Supreme Court of Canada
County of Wentworth v. Hamilton Radial Electric Rway. Co. and City of Hamilton, (1916)

54 S.C.R. 178
Date: 1916-12-30

The County of Wentworth *(Plaintiff) Appellant;*

and

The Hamilton Radial Electric Railway Company and The City of Hamilton *(Defendants) Respondents.*

1916: November 17; 1916: December 30.

Present: Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

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

Municipal Corporation—Annexation of territory—Portion of county road—Railway franchise—Annual payments—Divisibility after annexation—Ontario Railway and Municipal Board—Order for annexation.

In 1902, the County of Wentworth passed a by-law by which an electric railway company was given the privilege of running cars over a county road on paying annually to the county a certain sum for each mile of the operated road. In 1909, territory of the county, including part of said road, was annexed to the City of Hamilton.

Held, Brodeur J. dissenting, that the agreement with the railway company remained in force in respect to the portion of road so annexed and the county was entitled to the whole annual payment as if the annexation had not taken place.

The railway company, by agreement in writing, accepted the said by-law of the county and covenanted with the latter "their successors and assigns" to perform all the conditions thereof.

Held, Brodeur J. dissenting, that the City of Hamilton did not, as a consequence of the annexation of county territory, become the "successor" of the county under said agreement and by-law so as to be entitled to a proportion of the payments to be made by the railway company thereunder.

Per Fitzpatrick C.J. and Idington and Duff JJ.—The Ontario Railway and Municipal Board was not invested with authority to provide, in its order extending the boundaries of the city, that such rights as those reserved by section 24 of the county by-law should, on such extension of the boundaries, pass to the city in whole or in part.

Judgment of the Appellate Division (35 Ont. L.R. 434) reversed and that of the trial judge (31 Ont. L.R. 659) restored.

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APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario[1], reversing the judgment at the trial[2], in favour of the plaintiff.

The appellants in this action, the County of Wentworth, on the 6th of November, 1902, purchased from the Barton and Stoney Creek Consolidated Road Company for the sum of $24,000 certain toll roads which ran from a point in the County of Wentworth through the Township of Barton to the easterly boundary of the City of Hamilton. The respondents, the Hamilton Radial Electric Railway Company, by an agreement dated the 19th of June, 1905, acquired running rights over part of the said road from the County of Wentworth for the consideration therein named. On the 27th of September, 1909, upon the application of the City of Hamilton and Township of Barton (the County of Wentworth not being notified nor represented), the Ontario Railway and Municipal Board made an order annexing to the City of Hamilton, certain lands in the Township of Barton immediately adjoining the city through which lands certain portions of the said toll roads ran, and the order provided that all former toll roads purchased by the said county in the annexed territory, should vest in the City of Hamilton. After the aforesaid order was passed, and up to the year 1912, the appellants, the County of Wentworth, recognized it and permitted the City of Hamilton to exercise jurisdiction over the portions of the road included in the order of the Railway Board and to collect a proportionate part of the rental for the running rights thereon from the Hamilton Radial Electric Railway Company.

In the year 1913, the question of the validity of

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the said order of the Railway Board was raised and the County of Wentworth refused to further recognize the same, and upon the refusal by the Railway Company to pay the full amount of the rental due under and by virtue of the mileage agreement of the 19th of June, 1905, the County of

[1] 35 Ont. L.R. 434.
[2] 31 Ont. L.R. 659.

Wentworth thereupon issued a writ against the Hamilton Radial Electric Railway Company for the payment of the rental due under the agreement of the 19th day of June, 1905, and arrears. The Railway Company thereupon made application and as a result of same the Municipal Corporation of the City of Hamilton were joined as party defendants in this action.

The action by the county was to recover the whole payment for the year 1914 and arrears for the three preceding years representing the sums paid to the city during those years as its proportion for the mileage annexed. As to these amounts both courts below held that the county could not recover after acquiescing in the payments to the city and from that decision there was no appeal.

Lynch-Staunton K.C. and Counsell for the appellant.

Rose K.C. and Waddell K.C. for the respondent the City of Hamilton.

Leighton McCarthy K.C. and Gibson for the respondents The Hamilton Radial Electric Railway Co.

