THE ATTORNEY GENERAL FOR ONTARIO ..... APPELLANT;

1968 *Nov. 28, 29 1969 June 30

AND

POLICYHOLDERS OF WENTWORTH INSURANCE COMPANY AND OTHERS CLAIMING FOR LOSSES, POLICYHOLDERS OF WENTWORTH INSURANCE CLAIMING FOR REFUND OF UNEARNED PREMIUMS, THE CLARKSON COMPANY LIMITED AS LIQUIDATOR OF WENTWORTH INSURANCE COMPANY ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance—Constitutional law—Ontario insurance company licenced to do business in Ontario ordered to be wound-up under federal statute—Administration of deposit whether governed by provincial or federal legislation—Winding-up Act, R.S.C. 1952, c. 296. ss. 33, 165(1), 173—"Charge" in s. 173—Insurance Act, R.S.O. 1960, c. 190, ss. 41, 42(5), 48—Whether deposit must be transferred to liquidator.

The Ontario Insurance Act provides, *inter alia*, that every insurer carrying on business in Ontario shall be required to deposit with the Minister a defined amount of approved securities which are vested in the Minister for the protection of the insured. *The Insurance Act* further provides that, should a claim be made against the fund, the order of priority shall favour those who have suffered losses and that those who have claims for unearned premiums should come second. The order of priority provided for in the *Winding-up Act* ranks both claims for losses and claims for unearned premiums on an equal footing. On December 13, 1966, The Wentworth Insurance Company which had been incorporated under the laws of the Province of Ontario and had carried out business in that province with its head office in Toronto, was ordered to be wound-up and a provisional liquidator was appointed. The appointment of a permanent liquidator was made on January 27, 1967. In the meantime, by order dated December 19, 1966, the provisional liquidator was appointed receiver so to administer the deposit pursuant to the provisions of *The Insurance Act* without prejudice to the right of the provisional and of the permanent liquidator to administer the fund under the *Winding-up Act*. The Master's interim report required the liquidator to administer the fund in accordance with *The Insurance Act*. Upon appeal by these policyholders who had claims for refund of unearned premiums the Court of first instance confirmed the report. Upon

*PRESENT: Cartwright C.J. and Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence and Pigeon JJ.

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further appeal, the Court of Appeal unanimously held that the interim report should be varied and that the fund and securities be deposited in the manner provided for in the *Winding-up Act*. Leave to appeal to this Court was granted.

Held (Ritchie, Hall, Spence and Pigeon JJ. dissenting): The appeal should be dismissed.

Per Cartwright C.J. and Fauteux, Abbott, Martland and Judson JJ.: The words of s. 165(1) of the *Winding-up Act* regarding the transfer to the liquidator of all funds and securities that may be on deposit with any government in Canada or with trustees for the benefit of policyholders are plain and cannot mean anything else than that the fund deposited had to be distributed according to the provisions of that Act. Furthermore, the provisions of *The Insurance Act* which purports to lay down a scheme of distribution upon insolvency were invalid *per se* or, in any event, were certainly overborne by the distribution provisions of the *Winding-up Act* with which they cannot be compatibly administered.

Section 173 of the *Winding-up Act*, which provides that "the priority of any mortgage, lien or charge on the property of the company" shall not be prejudiced by reason of the winding-up, is not applicable to the present case. The word "charge" does not include any type of interest created by the alleged statutory trust and refers to an interest in existence, whereas the policyholders acquired no interest except perhaps, at the very most, a prospective one, prior to the administrative order which was, in fact, made at a date subsequent to the winding-up.

Per Hall, Ritchie, Spence and Pigeon JJ., *dissenting*: The power granted to the Minister under *The Insurance Act of Ontario* to require a deposit as a condition precedent to the granting of a licence must include as a necessary consequence the power to administer it if such power is not to become, to a great extent, illusory. The vital question is, therefore, not the exclusive jurisdiction of the Parliament of Canada on matters of bankruptcy and insolvency but whether Parliament, by enacting section 165(1) of the *Winding up Act*, in fact, intruded in a field of legislation, namely insurance, which by virtue of section 92 of the *B.N.A. Act* and of a succession of decisions in the Privy Council and in this Court, has been held as exclusively subject to provincial law. *The Insurance Act* is in "pith and substance" insurance legislation and consequently its disputed sections, in so far as they relate to the administration of a deposit, deal with bankruptcy and insolvency only as incidental to the right to legislate regarding insurance. It follows that section 165(1) of the *Winding-up Act*, by attempting to divert the deposit of its true purpose was *ultra vires* of Parliament.

Assurances—Droit constitutionnel—Compagnie opérant en vertu d'un permis de la province d'Ontario mise en liquidation sous l'autorité d'une loi fédérale—Argents et titres déposés auprès du ministre devaient-ils être gérés aux termes de la loi provinciale ou de la loi fédérale—Loi sur les liquidations, S.R.C. 1952, c. 296, art. 33, 165(1), 173—Sens du mot "charge" dans l'art. 173—Insurance Act, R.S.O. 1960, c. 190, art. 41, 42(5), 48—Argents et titres déposés auprès du ministre doivent-ils être confiés au liquidateur.

