corporation of the village or town or of the municipality to which the district is annexed, as the case may be, and if the interest of the district in the assets of the corporation of the municipality from which it becomes or is detached exceeds its proportion of the liabilities thereof, that corporation shall pay to the corporation of the village or town or of the municipality to which the district is annexed, as the case may be, the amount of excess; but if the district's proportion of such liabilities exceeds its interest in such assets the corporation of the village or town or of the municipality to which the district is annexed, as the case may be, shall pay to the corporation of the municipality from which the district becomes or is detached the amount of the excess.

"(2) If the corporations do not within three months after the separation takes effect agree as to such adjustment, the matter shall be determined by arbitration.

"(3) Where a district is detached as well from a county as from the local municipality, of which it forms part, there shall be a similar adjustment of the assets and liabilities of the corporation of the county from which the district is detached between that corporation and the corporation of the county to which the district is annexed, and the provisions of Subsection 1 and 2 shall *mutatis mutandis* apply.

"(4) If the corporation of the county, or of the local municipality, does not within three months after the separation takes effect, notify the corporation of the other county or local municipality that it requires an adjustment of the assets and liabilities, its right to claim an adjustment shall be barred.

"(5) Where a town not being a separated town is erected into a city, or a town or village is annexed to a city or separated town, there shall be a similar adjustment of the assets and liabilities of the corporation of the county from which the town or village is withdrawn between that corporation and the corporation of the city or separated town.

"(6) Where a town is erected into a city the city shall not be entitled, in the adjustment of assets and liabilities to any allowance in respect of its interest in the court-house or gaol of the county."

As the result of negotiations between the parties an agreement was entered into dated the 29th November, 1929, the material clauses of which are as follows :—

"1.—(*a*) The provisions of this paragraph are in full settlement of all current liabilities incurred up to and including December 31st, 1929, and which the City is or may be required to pay.

"(*b*) The City shall pay to the County 14·9308 per cent. of $493,197·08, which sum is the amount required to be levied on the various municipalities as provided in By-law No. 689 of the County, passed in the year 1929.

"(*c*) The County shall pay to or for the City all disbursements or payments, rebates, refunds, surplus allowances and credit allowances for which it would be obligated if the City had remained a part of the County until December 31st, 1929.

"2. After the 31st day of December, 1929, an adjustment in other respects of the assets and liabilities of the Corporations, according to the provisions of the Municipal Act respecting the same, shall be made, such adjustment to be made as of the 1st day of June, 1929. In the event of

failure of the parties to agree upon such adjustment, the determination of the matter shall be referred to His Honour Judge Coughlin, Senior Judge of the County of Essex, and his decision shall be subject to appeal.

"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."

The remaining clauses of the agreement are immaterial to the questions at issue in the present appeals.

The parties having failed to agree on the further adjustment referred to in clause 2 of the agreement, the matter was referred to His Honour Judge Coughlin, who issued his award on the 1st August, 1930. The first two findings of the award, which cover the matters now in dispute, are as follows :—

"1. I find that the City of East Windsor is liable to pay to the County on its debenture debt the amounts set out with respect thereto in Schedule 1 to this award, such payments to be made on the dates set forth in said Schedule.

"2. I have set out in Schedule 2 hereto a statement showing the adjustment made by me with respect to the matters therein set forth. I award that the balance of $55,095·32 therein set out shall be paid by the said City of East Windsor to the said County in one month from the date of this award with interest from the 1st day of January, 1930, at the rate of 5 per cent. per annum until paid."