THE CHIEF JUSTICE.—I agree with Mr. Justice Idington.

IDINGTON J.—What had been a toll road constructed by a private company was by it surrendered to appellant. Thereafter, pursuant to such juris-

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diction as appellant had, it bargained with the railway company respondent to confer upon it the franchise of using part of said road, for constructing and running thereon a railway, of the kind its name implies.

The franchise was given by section 1 of the by-law which reads as follows:—

> 1. The consent, permission and authority of the Corporation of the County of Wentworth is hereby granted to the Hamilton Radial Electric Railway Company (subject to and upon the

> terms, conditions and provisions hereinafter contained) to construct, maintain, complete and operate an electric railway along the Main Street Road, from Sherman Avenue to Delta, and on the King Street Road from the Delta easterly through the unincorporated Village of Bartonville to the Saltfleet Town Line.

For this franchise the said company agreed to comply with some twenty-four several terms and conditions specified in the appellant's by-law.

To hold many of these abrogated by reason of the events the city now herein relies upon in its present attitude relative to the 24th, would be rather embarrassing for it. Yet such would in many instances be the logical result of maintaining what it contends for.

The 24th is in these words:—

> 24. For the privileges hereby granted the Company shall pay to the Corporation of the County of Wentworth yearly at the commencement of each year, at the rate of FIFTY DOLLARS per mile or *pro ratâ* for portion of a mile per year for the first three years, and after the expiration of the first three years at the rate of ONE HUNDRED DOLLARS per mile, or *pro ratâ* for portion of a mile per year for the next five years, and at the rate of TWO HUNDRED DOLLARS per mile, per year thereafter for every mile or *pro ratâ* for portion of a mile of railway operated on the said county roads under this by-law. First payment to be made on the first day of January, 1907.

Whatever else appears in the agreement made by the parties these two clauses (the first and twenty-fourth) furnish the keynote for the construction of the document.

And surely there could not be clearer or more

explicit terms used as to the basis upon or by which the compensation was to be measured.

It is

> for every mile or *pro ratâ* for portion of a mile of railway operated on the said county roads under this by-law.

It mattered not whether the roads lost their character of county roads or not, or passed under some other jurisdiction the legislature chose to put them under, so long as the company continued to enjoy the franchise thus acquired and conferred.

However questionable from an economic point of view I might feel inclined to think the bargaining between municipalities and railway companies whereby profits are to be reaped, I have no reason to doubt the now generally accepted legislative authority to make such bargains as falling within the power given municipalities in control of a highway, to consent to the use of highways by a railway.

Indeed no argument was presented contesting this exercise of the power and there remains nothing in this case but the construction of a tolerably clear contract.

It seems to me a novelty to import into the consideration of the construction of the contract that which transpired later between third parties by reason of which some one else might have a right to pass by-laws or direct operations or means for the public safety relative to the maintenance of a part of the road.

It was quite competent for the parties to the contract to have included as their basis of the computation of the compensation to be given for the franchise the entire mileage over the part they were bargaining about or over the entire road if they saw fit.

They might have made the number of passengers

carried from any place outside the city to the market place of the city or any other agreed point or in short any other mode of computation they saw fit.

As Mr. Justice Hodgins has well pointed out it is as a whole the subject-matter of the bargain was dealt with by those immediately concerned.

Then what right has the respondent city to interfere? It knew, or ought to have known before bargaining for the annexation of part of a township all about the franchise in question, the terms upon which it was granted and the history leading up to the acquisition of those rights the county had acquired entitling it to so bargain.

And I venture to submit that the city was quite as much interested as the county in the abolition of tolls and knew what it cost and that it had no more right to try to take away from another corporation without its consent part of the incidental advantages which had flowed to it from the promotion of free travel and good roads designed for their common benefit.

Of course these considerations cannot answer the law if it has given respondent what appellant had acquired, but I submit they do answer much we have heard and read of the city's alleged burdensome duties relative to this part of its acquisition.

There is no pretence made that the appellants' by-law has been either expressly or impliedly repealed.

There is, by a curious confusion of thought, claimed to enure to the city a share in the compensation because it is based on mileage and the city has acquired jurisdiction over some of that mileage.