La loi d'Ontario sur les assurances stipule, entre autres choses, que tout assureur avant de se livrer au commerce d'assurance doit déposer auprès du ministre un certain montant en titres agréés dont le ministre est saisi pour la protection des assurés. La *Loi sur les assurances* prévoit en outre que, dans le cas d'une réclamation contre ce dépôt, les créances de ceux qui ont droit à une indemnité contre les pertes sont préférées aux créances de ceux qui ont droit à un remboursement de primes. L'ordre de préférence établi par la *Loi sur les liquidations* place sur un pied d'égalité les réclamations contre les pertes et celles portant sur un remboursement de primes. La compagnie Wentworth Insurance, dont le siège social était à Toronto, qui avait été constituée suivant les lois de la province d'Ontario et avait exercé le commerce d'assurance dans cette province, fut mise en liquidation le 13 décembre 1966 conformément aux termes de la *Loi sur les liquidations*. Un liquidateur provisoire fut désigné. La nomination d'un liquidateur permanent fut faite le 27 janvier 1967. Précédemment, par une ordonnance, datée le 19 décembre 1966, le liquidateur provisoire avait été nommé receveur aux fins de gérer le dépôt suivant les exigences de la *Loi sur les assurances* et sans préjudice aux droits du liquidateur provisoire et du liquidateur permanent désignés en vertu des dispositions de la *Loi sur les liquidations*. Le conseiller-maître à la Cour suprême de l'Ontario a, dans son rapport provisoire, exigé que le liquidateur administre le dépôt suivant les dispositions de la *Loi sur les assurances*. La Cour de première instance, qui a entendu les appels des détenteurs de police qui réclamaient un remboursement de primes, a confirmé le rapport. La Cour d'appel, à l'unanimité, a jugé que le rapport provisoire devait être modifié et que les argents et les titres devaient être déposés en la manière prescrite par la *Loi sur les liquidations*. L'autorisation d'interjeter appel à cette Cour a été accordée.

Arrêt: L'appel doit être rejeté, les Juges Ritchie, Hall, Spence et Pigeon étant dissidents.

Le Juge en Chef Cartwright et les Juges Fauteux, Abbott, Martland et Judson: Les termes de l'art. 165(1) de la *Loi sur les liquidations* concernant le transfert au liquidateur des fonds et valeurs dont peut être dépositaire tout gouvernement au Canada ou pouvant être en dépôt chez des fiduciaires pour protéger les porteurs de polices d'assurance sont clairs et ne peuvent pas signifier autre chose que ces fonds et valeurs doivent être répartis en la manière prescrite par cette loi. De plus, les dispositions de la *Loi sur les assurances* qui prétendent imposer un autre ordre de distribution au cas d'insolvabilité sont nulles de plein droit ou, à tout le moins, sont devenues inopérantes par l'effet des dispositions de la *Loi sur les liquidations* régissant l'ordre de distribution avec lesquelles elles ne sont plus compatibles.

L'article 173 de la *Loi sur les liquidations* aux termes de laquelle la liquidation ne doit pas porter préjudice à «la priorité de toute hypothèque, privilège ou charge» ne s'applique pas à la présente cause. Le mot «charge» ne comprend aucun des droits accordés par cette prétendue fiducie et ne s'applique qu'à un droit existant, tandis que les détenteurs de polices d'assurance n'avaient tout au plus qu'un droit éventuel avant la date de l'ordonnance administrative qui, de fait, fut postérieure à la liquidation.

Les Juges Ritchie, Hall, Spence et Pigeon, *dissidents:* Les pouvoirs conférés au ministre aux termes de la *Loi d'Ontario sur les assurances*

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d'exiger un dépôt avant qu'un permis ne puisse être accordé doit avoir pour conséquence nécessaire la faculté de l'administrer, sans quoi ces pouvoirs, dans une large mesure, risquent de devenir illusoires. La question essentielle n'est donc pas celle de la compétence exclusive du Parlement du Canada en matière de faillite ou d'insolvabilité, mais celle de savoir si le Parlement fédéral, en introduisant l'art. 165(1) dans la *Loi sur les liquidations* n'a pas, en fait, empiété sur un domaine législatif, à savoir l'assurance, qui en vertu des dispositions de l'art. 92 de l'*A.A.N.B.* et suivant les décisions répétées du Conseil Privé, fait partie du domaine exclusif des législatures provinciales. La *Loi sur les assurances* est dans son essence et dans sa réalité objective une législation régissant l'assurance et, en conséquence, les articles en litige, dans la mesure où ils se rapportent à l'administration du dépôt, ne traitent de faillite et d'insolvabilité que d'une façon accessoire inséparable du droit de légiférer en matière d'assurance. Il s'ensuit que l'art. 165(1) de la *Loi sur les liquidations*, parce qu'il cherche à détourner le dépôt de son véritable sens, est *ultra vires*.

APPEL d'un jugement de la Cour d'Appel de la province d'Ontario[1], infirmant un jugement du Juge Hartt portant sur la validité des articles de *la Loi d'Ontario sur l'Assurance* prévoyant un ordre de distribution au cas d'insolvabilité. Appel rejeté, les Juges Ritchie, Hall, Spence et Pigeon étant dissidents.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing the judgment of Hartt J. on the issue of the validity of the distribution provisions upon insolvency as found in *The Insurance Act of Ontario*. Appeal dismissed, Ritchie, Hall, Spence and Pigeon JJ. dissenting.

F. W. Callaghan, Q.C., and *R. Scott*, for the appellant.

H. H. Siegal, Q.C., for Policyholders of Wentworth Ins. and others claiming for losses.

Fred M. Catzman, Q.C., and *Marvin A. Catzman*, for Policyholders of Wentworth Ins. and others claiming for refund of unearned premiums.

Carl H. Morawetz, Q.C., for the Clarkson Co., liquidator.

N. A. Chalmers, Q.C., and *S. F. Weislo*, for the Attorney General of Canada.

Claude Gagnon, Q.C., for the Attorney General of Quebec.

S. Friedman, Q.C., for the Attorney General of Alberta.

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[1] [1968] 2 O.R. 416.

The judgment of Cartwright C.J. and Fauteux, Abbott, Martland and Judson JJ. was delivered by

JUDSON J.:—Under the provisions of *The Ontario Insurance Act*, R.S.O. 1960, c. 190, s. 41, every insurer carrying on business in Ontario is required to deposit with the Minister approved securities in certain defined amounts. While these securities are on deposit the property is vested in the Minister without any formal transfer (s. 42(5)). Nevertheless, the insurer is entitled to receive the interest on the deposits as long as it satisfies the conditions of the Act and no notice of any final judgment against the insurer or order for its winding-up or for the distribution of its assets or for the administration of its deposit is given to the Minister.

