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*Oct. 22, 23, 25.
*Dec. 9.

F. A. HOGABOOM, GEORGE A. CASE AND CHARLES MILLAR, (EXECUTORS AND TRUSTEES OF THE HOGABOOM ESTATE) .... APPELLANTS;

AND

THE RECEIVER-GENERAL OF CANADA (APPLICANT AND PETITIONER) AND GEORGE S. HOLMESTED (LIQUIDATOR)..................... RESPONDENTS.

IN THE MATTER OF

THE CENTRAL BANK OF CANADA AND OF THE WINDING-UP ACT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Winding-up Act—Moneys paid out of court—Order made by inadvertence —Jurisdiction to compel repayment—R. S. C. c. 129, *ss.* 40, 41, 94 *—Locus standi of Receiver General* —55 *&* 56 *V. c.* 28, *s.* 2*—Statute, construction of.*

The liquidators of an insolvent bank passed their final accounts and paid a balance, remaining in their hands, into court. It appeared that by orders issued either through error or by inadvertence the balance so deposited had been paid out to a person who was not entitled to receive the money, and the Receiver General for Canada, as trustee of the residue, intervened and applied for an order to have the money repaid in order to be disposed of under the provisions of the Winding-up Act.

Held, affirming the decision of the Court of Appeal for Ontario, that the Receiver-General was entitled so to intervene although the three years from the date of the deposit mentioned in the Winding-up Act had not expired.

Held, also, that even if he was not so entitled to intervene the provincial courts had jurisdiction to compel repayment into court of the moneys improperly paid out.

APPEAL from the judgment of the Court of Appeal for Ontario (1), which allowed the appeal of the Receiver-

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

(1) 24 Ont. App. R. 470.

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General from the order of Street J., refusing an application to compel repayment by the executors of the Hogaboom estate of moneys which had been paid to them out of court, under two orders made by Armour C.J., and rescinding and setting aside the two last mentioned orders with costs.

The liquidators of the Central Bank of Canada had paid the money in question into court as part of the balance remaining in their hands at the time of the passing of their final accounts on their discharge, after having paid to the creditors of the bank, out of the assets realized, ninety-nine and two-thirds cents on the dollar of their claims. Prior to this deposit being made, the liquidators, having exhausted every other effort to realize the assets of the bank, had, in 1891, offered the then unrealized assets for sale by tender as per schedule made up to the 22nd July of that year. The tenders were not opened until September, when Hogaboom's tender for $44,500 was accepted, but as some of the assets included in the schedule had been realized in the interval, a deduction was made in respect of those sums, computed at $2,500, and it was agreed that he should be entitled to all other moneys realized from the assets described in the schedule, and in a book containing a list of the unrealized assets, until they were actually transferred to and vested in him. This transfer was effected by an order of the Master in Ordinary, on 3rd October, 1891, containing language which his executors contend is wide enough to include other assets beyond those referred to in the schedule and list. The clause in question is in the following words :— "And every real and personal and heritable and movable property, effects and choses in action of the said bank, if any, of what nature and kind soever and wherever situated and existing to which the said bank was or appeared to be entitled or which was in the

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custody or under the control of the said liquidators and as the same existed on the 22nd July, 1891," save and except one or two claims especially mentioned. An application was made to the Chancellor on the 23rd day of October and an order made by him in the same terms.

Upon the 8th June, 1892, the Master-in-Ordinary had made an order upon the application of the liquidators for a final dividend, payable upon the 2nd July following, which recited that $2,197.50, which had been reserved for dividends upon notes of the bank outstanding and in circulation, and upon which no claims had been made during the time limited by the Act, should now form part of the funds applicable to a final dividend of 6⅓ per cent. which was as much, in view of outstanding matters, as in the opinion of the liquidators could be safely paid out of the assets without incurring risk. The liquidators were also required to deposit in the Canadian Bank of Commerce a schedule setting forth the names and addresses (so far as known) of the payees and the several amounts payable to them in respect of said dividend, and all dividends previously declared but unclaimed, and to make special deposit of the gross amount of the said dividends to be held by the bank subject to the provisions of Section 94 of the Winding-up Act, and the order then provided that by the 2nd July, 1892, the liquidators should deliver into the custody of the Master all the books of the bank, and all claim papers, and file their final accounts as liquidators and pay into court to the credit of the matter any balance remaining in their hands, including the amount reserved to pay dividends.