The argument confounds the rights flowing from a contract in relation to property and perhaps property itself, with those rights flowing from mere acquisi-

tion of jurisdiction over it for certain limited purposes and within certain relations only.

Let us see what the city did acquire. It obtained from the Ontario Railway and Municipal Board only that which the Lieutenant-Governor in Council was vested with relative to municipal annexations up to 1906, when 6 Edw. VII., ch. 31, by sec. 53 transferred same to the Board, and amending Acts.

The Municipal Amendment Act (1908) 7 Edw. VII., ch. 48, sec. 1, is, I assume, correctly presented in the city's factum as containing the said powers as existent at the time in question.

That section reads as follows:—

> In case the council of any city or town by resolution declare that it is expedient that any portion of an adjacent township should be annexed to the city or town, and in case the majority of the ratepayers in any such portion of such township petition the Lieutenant-Governor in Council to add such portion to such city or town, and after due notice of such resolution and petition has been given by such city or town to such adjacent township, the Lieutenant-Governor may, by proclamation to take effect upon some day to be named therein, annex to the city or town such portion of the adjacent township upon such terms and conditions as to taxation, assessment, improvements or otherwise as may have been agreed upon, or shall be determined by the Lieutenant-Governor in Council.

It is to be observed that the only terms or conditions of such changes of boundaries as agreed on with which the Lieutenant-Governor in Council or Board ever became entitled to meddle, were

> as to taxation, assessment, improvements or otherwise.

I fail to see how anything in question herein falls within such terms.

The Board clearly exceeded its authority unless we ignore the *ejusdem generis* rule of construction and attribute to the word “otherwise” a meaning that might enable it to transfer the ownership of the courthouse, jail, and registry office (though presumably

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county property) to the city, because they happen to be within the city.

The suggestion that the city is the “successor or assign” of the county within the meaning of these usual words of contract between contracting corporations in the operative part of the contract between the railway company and the county, seems to me rather far fetched.

We are not referred to any express legislative enactment which would be effectively applicable to such a contract and constitute the city the successor of the county.

The Board had no power to confer any such right or meddle with anything relative to that or anything but that expressly given it by the language I have quoted.

I have heard no answer made, or that can be made, by the railway company to its contract; or that either bound or entitled it to deal with any one else than the party it in fact contracted with.

Whether or not there is anything in the usual arbitration claim relative to the consequences of annexation now standing we are told as in the Consolidated Municipal Act, 1903, sec. 58, need not concern us.

The railway company as I understand its attitude is only a proper party to this appeal by virtue of the unfounded contention of the city and should get its costs of this appeal from the latter.

The appeal should be allowed with costs of the appellant and the railway company of this appeal and the appeal to the Appellate Division and the judgment of the learned trial judge be restored.

DUFF J.—By a by-law passed on the 10th of June, 1905, the municipal council of the County of Wentworth professed to enact that:—

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> The consent, permission and authority of the Corporation of the County of Wentworth is hereby granted to the Hamilton Radial Electric Railway Company (subject to and upon the terms, conditions and provisions hereinafter contained) to construct, maintain, complete and operate an electric railway along the Main Street Road, from Sherman Avenue to Delta, and on the King Street Road from Delta easterly through the unincorporated village of Bartonville to the Saltfleet Town Line;

and among a great variety of other provisions:—

> 24.—For the privileges hereby granted the Company shall pay to the Corporation of the County of Wentworth, yearly, at the commencement of each year, at the rate of fifty dollars per mile or *pro ratâ* for portion of a mile, per year for the first three years, and after the expiration of the first three years at the rate of one hundred dollars per mile or *pro ratâ* for portion of a mile, per year, for the next five years, and at the rate of two hundred dollars per mile thereafter for every mile or *pro ratâ* for portion of a mile of railway operated on the said County Roads under this By-law First payment to be made on the first day of January, 1907.

The by-law provided that it should not take effect unless formally accepted by the company within ten days after the passing of it by an agreement binding the company to “perform, observe and comply with all the agreements, obligations, terms and conditions” therein contained. Accordingly on the 19th of June, 1905, an agreement was entered into between the respondent company and the appellant county corporation by which the company contracted to observe all the obligations imposed upon it by the terms of the by-law.