By order dated December 13, 1966, Wentworth Insurance Company was ordered to be wound up under the *Winding-up Act*, R.S.C. 1952, c. 296. A provisional liquidator was appointed the same day and a permanent liquidator on January 27, 1967. In the meantime, by order dated December 19, 1966, the company's deposit of securities under s. 41 of *The Insurance Act* was ordered to be administered pursuant to the provisions of that Act, and the provisional liquidator was appointed receiver so to administer the deposit. This order was made without prejudice to the rights of the provisional liquidator and the permanent liquidator under the *Winding-up Act* and, particularly, s. 165 of that Act.

It is apparent that the issue with which we are concerned was recognized very early in the proceedings. *The Ontario Insurance Act* provides for a certain order of priorities for claimants against this fund. Briefly, those insured persons who have suffered losses come first. Those who have claims for unearned premiums come second. Under the *Winding-up Act* these two classes of creditors rank *pari passu*.

In the winding-up proceedings, in his interim report, dated September 19, 1967, the Master found that the liquidator was required to administer the fund in the manner provided by ss. 58 and 59 of *The Insurance Act*. There was an appeal from this report by those policyholders who had claims for refunds of unearned premiums. The judge of first instance, by order dated February 21, 1968, dismissed the appeal and confirmed the report. An appeal to the

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Court of Appeal followed. That Court unanimously held that the appeal should be allowed and the interim report of the Master varied and an order made that the liquidator administer the funds and securities deposited as above mentioned in the manner provided by the *Winding-up Act*. Leave to appeal was granted by this Court on July 4, 1968.

The Master held that the legislation relating to the deposit was in "pith and substance" insurance legislation and that the deposit was vested in the Minister *in trust* for the benefit of the policyholders and that he should be free to deal with it according to the provisions of the *Insurance Act*. In his view, the deposit was a "charge" within the meaning of that word in s. 173 of the *Winding-up Act*, which reads as follows:

> 173. Nothing in this Part prejudices or affects the priority of any mortgage, lien or charge upon the property of the company.

Mr. Justice Hartt, while affirming the decision of the Master, did so for different reasons. In his view, the effect of s. 41 of *The Insurance Act* was to vest the deposit in the Minister in trust for the policyholders. Therefore, on ordinary principles of the law of trusts, the deposit was not the property of the company and could not be distributed on insolvency according to the *Winding-up Act*. He did not agree with the Master that s. 173 was applicable. This section only applied where there was a charge upon the company's property. He rested his judgment on the statutory trust which took the deposit out of the classification of "property of the company".

The Court of Appeal unanimously reversed this decision. Mr. Justice Laskin, speaking for the Court, conceded that Hartt J.'s reasoning would be most convincing if one had to rely solely upon s. 33 of the *Winding-up Act*. Section 33 reads:

> 33. The liquidator, upon his appointment, shall take into his custody or under his control, all the property, effects and choses in action to which the company is or appears to be entitled, and he shall perform such duties in reference to winding up the business of the company as are imposed by the court or by this Act.

However, there was s. 165(1) which was enacted to deal with this very situation. Section 165(1) reads:

> 165. (1) The funds and securities of the company in Canada that may be on deposit with any government in Canada or with trustees or otherwise held for the company or for the protection of the policyholders of

the company of the class or classes that are affected by the winding-up order shall, on order of the court having jurisdiction, be transferred to the liquidator.

He could not see how the plain words of this section could mean anything else than that the fund deposited had to be distributed according to the provisions of the *Winding-up Act*. Furthermore, he was of opinion that the provisions of *The Insurance Act* purporting to provide for a scheme of distribution upon insolvency were invalid *per se* or, in any event, were certainly overborne by the distribution provisions of the *Winding-up Act*.

And finally, there were in his view at least three reasons why s. 173 was not applicable. First, on an *ejusdem generis* construction, the word "charge" did not include the type of interest created by the alleged statutory trust. Secondly, the term "charge" refers to an interest in existence at the time of the winding-up order. Here the policyholders acquired no interest until an administration order was made. Their interest was at the very most prospective until the advent of the order. Thirdly, the winding-up order was made before the administration order. Therefore, the deposit was subject to the transfer order under s. 165(1) before the creation of any beneficial interest in the loss claimants.

I agree with the reasons of the Court of Appeal in their entirety and have nothing to add. I would dismiss the appeal and make the same order as to costs in this Court, namely, that the permanent liquidator and the competing classes of policyholders should have their costs of the appeal out of the deposit on a solicitor and own client basis. There will be no costs to or against the Attorney-General for Ontario and the Intervenants.

The judgment of Ritchie, Hall, Spence and Pigeon JJ. was delivered by

HALL J. (*dissenting*):—The Wentworth Insurance Company was incorporated under the laws of the Province of Ontario and carried on the business of insurance in Ontario, with head office at Toronto. A succession of decisions in the Privy Council and in this Court have held that the business of insurance is exclusively subject to provincial law and that by s. 92 of the *B.N.A. Act* the provinces have exclusive jurisdiction to prescribe the way in which insurance business shall be carried on in the province. Dominion legislation which encroaches upon or intermeddles with such

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exclusive provincial jurisdiction is *ultra vires* of the Dominion Parliament. *Citizens Ins. Co. v. Parsons*[2]; *A.-G. Canada v. A.-G. Alta*[3]; *Re Reciprocal Ins. Legislation*[4]; *In Re The Insurance Act of Canada*[5], *Re Home Assurance Co.*[6].

Acting within its exclusive right to legislate regarding insurance, the Province of Ontario enacted *The Insurance Act* R.S.O. 1960, c. 190. This Act is a lengthy statute with XVI Parts, 353 sections, and deals with all phases and modes of insurance, other than those specifically excluded by s. 21(4). This Act and Part VI of *The Corporations Act*, R.S.O. 1960, c. 71, was intended by the Legislature to cover the entire field of insurance and to provide a complete and comprehensive code respecting the law of insurance in the Province of Ontario. Martin J.A., as he then was, in *Crown Bakery v. Preferred Accident Insurance Company*[7] said:

> A perusal of *The Saskatchewan Insurance Act*, as it was enacted in 1915 and again in 1924-25, convinces me that the Legislature intended to cover the entire field of insurance, and to enact a complete code of law to govern all insurance contracts in the province, . . .