On the 14th October, 1892, the Master reported that at the date of the report there had come into the liquidators' hands since a previous report $118,171.92. That after deducting various sums amounting to $110,758.01,

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there remained in their hands $7,413.91, which was deposited in the Canadian Bank of Commerce, and which deposit was exclusive of $801.45 for outstanding cheques credited and allowed to the liquidators in their final account; that against the sum of $7,413.91 there were dividend cheques unclaimed amounting to $2,588.04, leaving in the bank $4,825.87 to be paid into court in pursuance of the order of the 8th June, 1892. The liquidators were then discharged, and the respondent Holmested, Accountant of the Supreme Court of Judicature, appointed liquidator without salary, and he has, from the sum so paid into court, paid by order of the court various small sums, but there remained in court on the 3rd January, 1895, $3,635.13, which was claimed, after Hogaboom's death, by his executors as part of the assets which vested in him under his purchase in 1891.

On 4th January, 1895, Armour C. J. made an order for payment out to the trustees of the Hogaboom Estate of the sum of $2,994.88, part of the moneys in court at the credit of the liquidation proceedings, and on the 16th May, 1896, he made a further order for payment out of $606.36, the balance to the credit of the same account. The Receiver-General and Finance Minister for Canada then applied to Street J. for leave to appeal from the orders of Armour C. J., and for a substantive order for the repayment of the moneys, and his applications were dismissed. He then applied to Meredith J. and obtained leave to appeal on both branches of his application to the Court of Appeal (1). The Court of Appeal on the 30th June, 1897, allowed the appeal and reversed the orders of Armour C. J. It is from the judgment of the Court of Appeal that this appeal is taken.

(1) 17 Ont. P. R. 370.

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S. H. Blake Q.C. and *W. R. Smythe* for the appellants. The transfer order of 3rd October, 1891, entitled Hogaboom's Estate to the money, as it was part of the unrealized assets and the order confirming the sale vested all the bank's property in Hogaboom and covered such a residue as that in question. There are no special circumstances to justify interference with the orders made by Armour C. J. See *Marsh* v. *Joseph* (1); *Slater* v. *Slater* (2); *Dangar's Trusts* (3); *Re Ward* (4); *Todd* v. *Studholme* (5); *Re Spencer* (6); *Brydges* v. *Branfill* (7). Summary jurisdiction is not exercised except against solicitors and then only when their negligence has permitted a successful crime. This case is not within the class in which a summary jurisdiction is exercised. *In re Opera, Limited* (8); *In re Thorpe; Vipont* v. *Radcliffe* (9). The court has no right to interfere in this case *ex mero motu*.

The Receiver-General has no *locus standi* to complain or interfere on the ground that he should have had notice of the application to Chief Justice Armour or that the orders were *ex parte* in respect to him. Compare secs. 40 and 41 of the Winding-up Act, and 55 & 56 Vict. ch. 28, sec. 2, which did not come into force until a month after the order of 8th June, 1892. The deposit of the money in court under the latter statute cannot be substituted for the provision requiring the deposit in a bank. There had been no escheat or forfeiture to the crown and he consequently had no beneficial interest in the moneys. The liquidation was still going on with Mr. Holmested as liquidator; he got notice and the rule respecting *ex parte* applications cannot be invoked. The order of Meredith J. (8)

(1) 13 Times L. R. 136.
(2) 58 L. T. 149.
(3) 41 Ch. D. 178.
(4) 31 Beav. 1.
(5) 3 K. & J. 324.
(6) 18 W. R. 240.
(7) 12 Sim. 369.
(8) [1891] 2 Ch. 154.
(9) [1891] 2 Ch. 360.
(8) 17 Ont. P. R. 370.