Subsequently, *i.e.,* in 1909, an order was made by the Ontario Railway and Municipal Board extending the boundaries of the City of Hamilton in such a way as to embrace within the territorial limits of the city certain parts of the county roads named in the first section of the by-law, in which the respondent company was given the right to construct and operate its railway. After the passing of this order and down to and including the year 1912, it appears to

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have been assumed by the parties that the effect of the order of the board was to vest in the respondent city corporation the right to take and to impose upon the respondent company the obligation to pay to the city for the use of that part of the roads so named within the annexed territory occupied by the company's railway, a sum equivalent to $50 for each mile of railway within that territory. It was assumed, in other words, that the order extending the boundaries of the city did by its provisions transfer to that municipality and divest the county of the benefit of the moneys payable under section 24 to a degree proportionate to the number of miles of the railway which, by virtue of the order, came within the territory of the city. In the year 1913 the county for the first time disputed the validity of this assumption and called upon the company for the payment of the whole of the moneys payable under section 24, as if no change in boundaries had taken place.

The whole question in the action out of which the appeal arises is whether the county is or is not right in that contention. I am unable myself to entertain any doubt that the phrase "the said county roads" in section 24 is descriptive of the roads in which by the by-law the county gave its consent to the company constructing and operating its railway; neither have I any doubt that the railway is now "operated on the said county roads under this by-law." The county is therefore entitled to require payment of the whole of the sums made payable *ex facie* by section 24 of the by-law unless in some way their right to do so has been transferred to the city.

There are three ways, and three ways only, by which such a transfer could be legally effected; by agreement, by statute, or by the operation of some rule of law not

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resting on statute. Admittedly there is no agreement. For the reasons given by my brother Idington I think the powers of the board (where such an extension of the boundaries takes place) in respect of terms and conditions—limited as those powers were to imposing terms and conditions relating to

> taxation, assessment, improvements or otherwise—

are not sufficient to authorize a provision transferring to the city any of the rights created by section 24; and needless to say what the board could not do expressly it could not do by implication.

Then is there any rule of law having the effect of vesting in the city corporation the right to which it now lays claim? The first contention is that the city corporation is the "successor" of the county corporation within the meaning of the words of the contract; but although it may be there is a sense in which the city corporation can be said to be the successor of the county corporation with respect to the county roads affected by the extension of boundaries, still it is sufficiently evident that the word "successor" (if it is not to be treated, as it probably should be, as mere surplusage) is used *alio intuitu* pointing to something in the nature of universal successor; and that the presence of it cannot help, as the absence of it would not in anywise impair, the city corporation's claim.

It is suggested that the rule governing the case is one derived by analogy to that which determines the apportionment of rent when title to the reversion in part of land held by a tenant is severed from that to the reversion in the residue. I do not think Mr. Rose meant us to understand

him as arguing that the sums payable under the by-law could be treated as being rent service in contemplation of law. Self-evidently there is here no tenure of land and no reversion.

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To attempt to describe the railway company's rights *simpliciter* by reference to any of the well-known categories of common law rights *in alieno solo* would probably be misleading. The company's rights are statutory and it is perhaps better, if one desires to avoid deceptive analogies, to treat them frankly as *sui generis.* If one must search for some general analogy, the analogy of easement or license is nearer the mark than that of tenancy; "railway easement," though not in any sense, of course, a phrase of art, could mislead few lawyers in this country.

But with reference to the argument under consideration the characteristic of the railway company's rights to be noted and emphasized is that they are not rights created or capable of being created by the municipality as the owner of some sort of property in the soil of a highway. The highway as highway is a strip of soil in which His Majesty's subjects, as such, have rights of going and coming. The municipality is the public authority, speaking broadly, invested with the management of the highway and with certain powers in regulation of the exercise of the public right. The municipality does not derive its authority over the highway as such from any property in the soil; on the contrary, such property was vested in or could be acquired by the municipality precisely because the municipality is the public authority endowed with jurisdiction over the highway and charged with certain duties in relation to it; and it must be assumed that it was as public authority and not as proprietor that such power as it possessed to pass the by-law consenting to the construction and operation of the railway was entrusted to the municipality; and that it had such rights as it had to exact the consideration

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provided for in section 24 of the by-law. The parallel seems to fail.