The *Saskatchewan Insurance Act* and *The Ontario Insurance Act* are almost identical in scope and this observation would apply equally to the Ontario legislation.

Part I of *The Insurance Act* provides for a Superintendent of Insurance by s. 2(1) which reads:

> 2. (1) A Superintendent of Insurance shall be appointed who shall exercise the powers and perform the duties vested or imposed upon him by this or any other Act, shall have the general supervision of the business of insurance in Ontario and shall see that the laws relating to the conduct thereof are enforced and obeyed.

Part II of *The Act* applies to insurance undertaken in Ontario and to all insurers carrying on business in Ontario (s. 20(1)). S. 21(1) and (2) read:

> 21. (1) Every insurer undertaking insurance in Ontario or carrying on business in Ontario shall obtain from the Minister and hold a licence under this Act.
>
> (2) Every insurer undertaking insurance or carrying on business in Ontario without having obtained a licence as required by this section is guilty of an offence.

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[2] [1881] 7 App. Cas. 96, 51 L.J.P.C. 11.
[3] [1916] 1 A.C. 588, 26 D.L.R. 288, 10 W.W.R. 505, 25 Que. K.B. 187.
[4] [1924] A.C. 328, [1924] 1 D.L.R. 789, 2 W.W.R. 397, 41 C.C.C. 336.
[5] [1932] A.C. 41, [1932] 1 D.L.R. 97, 53 Que. K.B. 34.
[6] [1949] 2 D.L.R. 382, [1949] 1 W.W.R. 656, 16 I.L.R. 56.
[7] [1933] 2 W.W.R. 33 at p. 41.

and prohibit anyone undertaking insurance or carrying on the business of insurance in Ontario unless licenced to do so. A licence issued under s. 21(1) authorizes, as stated in s. 23:

23. (1) Upon due application and upon proof of compliance with this Act, the Minister may issue a licence to undertake contracts of insurance and carry on business in Ontario to any insurer coming within one of the following classes:

1. Joint stock insurance companies.
2. Mutual insurance corporations.
3. Cash-mutual insurance corporations.
4. Fraternal societies.
5. Mutual benefit societies.
6. Companies duly incorporated to undertake insurance contracts and not within classes 1 to 5.
7. Reciprocal or inter-insurance exchanges.
8. Underwriters or syndicates of underwriters operating on the plan known as Lloyds.
9. Pension fund associations.

(2) A licence issued under this Act authorizes the insurer named therein to exercise in Ontario all rights and powers reasonably incidental to the carrying on of the business of insurance named therein that are not inconsistent with this Act or with its act or instrument of incorporation or organization.

Certain conditions precedent to the issuing of a licence are set out in s. 32.

S. 41 and 42 which read:

41. (1) Every insurer carrying on the business of insurance in Ontario *shall, before receiving a licence under this Act, deposit approved securities* with the Minister in the following amounts: (emphasis added)

1. Where the insurer undertakes life insurance—$50,000.
2. Where the insurer undertakes any one or more classes of insurance other than life,
   i. in Ontario only—$25,000.
   ii. in Ontario and elsewhere—$50,000.

(2) The Superintendent may require the deposit referred to in subsection 1 to be increased, either before or after granting the licence, to such amount as he considers necessary.

(3) An insurer may voluntarily make a deposit in excess of the amount prescribed by this section, but no part of a voluntary deposit shall be withdrawn without the sanction of the Minister.

42. (1) The value of such securities shall be estimated at their market value, not exceeding par, at the time they are deposited.

(2) If any other than approved securities are offered as a deposit, the Minister may accept them on such valuation and on such conditions as he deems proper.

(3) If the market value of any securities that have been deposited by an insurer declines below that at which they were deposited, the

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Minister may notify the insurer to make such further deposit as will ensure the accepted value of all the securities deposited by the insurer being equal to the amount that is required by this Act to be deposited.

(4) On failure by the insurer to make such further deposit within sixty days after being called upon so to do, the Minister may suspend or cancel the licence of the insurer.

(5) *The property in any stock, bonds or debentures deposited with the Minister under this Act or any predecessor thereof is vested in the Minister by virtue of his office without any formal transfer while such stock, bonds or debentures form the whole or any part of the deposit required by this Act.* (emphasis added)

(6) So long as the conditions of this Act are satisfied and no notice of any final judgment against the insurer or order for its winding-up or for the distribution of its assets or for administration of its deposit is given to the Minister, the insurer is entitled to receive the interest upon the securities forming the deposit.

are the sections which provide for the deposit, and it will be observed that the deposit called for by section 41 is made a condition precedent to receiving a licence under the Act.

In sections 46 to 73 the Act provides for the administration of the deposit required by s. 41. Specifically, sections 48 to 52 provide as follows:

48. (1) The deposit made by an insurer under this Act is subject to administration in the manner hereinafter provided.

(2) *Subject to sections 69 and 70, the deposit shall be held and administered for the benefit of all insured persons under Ontario contracts and they are entitled to share in the proceeds of the deposit.* (emphasis added)

(3) An insured person under an Ontario contract is entitled to share in the proceeds of the deposit in respect of,

(a) a claim for a loss that is covered by the contract and that occurred before the termination date fixed under section 53 of this Act or section 233 of The Corporations Act; or

(b) a claim for refund of unearned premiums, except in the case of life insurance; or

(c) a claim for payment of the legal reserve in respect of the contract in the case of life insurance; or

(d) claims under both clauses a and b.

49. (1) An application for administration of a deposit shall be made by originating notice of motion to a judge of the Supreme Court.

(2) The application shall be made in the county or district,

(a) in which the head office of the insurer is situate; or

(b) in which the chief office of the insurer in Ontario is situate if its head office is out of Ontario.

50. (1) With the approval of the Minister, the Superintendent may make application for administration at any time when, in his opinion, it is necessary or desirable for the protection of the insured person entitled to share in the proceeds of the deposit.

(2) In the case of a reciprocal deposit held in Ontario, the superintendent of insurance of a reciprocating province may make application for administration of the deposit.