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giving leave to appeal from the orders of Armour C. J., after such leave had been refused by Street J. was made without jurisdiction, and therefore no effective appeal came before the Court of Appeal for Ontario. See *Re Sarnia Oil Co.* (1); *Ex parte Stevenson* (2), at page 609 per Esher L.J.; *Kay* v. *Briggs* (3); *Ryan* v. *Canada Southern Railway Co.* (4); "*The Amstel*" (5). See also remarks by Ferguson J. refusing appeal from the same order (6) and cases there cited.

Newcombe Q.C., *Deputy Minister of Justice*, and *F. E. Hodgins* for the Receiver-General and Finance Minister of Canada, respondent. The vesting orders and minutes of settlement are confined in their effects to the unrealized assets actually sold and purchased on the tender. *Joint Committee of River Ribble* v. *Croston Urban District Council* (7). There is inherent jurisdiction in the court to compel repayment into court of funds which may have been erroneously and inadvertently ordered to be paid out to an improper person. See *Ex parte James* (8), at page 614; *Ex parte Simmonds* (9); *In re Brown* (10); *In re The Opera Limited* (11); *Brydges* v. *Branfill* (12) at p. 388. This should more particularly be done where all parties have not had an opportunity of laying facts before the court. *Flett* v. *Way* (13); *Re Dangar's Trusts* (14), at page 184; *Marsh* v. *Joseph* (15); *In re Spencer* (16). It is trust money and ear-marked and can be followed. *Bailey* v. *Jellett* (17). The court should not permit itself to be used as a means of effecting a fraud; *White* v. *Tommey* (18) at page 334. The interest

(1) 15 Ont. P. R. 347.
(2) [1892] 1 Q. B. 394.
(3) 22 Q. B. D. 343.
(4) 10 Ont. P. R. 535.
(5) 2 P. D. 186.
(6) 17 Ont. P. R. 395.
(7) [1897] 1 Q. B. 251.
(8) 9 Ch. App. 609.
(9) 16 Q. B. D. 308.
(10) 32 Ch. D. 597.
(11) 39 W. R. 398.
(12) 12 Sim. 369.
(13) 14 Ont. P. R. 123.
(14) 41 Ch. D. 178.
(15) 74 L. T. 412; 75 L. T. 558.
(16) 18 W. R. 240.
(17) 9 Ont. App. R. 187.
(18) 4 H. L. Cas. 313.

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in the payment over of the money at the end of three years from the discharge of the liquidators entitled the Receiver-General to take such conservatory measures; *Peacock* v. *Colling* (1) *Howard* v. *Shrewsbury* (2); and also to special notice of the appellants' application. The notice to the Crown must be special; *Perry* v. *Eames* (3); *Wheaton* v. *Maple* (4); *Re Parker* (5); *Re Bonelli's Electric Telegraph Co.* (6). The official liquidator not being allowed to act, the Receiver-General was the proper person to intervene; *In re Arthur Average Association* (7), at page 529 per Jessel M.R. See also *Duggan* v. *Duggan* (8); *Whitmore* v. *Turquand* (9); *Walker* v. *Budden* (10); *Allum* v. *Dickinson* (11); *Watson* v, *Cave* (12); *Jacques* v. *Harrison* (13).

In cases to restrain waste, it is held that trustees, to preserve contingent remainders, could support a bill for the benefit of the contingent remainders. *Perrott* v. *Perrott* (14), at page 95; *Davies* v. *Leo* (15); *Birch-Wolfe* v. *Birch* (16). The parties affected by proceedings have a sufficient interest to enable them to apply to set them aside. *Jacques* v. *Harrison* (13). A trustee may not sufficiently represent his *certuis qui trustent* particularly if the destruction of trust estate is being accomplished. *Miller* v. *Ostrander* (17); *Baker* v. *Trainor* (18); *Eccles* v. *Lowery* (19); *Francis* v. *Harrison* (20)

Even if the provisions of section forty had not been strictly complied with it is clear that these are moneys