It might, no doubt, be argued that as incidental to the transfer of jurisdiction the right to a proportionate part of the mileage toll should justly and reasonably pass to the city; but that argument should be addressed to the legislature.

Finding, therefore, neither contract, nor statute nor principle of common law upon which the city's claim can rest, it follows that effect must be given to the contract in accordance with the view already expressed. The appeal ought to be allowed and the judgment of the Chief Justice of the Common Pleas restored. I think the city corporation should pay all the costs incurred in consequence of the appeals since the date of that judgment.

ANGLIN J.—With deference, it seems to me that immaterial features of this case have unduly absorbed the attention of the courts below. For instance, we are not concerned with the past history of the roads in question as toll roads. The only relevant facts in that connection—that upon the removal of the tolls from these roads by the County of Wentworth they became county roads under section 15 of the Toll Roads Expropriation Act, 1901, as enacted by section 6 of ch. 35 of the Ontario Statutes of 1902, and that when the contract sued upon was made they were under the jurisdiction of the county, so that it could validly and effectively grant the privileges or franchise over them which that contract purported to confer upon the Hamilton Radial Electric Railway Company—are not contested. Neither does it seem to be of the least importance that the annexation order of the Municipal Board contained a provision—probably

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as held in the Ontario courts, in excess of its authority—which purported to vest in the City of Hamilton the portions of those roads lying within the annexed territory. It is unnecessary either to pass upon the question of the Board's jurisdiction to make this provision or to determine whether the title to the portions of the road in question became vested in the City of Hamilton immediately upon the annexation or remained vested in the County of Wentworth until the enactment of section 433 of the Municipal Act of 1913. The only material matter in connection with the action of

the Board is its jurisdiction to order the annexation itself, which is uncontroverted and incontrovertible. Whether the order for annexation does full justice to the county in the matter of burdens which it had assumed in connection with the roads in question, or to the city in regard to the responsibilities imposed upon it for their future maintenance, is likewise beside the question with which we have to deal. There may, as Mr. Justice Garrow has suggested, be claims on the part either of the city or of the county, which would be proper subjects for arbitration under section 58 of the Consolidated Municipal Act of 1903—now section 38 of ch. 192, R.S.O., 1914—but these claims do not form part of the subject of this action. The introduction of all these matters merely tends to be-cloud and obscure the real issue presented, which is whether anything has transpired which has the legal effect of depriving the County of Wentworth of the contractual right that it formerly had, and would otherwise continue to possess, to collect from the Hamilton Radial Electric Railway Company the entire annual payments which that company bound itself to make to the county when it acquired the rights or franchise under which it maintains and operates its railway.

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By a by-law passed in June, 1905, to fulfilment of the terms and conditions of which the railway company duly bound itself by contract, the county authorized the construction, maintenance and operation by the railway company of an electric tramway on certain streets or roads then under the jurisdiction of the county. For the privilege thus granted to it the company undertook and agreed to pay to the county a money consideration or compensation, in some of the American cases called a bonus. Booth on Street Railways, 2 ed., secs. 284 and 287. Instead of a gross sum payable on the execution of the contract, as of course it might have been, this compensation took the form of annual instalments of fixed sums payable for each mile of the railway to be constructed, and *pro ratâ* for any portion of a mile. The question now presented is whether the annexation, in November, 1909, to the City of Hamilton of territory which includes portions of the roads or streets covered by the agreement between the county and the company, has affected the obligation of the latter to pay the stipulated compensation, in respect of such portions of the

roads or streets, or has deprived the county of its right to recover the same or vested that right in the city.

The obligation of the company to pay is not contested. Rightly insisting upon the continuation of its franchise to maintain and operate its railway on the portions of the highways in question, the railway company could not consistently contest its correlative obligation to fulfil the condition as to payment of the compensation upon which the existence of that right depends. The substantial dispute is as to the body entitled to receive the moneys—whether they belong to the county or to the city—and for the present that

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dispute is confined to the instalment for the year 1914, the provincial courts having held that the county had acquiesced in the payments for 1911, 1912 and 1913 being made to the city and was thereby estopped from claiming them—and from that part of the judgment there has been no appeal.