From this award the City appealed to a Judge of the Supreme Court of Ontario (*a*) in respect of the last five items in Schedule 1, which relate to By-laws 480, 499, 518, 661 and 690 ; (*b*) certain items in Schedule 2, including No. 2, with which alone the present appeals are concerned, and (*c*) the award of interest. The appeal was heard by Rose C.J.H.C., who gave judgment on the 15th January, 1931, and allowed the appeal as regards (*a*) By-law 690 in Schedule 1, (*b*) item No. 2 in Schedule 2, and (*c*) the award of interest, and directed that these items should be struck out of the award, as also item 8 of Schedule 2, which admittedly followed on the deletion of item 2 of that Schedule. From this judgment both parties appealed to the Appellate Division of the Supreme Court of Ontario, which, on the 12th June, 1931, dismissed both appeals, and from this judgment the parties have taken the present appeals.

The appeal for the City, which falls to be dealt with first, relates only to By-laws 480, 499, 518 and 661 in Schedule 1 of the award, and it was maintained for the City that these items should be struck out of the award.

It is not disputed that these four items consist of debenture debts of the County issued before the 1st June, 1929, that the expenditure on roads in respect of which the money was borrowed was all incurred before that date, and that the City was bound —up to that date—to contribute by means of the annual general levy of the County for road purposes towards the interest and sinking fund charges of these debentures. It is clear, therefore, that these debentures, so far as then remaining unpaid, were an existing liability of the County as at the 1st June, 1929, towards

which the City was liable to contribute its proper share. But the City contended that the roads were an asset of the County, which the latter retained on separation of the municipalities and of which the City then lost the benefit, and that the City should therefore be relieved of any liability relative to these roads. This contention has been rejected in both Courts below, as well as by the learned arbitrator, on the ground that the roads are not assets of the County capable of valuation, but are public highways just as available to the inhabitants of the City now as before separation, and that there is no reason why the City, on separation, should escape liability for its share of expenditure on the roads laid out upon them before the separation. Their Lordships agree with these reasons and the decision of the learned arbitrator and of the Courts below.

On the footing that their share of the liability for the debenture debt under these four By-laws fell to be brought into the adjustment as at the 1st June, 1929, the City maintained that they were entitled to an abatement of 50 per cent. on the amounts which they were directed by the arbitrator to pay, as set forth in Schedule 1. This contention was raised for the first time before this Board, but their Lordships are not prepared to exclude it on that ground, as the facts necessary for its decision are fully before them.

In settling the City's proper share of the interest and sinking fund charges of the County's debenture debt, the learned arbitrator adopted the percentage of 14·9208 brought out by the equalisation of assessments for the year 1929, a figure which was also adopted by the parties for the purposes of clause 1 of the agreement of the 29th November, 1929. The fairness of this percentage was not disputed by the City before this Board, but they based the claim for a reduction of 50 per cent. on that figure on the provisions of Section 28 of the Highway Improvement Act (R.S.O. 1927, cap. 54), the material portions of which, as amended up to the 1st June, 1929, are as follows :—

"(1) Where a street in any urban municipality not separated from the county is not a part of the county road system, but is an extension of or connects different portions of roads included in the county road system, the county shall construct or improve the roadway on such street to the extent of 20 feet in width and shall assume the cost thereof, and the expenditure thereon, to the extent approved by the Minister, shall form part of the expenditure in carrying out the plan of highway improvement in the county for the purpose of ascertaining the amount of aid which may be granted to the county under this Act, but no such work shall be performed by the county unless and until an agreement has been entered into with such urban municipality.

"(5) An urban municipality situate within a county, but not separated therefrom for municipal purposes, whether there is or is not any such county road extension or connection in such urban municipality, shall be subject to the annual general levy for county road purposes under the by-law mentioned in Section 12, but the council of the county shall on or before the 1st day of April in each year remit, in the case of a town, 50 per centum, and in the case of a village 75 per centum, of the amount raised by such

rate in the town or village in the previous year, less the cost of the repairs, if any, done by the county upon any such county road extension or connecting link or upon any road in such urban municipality included in the county road system during the previous year :—

(a) Any moneys so received by the town or village shall be expended under the supervision of the county road superintendent upon streets in the municipality designated by the Minister.

(b) No such rebate shall be made for any year during which the construction or rebuilding of any such extension or connecting link has been in progress.