(3) An insured person entitled to share in the proceeds of a deposit may make application for administration of the deposit upon producing evidence,

(a) that he has served the Superintendent with a notice in writing of his intention to make application if the Superintendent or the superintendent of insurance of a reciprocating province does not apply; and

(b) that sixty days have elapsed since the service of the notice and that no application for administration of the deposit has been made.

(4) In the case of a reciprocal deposit, if the Superintendent is served with a notice as provided in subsection 3, he shall forthwith notify the superintendent of insurance of each reciprocating province that he has been so served.

51. (1) The applicant for administration of the deposit shall serve the originating notice of motion at least ten days before the date specified in the notice for the making of the application,

(a) upon the insurer or, where the insurer is in liquidation, upon the liquidator of the insurer; and

(b) upon the Superintendent; and

(c) in the case of a reciprocal deposit, upon the superintendent of insurance of each reciprocating province.

(2) An applicant for administration is entitled to an order for administration upon proof,

(a) that the licence of the insurer has been cancelled, and that its assets are insufficient to discharge its outstanding liabilities; or

(b) that an order has been made for the winding up of the insurer, or

(c) that the insurer has failed to pay,

(i) an undisputed claim for sixty days after it has been admitted, or

(ii) a disputed claim after final judgment and tender of a valid discharge,

if the claim arose under a contract of insurance in respect of which the deposit is subject to administration.

52. (1) Upon granting an order for administration, the court shall appoint a receiver to administer the deposit.

(2) Where a provisional liquidator or a liquidator has been appointed under this Act or The Corporations Act or a liquidator has been appointed under the Winding-up Act (Canada) to wind up a company that has made a deposit under this Act, the court may appoint the provisional liquidator or the liquidator as the receiver to administer the deposit.

(3) Thereupon the provisional liquidator or the liquidator shall administer the deposit for the benefit of the insured persons entitled to share in the proceeds thereof in accordance with the provisions of and the priorities set out in this Act.

Sections 58 and 59 read:

58. The proceeds of the deposit are payable,

(a) first, in payment of the receiver and of all costs and expenses incurred by him in the administration of the deposit and in payment of the remuneration, costs and expenses of the provisional liquidator as ordered by the Minister under section 229 of *The Corporations Act*;

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(b) second, in payment of the insured persons who are entitled to share in the proceeds of the deposit in accordance with the priorities set out in section 59.

59. (1) Except in the case of life insurance, each insured person who claims in respect of a loss covered by the contract that occurred before the termination date fixed under section 53 of this Act or section 233 of *The Corporations Act* is entitled to receive payment of his approved or settled claim in full in priority to the insured persons who claim in respect of refunds of unearned premiums.

(2) Subject to subsection 1, an insured person who claims in respect of a refund of unearned premiums may claim such part of the premium paid as is proportionate to the period of his contract unexpired,

(a) at the termination date fixed by the receiver under section 53 or fixed by the provisional liquidator or the liquidator under section 233 of *The Corporations Act;* or

(b) at the date the insured person cancelled the contract, whichever is the earlier date.

(3) In the case of life insurance, each insured person who has a claim for a loss covered by the contract that occurred before the termination date fixed under section 53 of this Act or section 233 of *The Corporations Act* ranks in the distribution of the proceeds of the deposit for the approved or settled amount of the claim *pari passu* with insured persons under unmatured life insurance contracts.

(4) An insured person under an unmatured life insurance contract is entitled to the full amount of the legal reserve in respect of his contract determined by the receiver according to the valuation thereof approved by the Superintendent under this Act.

These sections must be read in conjunction with sections 231 and 232 of Part VI of *The Corporations Act*, respecting insurance corporations. These sections provide:

231. (1) The provisional liquidator or the liquidator, before any order granting administration of the deposit and before the fixing of a termination date pursuant to section 233, may arrange for the reinsurance of the subsisting contracts of insurance of the insurer with some other insurer licensed in Ontario.

(2) For the purpose of securing the reinsurance, the following funds shall be available:

1. The entire assets of the insurer in Ontario other than the deposit except the amount reasonably estimated by the provisional liquidator or the liquidator as being required to pay,
   (a) the costs of the liquidation or winding up;
   (b) all claims for losses covered by the insurer's contracts of insurance of which notice has been received by the insurer or provisional liquidator or liquidator before the date on which the reinsurance is effected;
   (c) the claims of the preferred creditors who are the persons paid in priority to other creditors under the winding up provisions of this Act,

   all of which shall be a first charge on the assets of the insurer, other than the deposit.
2. All or such portion, if any, of the deposit as is agreed upon pursuant to subsection 3.

(3) If it appears necessary or desirable to secure reinsurance for the protection of insured persons entitled to share in the proceeds of the deposit, the Minister, on the recommendation of the Superintendent, or, in the case of a reciprocal deposit, the superintendents of insurance of the reciprocating provinces, may enter into an agreement with the provisional liquidator or the liquidator, whereby, pursuant to section 47 or 71 of *The Insurance Act*, all or any part of the securities in the deposit may be used for the purpose of securing the reinsurance.

(4) The creditors of the insurer, other than the insured persons and the said preferred creditors, are entitled to receive a payment on their claims only if provision has been made for the payments mentioned in subsection 2 and for the reinsurance.

(5) If, after providing for the payments mentioned in subsection 2, the balance of the assets of the insurer, together with all or such portion, if any, of the deposit as is agreed upon under subsection 3, is insufficient to secure the reinsurance of the contracts of the insured persons in full, the reinsurance may be effected for such portion of the full amount of the contracts as is possible.

(6) No contract of reinsurance shall be entered into under this section until it is approved by the Supreme Court.

232. (1) In the winding up of an insurer that has made a deposit pursuant to *The Insurance Act*, if the person appointed as receiver to administer the deposit pursuant to section 52 of *The Insurance Act* is not the person appointed as the provisional liquidator or the liquidator under *The Insurance Act* or this Act or appointed as the liquidator under the *Winding-up Act* (Canada), as the case may be, the Supreme Court at any time in its discretion may order that the deposit and the administration thereof be transferred from the receiver to the provisional liquidator or the liquidator.