(1) 53 L. T. 620.
(2) L. R. 3 Eq. 218.
(3) [1891] 1 Ch. 658.
(4) [1893] 3 Ch. 48.
(5) 14 Q. B. D. 405.
(6) L. R. 18 Eq. 656.
(7) 3 Ch. R. 522.
(8) 17 Can. S. C. R. 343.
(9) 1 J. & H. 296.
(10) 5 Q. B. D. 267.
(11) 9 Q. B. D. 632.
(12) 17 Ch. D. 19.
(13) 12 Q. B. D. 136, 165.
(14) 3 Atkyns, 94.
(15) 6 Ves. 784.
(16) L. R. 9 Eq. 683.
(17) 12 Gr. 346.
(18) 15 Gr. 252.
(19) 23 Gr. 167.
(20) 43 Ch. D. 183.

paid in by the liquidators and therefore available for creditors. If so the court should insist on their restoration, as in that case the Receiver-General is entitled to any part of it remaining unclaimed for three years, and entitled to have it put in such a position as to allow of the declaration of the dividend. The vesting orders on which such reliance was placed vest the unrealized assets on Hogaboom, "subject to the equity and conditions attaching thereto." The Receiver-General's right is at least an equity or condition.

McCarthy Q.C. for the respondent Holmested cited *Joint Committee of River Ribble* v. *Croston Urban District Council* (1), and authorities mentioned in Holmested & Langton, Ont. Jud. Act, under sec. 782 (2).

The judgment of the court was delivered by

GWYNNE J.—I retain the opinion which I held during the argument that this appeal should not have been entertained. It simply calls in question the jurisdiction of the High Court of Justice for Ontario to rescind certain orders made by a judge of one of the divisions of the court, whereby monies paid into court in the matter of the Winding-up of the Central Bank in favour of the scheduled creditors, were paid out of court to parties not entitled to such trust funds. The parties who had so received such trust funds out of court have in obedience to the order now appealed from repaid the monies back into court where they now remain subject to the trust purposes for which they were originally paid into court, and this court could not order that money to be repaid to the appellants without committing the error with which the Court of Appeal in Ontario have adjudicated that the

(1) [1897] 1 Q. B. 251. (2) Ed. 1890, p. 656.

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orders under which the monies were paid out of court were affected ; and so this court would become advisedly instrumental in causing a repetition of the breach of trust which had originally been committed inadvertently or in error. The only foundation upon which the argument for the appellants has been rested was that the Receiver-General, by a petition in whose name Her Majesty's Attorney-General, the Minister of Justice for the Dominion, informed the court of the breach of trust which had been committed and prayed the court to rescind the orders by which the breach of trust had been effected, and to order the Hogaboom estate to refund into court the monies erroneously paid out to it, had no *locus standi* in court, and secondly that the orders complained of were not appealed against within the terms of the seventy-fourth section of the Winding-up Act, nor had the proceedings to set aside the orders been taken in the form prescribed by the rules of practice established under the Ontario Judicature Act to regulate the practice of the court in the conduct of litigious proceedings *inter partes*. It would be useless to attempt to add anything to the judgment of the learned Chief Justice of Ontario for the purpose of establishing, as he has done most incontrovertibly, that the court had held the monies so paid out to the Hogaboom estate, subject to a certain trust purpose in which that estate had no right or shadow of right whatever, and we need only say that we entirely concur with the learned Chief Justice in his amazement that any one could have supposed that Hogaboom or his estate ever had any such claim, and in the conclusion reached by him that, by the payment of the money out of court to that estate, a great miscarriage of justice had taken place which it was incumbent upon the court as soon as apprised of the error to correct. In the argument