Under the terms of the contract the annual instalments are payable for the privilege granted to use the highways for the purpose, in the manner and on the terms stipulated in the county by-law. That right is conferred by the by-law. Its existence depends upon it and is in nowise affected by the annexation to the city, which took the highways subject to it. The jurisdiction acquired by the city upon the annexation over certain portions of the roads on which the railway is constructed does not enable it to interfere with the franchise of the company, which is its property. *Woodhaven Gas Co. v. Deehan*[3]; *Chicago General Railway Co. v. City of Chicago*[4]; *City of Grand Rapids v. Grand Rapids Hydraulic Co.*[5] The description in the agreement of the roads dealt with as, “county roads,” if not geographical, as Mr. Justice Hodgins thinks it was meant to be, at all events has not the effect of confining the operation of the agreement to such portions of

[3] 153 N.Y. 528, at p. 532.
[4] 176 Ill. 253, at p. 259.
[5] 66 Mich. 606, at p. 613.

those roads as remain county roads in the legal sense throughout the term of the franchise. They were county roads in the legal sense when the agreement was made. That the portions of them in the annexed territory have ceased to be county roads within the meaning of that term in the Municipal Act is quite as immaterial as is the question whether the title to the freehold or soil

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of them passed to the city immediately upon the annexation. What is material is that the franchise or right to maintain and operate the tramway of the respondent company upon these portions of the highways was conferred by the county when they were, as portions of "county roads," under its jurisdiction and when it had unquestioned power and authority to subject them to that right or franchise for whatever term it deemed proper and whatever the legal character of the roads might become, or however the ownership of the freehold or soil thereof might change during the term for which such right or franchise should be conferred. Those rights still subsist and they are now enjoyed and exercised by the company solely by virtue of their contract with the county and the county by-law. That by-law, because it affected roads, unlike other by-laws of the county, remained in force within the annexed territory (3 Edw. VII., ch. 19, section 56) and, so far as it authorized the conferring of property rights on the Hamilton Radial Electric Railway Company, cannot, notwithstanding the annexation, be repealed, altered or affected by the city to the prejudice of that company. If the consideration for the privilege granted to the company by the county had been a sum in gross paid on the execution of the contract, it is difficult to conceive on what basis the city could formulate a claim against the county for any part of the money so paid. It is from the county that the company has received its entire right or franchise over the roads in question. It takes nothing in that connection from the city. The annual instalments which it has bound itself to pay are just as much and just as truly the consideration for what it has obtained from the county, and from the county alone, as their total amount would have been if paid when the contract was made.

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On behalf of the respondent, the City of Hamilton; it was sought to treat these payments as rental, incident to and intended to follow a supposed reversion, and, as such, apportionable upon the severance or division of that reversion; and reliance was placed in this connection on section 433 of the Municipal Act of 1913, which declares the freehold and soil of every highway to be vested in the corporation of the municipality, the council of which exercises jurisdiction over it. This idea, though not in terms expressed, would appear to underlie the judgment of the late Mr. Justice Garrow, concurred in by Maclaren and Magee JJ. A., which proceeds on the assumption that because the annexation shortened the mileage in the county and transferred portions of the roads from the county to the city the right to collect the mileage payable in respect of the portions so transferred passed with the transfer. The order of the court is not confined to disaffirming the right of the county to the money in question: it directs the payment of it to the city. But the County of Wentworth was not a lessor and the railway company in no sense became its tenant. It acquired no right to exclusive possession of any part of the highway: *City of St. Louis v. Western Telegraph Co.*[6] The annual instalments are not charged upon and do not issue out of any land. Neither is there any reversion to which the right to receive them is incident or which it can follow. The transfer from the county to the city of jurisdiction over the parts of the highways in question, even though it carried with it the property in the soil or freehold, did not transfer to the city any interest in the moneys payable under the contract in question, for which the railway company had already

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received from the county the full and entire consideration.

There is no statute which takes from the county its contractual right to these moneys. There is no rule of law applicable to the circumstances which deprives it of that right or vests it in another. It has neither relinquished nor transferred it by contract. I know of no other means by which its title to the moneys can have been divested.