(2) Upon the making of an order under subsection 1, the provisional liquidator or the liquidator shall administer the deposit for the benefit of the persons entitled to share in the proceeds thereof in accordance with the provisions of and the priorities set out in this Act.

(3) The amount payable to the provisional liquidator or the liquidator for administering the deposit and all costs and expenses incurred by him in administering the deposit shall be paid out of the deposit in accordance with the priorities fixed by clause a of section 58 of *The Insurance Act*, but the amount payable to the provisional liquidator or the liquidator and all costs and expenses incurred by him in the winding up of the insurer shall not be paid out of the deposit but shall be paid out of and are a first charge on the assets of the insurer except as provided in subsection 3 of section 229.

It will be seen that the provisions of section 232 above correspond to those in s. 52 of *The Insurance Act*.

Wentworth Insurance Company became insolvent and was ordered to be wound up under the *Winding-up Act* R.S.C. 1952, c. 296. Clarkson Company Limited was appointed provisional liquidator on December 13, 1966 (later confirmed as permanent liquidator). On December 19, 1966, the following order was made respecting the

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deposit which Wentworth Insurance Company had been required to put up as a condition of being licenced to do business in Ontario:

UPON the application of counsel on behalf of the Superintendent of Insurance, in the presence of counsel for The Clarkson Company Limited, Provisional Liquidator of Wentworth Insurance Company under *The Winding-Up Act*, R.S.C. 1952, Chapter 296, upon reading the affidavit of Cecil Richards, the consent of The Clarkson Company Limited to act as receiver to administer the deposit of Wentworth Insurance Company under the said Insurance Act and the consent of the said Provisional Liquidator through its solicitors, filed, and upon hearing what was alleged by counsel aforesaid,

1. IT IS ORDERED that the deposit of securities deposited by Wentworth Insurance Company pursuant to Section 41 of the said Insurance Act with the Minister, as defined by the said Act, be administered pursuant to the provisions of the said Act.

2. IT IS FURTHER ORDERED that The Clarkson Company Limited be and is hereby appointed receiver to administer the said deposit pursuant to the said Act.

3. IT IS FURTHER ORDERED that The Clarkson Company Limited be and is hereby authorized to exercise in respect of the account of the insurer all or any of the powers that the Master of the Supreme Court would have if he were taking an account of the claims against the said deposit.

4. IT IS FURTHER ORDERED that The Clarkson Company Limited be and is hereby authorized to sell or realize upon bank deposit receipts in the aggregate sum of approximately $60,000.00 comprising part of the said deposit.

5. IT IS FURTHER ORDERED that this matter be and is hereby referred to the Master at Toronto to give such further directions or advice pertaining to any matter arising in the administration of the deposit as may be necessary from time to time and that the said Master be and is hereby conferred with all the powers conferred upon the Court by the said Insurance Act in and about the administration of the said deposit, passing the accounts of the said receiver, approving the accounts and discharging the said receiver.

6. IT IS FURTHER ORDERED that all the above provisions of this order be without prejudice to the rights of The Provisional Liquidator and The Permanent Liquidator, or either of them of Wentworth Insurance Company appointed under The Winding-Up Act, R.S.C. 1952, Chapter 296 and in particular Section 165 thereof.

7. AND IT IS FURTHER ORDERED that the costs of this application be taxed and paid to the applicant and to the said Provisional Liquidator out of the said deposit.

On July 14, 1967, an application was made to the Master for advice and direction of the Court as to the manner in which the deposit under s. 41 of *The Insurance Act* in the hands of the Liquidator was to be administered, whether under *The Insurance Act*, or as a general asset of the company under the *Winding-up Act*. On this application counsel for the Attorney General for Canada submitted that the

provisions of *The Insurance Act* respecting the administration of the deposit were legislation relating to insolvency and *ultra vires* Ontario.

The Master directed the Liquidator to deal with the deposit in the manner provided by sections 58 and 59 of *The Insurance Act*. An appeal was taken to Hartt J., who upheld the Master and ordered insofar as is relevant here, as follows:

2. AND THIS COURT DOTH FURTHER ORDER that The Clarkson Company Limited, Permanent Liquidator of Wentworth Insurance Company, do administer the funds and securities deposited pursuant to the provisions of The Insurance Act, R.S.O. 1960, Chapter 190, in the manner provided by Sections 58 and 59 of the said Insurance Act.

The Policyholders entitled to claim for refunds of unearned premiums appealed to the Court of Appeal and that Court allowed the appeal and ordered:

2. AND THIS COURT DOTH FURTHER ORDER that The Clarkson Company Limited, Permanent Liquidator of Wentworth Insurance Company, do administer the funds and securities deposited pursuant to the provisions of The Insurance Act, R.S.O. 1960, Chapter 190, in the manner provided by The Winding-up Act, R.S.C. 1952, Chapter 296.

The effect of this order was to require distribution of the deposit as set out in s. 162 of *The Winding-up Act*.

Laskin J.A., writing for the Court, said in his reasons:

It was contended that where on a winding-up under the federal Act by reason of insolvency (which is the present case) securities are on deposit with the Minister, they are not assets of the insolvent company administrable under the federal Act. If the matter rested only on the reach of section 33 of the federal Act, previously mentioned, or on the stark question whether the securities were property of the insolvent company at the time of insolvency the argument would be a formidable one. But it fails to take account of what to me are the plain words of section 165(1).

and

Having regard to the making of a winding up order by reason of insolvency of the Wentworth Insurance Company, I would, as a matter of construction of the Ontario Insurance Act, hold that Act inapplicable to govern the distribution of the deposit in view of the order made under section 165(1) of the Winding-up Act. In so far as the Ontario provisions purport to provide a scheme of distribution upon insolvency, they are invalid *per se*. In any event, they are overborne by the Winding-up Act and especially by sections 162 and 165(1) with which they cannot be compatibly administered.