" (6) Subject to the provisions of Subsection (5), the amount so repaid by the county shall be deemed to form part of the expenditure in carrying out a plan of highway improvement in the county for the purpose of ascertaining the amount of aid which may be granted to the county under this Act."

It was admitted by Counsel for the County that it was this section that rendered the City, before separation, liable to the annual general levy of the county for county road purposes, and that the interest and sinking fund charges of the road debenture debt were included in the general levy ; in the recent case of *Lincoln County Corporation* v. *Port Dalhousie Village Corporation* [1931], A.C. 808, it was held by this Board that the County was bound to include the amount raised by it in the village towards the interest and sinking fund charges on similar debentures in the 75 per cent. rebate to which the village was entitled. The parties were also agreed that the cost of repairs which are to form a deduction from the rebate refers to work done by the County under Subsection 1 of Section 28.

It appears, therefore, that if the City had not been separated on the 1st June, 1929, the County would have been bound, during the currency of the debentures in question, to give them a rebate of 50 per cent. of the amount raised from them in the previous year towards the interest and sinking fund charges on such debentures, but under deduction of any expenditure in the previous year under Subsection 1 of Section 28 on a street within the City, but not forming part of the county road system.

Counsel for the County, however, founded on an amendment of Subsection 5 introduced by an amending Act of 1930—cap. 10, Section 5 (2)—and which provided the following addition to the section : " (c) In determining the amount of such rebate payable in the year 1931 and thereafter the amount raised by the corporation of a town or village for the purpose of paying off its share of any debenture debt of the County shall not be considered." But the arbitrator's duty was to estimate the liability as at the 1st June, 1929, and, in the opinion of their Lordships, he was not entitled to take into account subsequent legislation, but was bound to resolve the question on the state of legislation as at that date. Counsel for the County also contended that, as it was not possible to foresee as at the 1st June, 1929, whether the rebate in later years would be subject to deductions or not, the right to

any rebate was contingent and could not be taken into consideration; but the answer to that contention is that after separation the County would no longer be entitled to incur expenditure under Subsection 1 of Section 28, and that the deduction, being only a reimbursement of money expenditure actually incurred, the provision as to deduction falls to be ignored for present purposes. Accordingly, their Lordships are of opinion that the right of the County to recover 14·9208 per cent. of the interest and sinking fund charges on these debentures by the annual general levy for county road purposes must be held to be subject to a rebate of 50 per cent. without deduction, and the appeal for the City should be allowed to this extent.

The appeal for the County relates to (1) item 2 of Schedule 2; (2) the debenture debt under By-law 690, being the last item of Schedule 1, and (3) the question of interest on the balance brought out in Schedule 2.

Item 2 of Schedule 2 is described as "Share of County liability to Province for provincial highways charges for 1929," and is stated at $10,765·45. This sum is 14·9208 of $72,101·45, which was the Province's claim against the County for their share of the expenditure on provincial highways in 1929. The provisions as to provincial highways are to be found in Part V of the Highway Improvement Act, and it will be convenient to set out these provisions so far as relevant to the present question:—

> "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 20 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.
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> "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.
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> "63.—(1) The Department shall annually transmit to the clerk of each municipality a statement certified by the engineer of the Department showing the expenditure for the specified period, and the amount thereof due to Ontario in accordance with the next preceding section.
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> "64. The proportion of cost as estimated under the next preceding section shall be a debt due to Ontario by the municipal corporation and shall be paid to the Department within six months from the date of notification under Subsection 1 of Section 63."