before the Court of Appeal for Ontario the appellants, impressed no doubt with a conviction of the impossibility of maintaining any right to withdraw any part of the fund upon a motion made in the manner in which they did, or upon the material supplied by them in their motion for the orders, set up a claim to retain the monies so received by them, in virtue of a cause of action which they claimed to have against the liquidators of the estate in liquidation, upon an allegation that the said liquidators had not delivered to Hogaboom or his estate the whole of the unrealised assets of the estate which Hogaboom in his lifetime had purchased from them and paid them for. Mr. Justice Maclennan in his exhaustive judgment has dealt with this contention in a much fuller manner than we think was at all necessary for the determination of the matter with which alone the court were dealing, for if the estate of Hogaboom had any such claim, before they could obtain satisfaction of it they must needs establish their claim by a judgment pronounced upon it in their favour, and in order to obtain such a judgment, it was necessary for them to proceed against the liquidators charged with having committed the wrong complained of, either in an ordinary action, or at least, it may be, by proceedings instituted against them under the winding-up order, as nearly as may be in the same manner as an ordinary action, suit or proceeding within the jurisdiction of the court (1). Mr. Justice Maclennan has pointed out in his judgment that in January, 1892, Hogaboom made an application to the court to commit the liquidators for non-delivery to him of certain mortgages, bills, notes and other securities which he claimed to be entitled to by virtue of his purchase of the unrealised assets of the bank, and

(1) 52 Vict. ch. 32, s. 21.

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which he had not received. This contestation was carried on by Hogaboom into the Court of Appeal for Ontario; in that contestation, if there were other assets which Hogaboom claimed to be entitled to, then was the time to present his claim, when it could have been disposed of in the presence of the persons from whom he had purchased the unrealised assets of the bank, as they stood on the 22nd July, 1891, and who were the parties responsible if the claim was well founded.

The learned judge has also shewn that after much litigation that claim was finally disposed of by an agreement concluded between Hogaboom and the liquidators upon the 3rd March, 1893, after the liquidators had been discharged from their office, and after a final close of their dealings with the estate in liquidation and after the payment into court in trust for the creditors of the estate under the provisions of 55 & 56 Vict. ch. 28, of the monies which have been paid out of court to the appellants, in the manner complained of, and by an order made by the court upon the application of Hogaboom in the matter upon the 19th June, 1893, whereby that settlement was approved and confirmed and so finally adjudicated upon. By that settlement Hogaboom released and discharged the liquidators from all claims whatsoever and accepted the sum of fifty dollars in full of all claims against the liquidators and the bank in respect of the assets purchased by him and not handed over. In the Court of Appeal for Ontario, and before us, it was argued that this settlement is not open to the construction put upon it by the respondents' counsel, or rather that it is open to a different construction. We are not here concerned at present with an inquiry whether this be so or not, for if the estate of Hogaboom had, and has still, any claim for assets of the

estate in liquidation purchased by Hogaboom, and not handed over to him, that claim must needs be determined and adjudicated upon in a proceeding duly instituted asserting the demand. When that proceeding shall be, if it ever shall be, instituted, will arise some important questions which must be decided in favour of the appellants before they can obtain a judgment in their favour, namely: 1st. Whether the liquidators who are charged with having committed the wrong of which the appellants complain, must not be the parties against whom the proceedings must be instituted: 2ndly. Whether the estate of Hogaboom is or is not barred and estopped by the settlement made upon the proceedings instituted in January, 1892: 3rdly. If not so estopped, whether there is any foundation for the claim to any, and if any, to what amount: And 4thly. Whether such amount, if any there should be found to be, can now, after the final discharge of the liquidators and the payment by them into court in trust for the creditors who had proved in the liquidation, of the monies remaining in their hands the property of the estate in liquidation, can be charged against such monies.

In the argument before us it was expressly admitted upon behalf of the appellants, indeed it could not be contended to the contrary, that the claim which the appellants assert in argument here has never yet been established in proof, but their learned counsel contended that as the appellants obtained the orders which the Court of Appeal for Ontario have pronounced to have issued upon insufficient material inadvertently and in error it must be assumed that the claim had been established, that in fact it must be so assumed contrary to the manifestly apparent facts. The statement of this contention carries in itself its own refutation. But all these matters are irrelevant