With respect, I cannot agree. In my view, sections 58 and 59 of *The Insurance Act* are, in pith and substance, valid provincial legislation and further, that s. 165(1) of the

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Winding-up Act is *ultra vires* Parliament; an intrusion into a field of legislative power reserved exclusively to the provinces.

The present case is another in the series of decisions in litigation between the Federal authority and the provinces involving insurance and in every case without exception the exclusive jurisdiction of the provinces as to the conduct of the business of insurance has been upheld by the Courts. Insurance is defined by *The Insurance Act 1960,* R.S.O. c. 190, as follows:

> 1. (31) "insurance" means the undertaking by one person to indemnify another person against loss or liability for loss in respect of a certain risk or peril to which the object of the insurance may be exposed, or to pay a sum of money or other thing of value upon the happening of a certain event;

This is the definition used by all provinces which have adopted the uniform approach, being all ten provinces except Quebec and Newfoundland.

It is accordingly of the essence of insurance that when an eventuality occurs which entitles the insured to indemnity that there be in existence a fund or assets in the hands of someone from which the indemnity will be forthcoming, otherwise the insurance may be no more than a delusion. The deposit feature of the several insurance acts, including the Ontario Act, thus became an integral part of the whole scheme of insurance. To deny access to that deposit to the very persons for whose protection it was established at the time when they need it most is to destroy one of the fundamentals of insurance protection in Ontario.

The deposit is the day to day assurance to insureds who, having no means of their own to evaluate the reliability of insurers, are given that assurance by the provisions of *The Insurance Act* which require the deposit as a condition of being permitted to do business in Ontario. Accordingly an insured in Ontario buys insurance with the knowledge that he will be indemnified if he has a valid claim; in other words that the umbrella will be there if and when it rains; i.e. when *any* of the eventualities set out in s. 51(2) occur.

In these circumstances, how can it be said that *The Ontario Insurance Act* in requiring the deposit and administering it if need be for any of the reasons stated in s. 48 is in pith and substance other than valid insurance legislation?

The pith and substance test of legislative validity has been recognized as the most valid test in determining whether legislation of the Dominion or of a province is *intra vires* or *ultra vires* and particularly so in the much traversed field of insurance law in Canada. The leading case in this respect would appear to be *Attorney-General for Ontario v. Reciprocal Insurers*[8]. The Judgment of their Lordships in that case was delivered by Duff J. (later C.J.C.) sitting as a member of the Privy Council. He said at pp. 336 to 338:

> In *Attorney-General for Canada v. Attorney-General for Alberta* (1916) 1 A.C. 588, it was decided by this Board that it was not competent to the Dominion to regulate generally the business of insurance in such a way as to interfere with the exercise of civil rights in the Provinces.
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> The provisions relating to licences in the Insurance Act of 1910, which by this judgment was declared to be ultra vires, and the regulations governing licences under the Act and applicable to contracts and to the business of insurance, did not, in any respect presently material, substantially differ from those now found in the legislation of 1917; but the provisions of the statute of 1910 derived their coercive force from penalties created by the Insurance Act itself.
>
> The distinction between the legislation of 1910 and that of 1917, upon which the major contention of the Dominion is founded, consists in the fact that s. 508c is enacted in the form of an amendment to the statutory criminal law, and purports only to create offences which are declared to be indictable, and to ordain penalties for such offences. The question now to be decided is whether, in the frame in which this legislation of 1917 is cast, that part of it which is so enacted can receive effect as a lawful exercise of the legislative authority of the Parliament of Canada in relation to the criminal law. It has been formally laid down in judgments of this Board, that in such an inquiry the Courts must ascertain the "true nature and character" of the enactment: *Citizens Insurance Co. v. Parsons* (1881) 7 App. Cas. 96; its "pith and substance": *Union Colliery Co. v. Bryden* (1899) A.C. 580; and it is the result of this investigation, not the form alone, which the statute may have assumed under the hand of the draughtsman, that will determine within which of the categories of subject matters mentioned in ss. 91 and 92 the legislation falls; and for this purpose the legislation must be "scrutinised in its entirety": *"Great West Saddlery Co. v. The King* (1921) 2 A.C. 91, 117. Of course, where there is an absolute jurisdiction vested in a Legislature, the laws promulgated by it must take effect according to the proper construction of the language in which they are expressed. But where the law-making authority is of a limited or qualified character, obviously it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what it is that the Legislature is really doing. Upon this principle the Board proceeded in 1878, in *Attorney-General for Quebec v. Queen Insurance Co.* (1878) 3 App. Cas. 1090, where a statute of Quebec (39 Vict. c. 7), which took the form of a licensing Act, enacted under the authority of s. 92, head 9, of the British North America Act, was held to be in its true character

[8] [1924] A.C. 328, [1924] 1 D.L.R. 789, 2 W.W.R. 397, 41 C.C.C. 336.

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a Stamp Act and an attempt to impose a tax which was an indirect tax, in contravention of the limitation to which the Provincial powers of taxation are subject under the second head of that section. The principle is recognized in *Russell v. The Queen* (1882) 7 App. Cas. 829, and in *Citizens Insurance Co. v. Parsons* 7 App. Cas. 96, and in 1899, conformably to this doctrine, it was held, in the well-known case of *Union Colliery Co. v. Bryden* (1899) A.C. 580, that a statutory regulation, professedly passed for governing the working of coal mines, which admittedly "might be regarded as establishing a regulation applicable" to the working of such mines, and which, "if that were an exclusive description of the substance of it," was "within the competency of the Provincial Legislature by virtue either of s. 92, No. 10, or s. 92, No. 13," must be classed, its "true character," its "pith and substance" being ascertained, as legislation in relation to the subject of "aliens and naturalisation," a subject exclusively within the Dominion sphere of action. The general doctrine was later applied in *John Deere Plow Co. v. Wharton* (1915) A.C. 330, and again in *Great West Saddlery Co. v. The King* (1921) 2 A.C. 91, 117.

and at p. 340:

The power which this argument attributes to the Dominion, is, of course, a far-reaching one. Indeed, the claim now advanced is nothing less than this, that the Parliament of Canada can assume exclusive control over the exercise of any class of civil rights within the Provinces, in respect of which exclusive jurisdiction is given to the Provinces under s. 92, by the device of declaring those persons to be guilty of a criminal offence who in the exercise of such rights do not observe the conditions imposed by the Dominion. Obviously the principle contended for ascribes to the Dominion the power, in execution of its authority under s. 91, head 27, to promulgate and to enforce regulations controlling such matters as, for example, the solemnization of marriage, the practice of the learned professions and other occupations, municipal institutions, the operation of local works and undertakings, the incorporation of companies with exclusively Provincial objects—and superseding Provincial authority in relation thereto. Indeed, it would be difficult to assign limits to the measure in which, by a procedure strictly analogous to that followed in this instance, the Dominion might dictate the working of Provincial institutions, and circumscribe or supersede the legislative and administrative authority of the Provinces.