The annual claim of the Province against the County in respect of expenditure on provincial highways is not ascertained and presented until after the completion of the calendar year in which the expenditure is incurred, and in the present instance the claim in respect of the expenditure in 1929 was not notified under Subsection 1 of Section 63 until 1930. The learned arbitrator appears to have held the City liable for its share of this

claim on the ground that the County's liability therefore accrued during 1929, though its amount was not definitely ascertained until the following year, and that, as no steps had been taken by the Province to have a direct allotment made against the City after its separation, the City would escape its share of contribution to provincial highways unless it were made to pay through the County. He also held that the City had made an admission of liability for this expenditure by executing the agreement of the 29th November, 1929, whereby it agreed to pay its full share of all County rates for 1929. On appeal, the learned Chief Justice struck out this item on the ground that the obligation of the County to the Province arose as soon as the expenditure on provincial highways was made, and that it was therefore a current liability incurred up to and including December 31st, 1929, and was included in the settlement under clause 1 of the agreement of the 29th November, 1929. This view was affirmed by the Appellate Court.

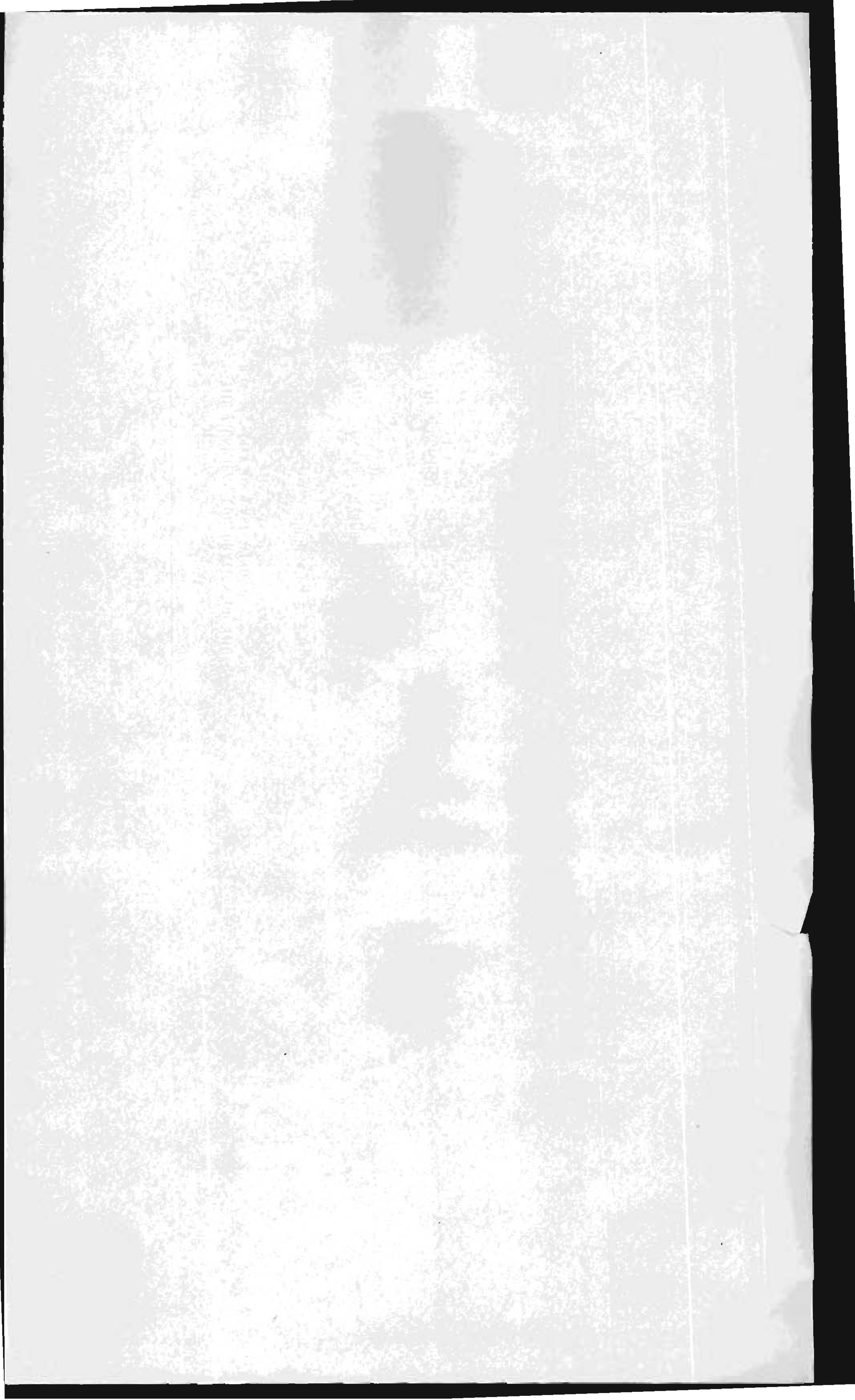
Bearing in mind that the County must establish that this item constituted an existing liability as at the 1st June, 1929, it is difficult to see how the City, after separation could be liable to relieve the County of any part of its liability to the Province so far as relating to expenditure made after that date, or that the failure of the Province to allot any part of the expenditure to a direct claim against the City can create a right in the County to recover for behoof of the Province. But, apart from this difficulty, the County are in a dilemma as to this claim, for either it was a liability that accrued during 1929, in which case it falls within the settlement under clause 1 of the agreement, or the liability did not accrue until the notification of the claim in 1930, in which case it could not form a liability as at the 1st June, 1929. Much may be said for the latter view, for it was admitted that among the current liabilities for the year 1929 dealt with in clause 1 of the agreement was the County's liability for the expenditure on provincial highways in 1928, but it is unnecessary to decide as between these views, as, in any event, this item falls to be struck out.