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upon the present appeal, as indeed also is the following to which, nevertheless, I must add a few words because of the contention of the appellants' counsel that inasmuch as the order of the 8th June, 1892, was made before the passing of 55 & 56 Vict. ch. 28, which took place on the 9th July, 1892, the appointment of Mr. Holmested as liquidator for the special purposes named in the order of the 21st November, 1892, had the effect of continuing the estate in liquidation notwithstanding the passing of the final account of the liquidators on the 14th October, 1892, and the order of that date, and notwithstanding anything contained in 55 & 56 Vict. ch. 28. Mr. Justice Maclennan in his judgment points out that unless the liquidators were discharged under the Act they have never been discharged; that the court had no power except under the authority of that Act to discharge them, nor to appoint a liquidator in their place; and he concludes that the naming of Mr. Holmested, the financial officer of the court, as a "liquidator" for the purpose of distributing the balance paid into court by the liquidators, who in passing their final accounts had been discharged, did not make Mr. Holmested a *liquidator* in the sense in which a statutory liquidator representing the creditors of an estate in liquidation is regarded. The naming of Mr. Holmested "liquidator" for the special purpose named in the order had no more effect than if the purpose for which he was so named had been entrusted to him as an officer of the court, without adding to him the appellation of liquidator; and Mr. Justice Maclennan says that the order of the 8th June was made in anticipation of the passing of the Act. He might indeed have added as an historical fact known to the court, that the Act was framed for the purpose of enabling the liquidation of the Central Bank to be closed; that it was framed by

the present Chief Justice, Sir William Meredith, then solicitor of the liquidators in the liquidation matter; that it was revised by the learned Chancellor, and so revised was introduced into Parliament and passed, and that the Master in Ordinary, before whom the proceedings in liquidation were conducted, had urged the Minister of Justice to expedite its passing. Mr. Justice Maclennan's judgment on this point was well founded, but apart from this, the order of the 8th June was provisional only, it authorized accounts to be taken, but gave no effect as yet to their being taken—they were not taken until after the passing of the Act, and the order did not obtain effect until the 14th October, when the accounts having been finally taken, and the amount to be paid in court having been ascertained and paid into court, the order of the 14th October, 1892, finally discharging the liquidators was made, and that order then constituted the finality given to the liquidation by the statute and the money paid into court became by the statute money in court upon the trust purposes named in the statute. But to advert to the only matters which are material on the present appeal, which affect merely the regularity of the proceedings adopted for the purpose of obtaining a rescission of the orders complained of, I desire to say that in my judgment the jurisdiction of the court to rescind orders which like those in the present case have been issued as is clearly demonstrated inadvertently and through error, and which constituted a breach of trust committed by the court itself, is not fettered in any respect either by the rules of practice established by the Judicature Act for regulating proceedings in litigious matters *inter partes*, or by the 74th section of the Winding-up Act, or in fact by any rule other than that compliance with which natural justice requires, namely, that the party to be affected by the order should have notice of

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the application for it so as to enable him to answer such application I am of opinion that the error in the issuing of the orders which the court below has rescinded, is so conclusively apparent, that the application to the Divisional Court should have been granted as soon as it was made. As to the objection that the Receiver General had no *locus standi in curiâ*, while I concur in Mr. Justice Maclennan's judgment that under the statute he had, I must repeat that in my judgment it is quite immaterial whether he had or not. Her Majesty's Attorney General gave the court information of the error and breach of trust through, it is true, the form of a petition signed by the Receiver General, but that was sufficient information to call the court into action whether the person signing the petition had or had not an interest in the fund. The court, indeed, upon being informed of the error and breach of trust as it was by its own financial officer, might have ordered the issue of a rule *nisi* or any other mode of calling upon the appellants to show cause why the orders should not be rescinded. And finally, I am of opinion, that in a matter of this peculiar character, alleged irregularity in the procedure adopted in the court below, is not a matter to be entertained in this court upon appeal.

The appeal, therefore, must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Charles Millar & Co.*

Solicitors for the respondent, the Receiver General: *F. E. Hodgins.*

Solicitor for the respondent, George S. Holmested: *John Hoskin.*