[6] 148 U.S.R. 92, at pp. 97-9.

While I express no opinion on the merits in this respect of the case at bar, I can conceive that it may be desirable that some body, such as the Ontario Railway and Municipal Board, should be endowed with authority to control contracts such as that now before us, which confer franchises exercisable in territory in which changes of municipal boundaries may occur, and thereupon to revise and readjust their terms. Such authority does not exist, however, and it can be created only by legislation.

I would, for these reasons, with respect, allow this appeal with costs of the appellant and of the Hamilton Radial Electric Railway Company in this court and in the Appellate Division to be paid by the respondents, the Municipal Corporation of the City of Hamilton, and would restore the judgment of the learned trial judge.

BRODEUR J. (dissenting)—This is an action instituted by the County of Wentworth to claim from the railway company, respondent, a sum of money due for the year 1914 by virtue of an agreement made on the 19th June, 1905.

By that agreement the respondent railway company was authorized to run its street cars on some county roads which were under the jurisdiction of the appel-

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lant corporation and one of the clauses of that agreement was to the effect that the company should pay a yearly sum

> for every mile or *pro ratâ* for portion of a mile of railway operated on the said county roads.

In 1909 a certain portion of the township of Barton in the County of Wentworth was annexed to the City of Hamilton by order of the Ontario Railway and Municipal Board and a portion of those

county roads came, as a result of that annexation, under the jurisdiction of the City of Hamilton. The street railway respondent then apportioned its rental and paid to the County of Wentworth the portion of rent for the road which was under the jurisdiction of the County of Wentworth and paid the other portion to the City of Hamilton.

By its action the County of Wentworth claims that the whole amount should be paid to the county. The money was deposited in court by the railway company and the City of Hamilton claims that the portion of rent which they received from the railway company had been properly paid.

There may be some question as to the extent of the rights of the county corporation over the roads in question; but this question has been solved by an Act passed in 1913 (3 & 4 Geo. V., ch. 43) which declared that the soil of every highway shall be vested in the corporation of the municipality the council for which for the time being have jurisdiction over it.

It is not disputed that the Municipal Board had the right to annex a portion of the Township of Barton to the City of Hamilton. It is common ground also that as a result of that annexation the Council of Hamilton had jurisdiction over all the highways which were in the

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portion so annexed. As a result of that legislation of 1913 the City of Hamilton became also the owner of the soil over which those highways were built.

Then what is the result of that jurisdiction and that ownership with regard to the payment of money which was stipulated for in the deed of the 19th of June, 1905, between the street railway company and the County of Wentworth?

If the sum which had been stipulated for the rent or for the easement in question were a lump sum, the question might be differently solved; but, in the case where it has been stipulated, as in

this one, that the amount to be paid is so much per mile, it seems to me that the only conclusion which might be reached is that if a portion of the highway on which the street railway runs is transferred to the jurisdiction of another body and ceases to be a county road then the rights and obligations in connection with that portion of highway become vested in the new body.

Nobody will dispute that the City of Hamilton is now bound to look after the maintenance of that highway. But it is also entitled to receive all the rents which might be due in connection with the use of that highway. The rent, according to the law, is apportionable where the lessee ceases to have possession of the demised premises, provided this is not due to unlawful eviction by the elssor; thus it is apportionable where the lessee is evicted from part by a person lawfully claiming under title paramount. Halsbury, Laws of England, vol. 18, page 484.

It seems to me that the action by the County of Wentworth for the recovery of the rent and for the use of the road in question is not well founded and the judgment of the Court of Appeal which dismissed that action should be confirmed with costs.

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The appellant has contended and argued that the Municipal Board had illegally and unjustly, in their order, dealt with regard to the payment of a portion of the good roads debentures issued by the County of Wentworth. I did not deal with that question because I consider that it had no bearing on the issues raised by the plaintiffs.

Appeal allowed with costs.

Solicitors for the appellant: Bruce, Bruce & Counsell.

Solicitors for the respondents The Hamilton Radial Railway Co.: Gibson, Levy & Gibson.

Solicitor for the respondent the City of Hamilton: T.R. Waddell.