The County, in the second place, claims that the debenture debt under By-law 690 should be restored in Schedule 1. By-law 690, which authorised the issue of these debentures, was passed by the Municipal Council of the County on the 21st June, 1929, some weeks after the date of separation of the City. The County's road-building programme for 1929 was approved by By-law 684 on the 15th March, 1929, and the acceptance of particular tenders was approved on the 29th May, 1929, but, in the words of the learned arbitrator, " the formal contracts binding the successful tenderers to execute the works were not executed until some time after June 1st." Further, clause 2 of By-law 690 itself provides: " There shall be raised and levied in each year by a special rate on all the rateable property in the Municipality of the County of Essex a sufficient sum to discharge the several instalments of

principal and accruing due on the said debt as the same shall become due and payable." At that date the City was no longer in the Municipality of the County of Essex. Their Lordships agree with the learned Chief Justice and the Appellate Court that this item should be deleted from Schedule 1, as also in their reasons for that view.

Lastly, the learned arbitrator awarded interest on the balance of $55,095·32 found in favour of the County in Schedule 2 at the rate of 5 per cent. per annum from the 1st January, 1930, until paid. The learned Chief Justice struck out this finding from the award, and this was affirmed on appeal as being inconsistent with clause 3 of the agreement of the 29th November, 1929, and this was affirmed on appeal. Their Lordships agree with the learned Chief Justice.

Accordingly the appeal of the County fails on all three heads and falls to be dismissed. The appeal of the City should be allowed, the judgment of the Appellate Division of the 12th June, 1931, should be discharged in so far as it dismisses the appeal of the City, and the judgment of the Chief Justice of the 15th January, 1931, should be reversed in so far as it dismisses the appeal of the City with respect to By-laws Nos. 480, 499, 518 and 661, and in lieu thereof it should be ordered and directed that the East Windsor share of each instalment under these By-laws set out in the penultimate column of Schedule 2 of the award should be reduced by an abatement of 50 per cent. and the East Windsor total set out in the last column should be amended accordingly. In the circumstances, their Lordships think that the proper order with regard to costs will be to order the County to pay to the City one-half of their costs of the consolidated appeals and to leave undisturbed the orders as to costs in the Courts below. Their Lordships will humbly advise His Majesty accordingly.



In the Privy Council.

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DELIVERED BY LORD THANKERTON.

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