Such a procedure cannot, their Lordships think, be justified, consistently with the governing principles of the Canadian Constitution, as enunciated and established by the judgments of this Board.

and again at pp. 342-3:

In accordance with the principle inherent in these decisions their Lordships think it is no longer open to dispute that the Parliament of Canada cannot, by purporting to create penal sanctions under s. 91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the Provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid. And indeed, to hold otherwise would be incompatible with an essential principle of the Confederation scheme, the object of which, as Lord Watson said in *Maritime Bank of Canada v. Receiver-General of New Brunswick* (1892) A.C. 437, 441, was "not to weld the Provinces into

one or to subordinate the Provincial Governments to a central authority." "Within the spheres allotted to them by the Act of the Dominion and the Provinces are," as Lord Haldane said in *Great West Saddlery Co. v. The King* (1921) 2 A.C. 91, 100, "rendered in general principle co-ordinate Governments."

Having the power to require the deposit as a condition of granting a licence (and that power is expressly conceded by the respondents and by the Attorney General for Canada) for no one challenges the validity of sections 41 and 42 of *The Insurance Act of Ontario*, the power to administer the deposit follows as a necessary consequence. This argument was recognized as sound as long ago as 1880 where, in *The Queen Insurance Company v. Parsons*[9], Ritchie C.J. said:

> How can this be said to be an interference with the general regulation of trade and commerce? Yet it deals as effectually with the matter or contract of insurance in these particulars as this Act does in reference to the matters with which it deals. If the Legislative power of the provincial legislatures is to be restricted and limited, as it is claimed it should be, and the doctrine contended for in this case, as I understand it, is carried to its legitimate logical conclusion, the idea of the power of the local legislature to deal with the local works and undertakings, property and civil rights, and matters of a merely local and private nature in the province is, I humbly think, to a very great extent, illusory.
>
> I scarcely know how one could better illustrate the exercise of power to the local legislature to legislate with reference to property and civil rights, and matters of a merely local and private nature, than by a local Act of incorporation, whereby a right to hold or deal with real or personal property in a province is granted, and whereby the civil right to contract and sue and to be sued as an individual in reference thereto is also granted. If a legislature possesses this power, as a necessary sequence, it must have the right to limit and control the manner in which the property may be so dealt with, and as to the contracts in reference thereto the terms and conditions on which they may be entered into, whether they may be verbal, or shall be in writing, whether they shall contain conditions for the protection or security of one or other or both the parties, or that they may be free to deal as may be agreed on by the contracting parties without limit or restriction.
>
> Inasmuch, then, as this Act relates to property in Ontario, and the subject-matter dealt with is therefor local, and as the contract between the parties is of a strictly private nature, and as the matters thus dealt with are therefore, in the words of the *British North America Act*, "of a merely local and private nature in the province," and as contracts are matters of civil rights and breaches thereof are civil wrongs, and as the property and civil rights in the province only are dealt with by the Act, and as "property and civil rights in the provinces" are in the enumeration of the "exclusive powers of provincial legislatures," I am of opinion that the legislature of Ontario, in dealing with these matters in the Act in question, did not exceed their legislative powers.

[9] (1880), 4 S.C.R. 215 at pp. 247-248.

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I am happy to say I can foresee, and I fear, no evil effects whatever, as has been suggested, as likely to result to the Dominion from this view of the case. On the contrary, I believe that while this decision "recognizes and sustains the legislative control of the Dominion parliament over all matters confided to its legislative jurisdiction, it, at the same time, preserves to the local legislatures those rights and powers conferred on them by the *B.N.A. Act,* and which a contrary decision would, in my opinion, in effect, substantially, or to a very large extent, sweep away.

Similarly, Lord Atkin in *Ladore v. Bennett*[10], said:

But in the present case nothing has emerged even to suggest that the Legislature of Ontario at the respective dates had any purpose in view other than to legislate in times of difficulty in relation to the class of subject which was its special care—namely, municipal institutions. For the reasons given the attack upon the Acts and scheme on the ground either that they infringe the Dominion's exclusive power relating to bankruptcy and insolvency, or that the deal with civil rights outside the Province, breaks down. *The statutes are not directed to insolvency legislation; they pick out insolvency as one reason for dealing in a particular way with unsuccessful institutions; and though they affect rights outside the Province they only so affect them collaterally, as a necessary incident to their lawful powers* of good government within the Province. (emphasis added)

And in this Court in the case of *Attorney-General for Ontario v. Barfried Enterprises Ltd*[11], Judson J. said:

The issue in this appeal is to determine the true nature and character of the Act in question and, in particular, of s. 2 above quoted. The Act deals with rights arising from contract and is *prima facie* legislation in relation to civil rights and, as such, within the exclusive jurisdiction of the province under s. 92(13). Is it removed from the exclusive provincial legislative jurisdiction by s. 91(19) of the Act, which assigns jurisdiction over interest to the federal authority? In my opinion, it is not legislation in relation to interest but legislation relating to annulment or reformation of contract on the grounds set out in the Act, namely, (a) that the cost of the loan is excessive, and (b) that the transaction is harsh and unconscionable. The wording of the statute indicates that it is not the rate or amount of interest which is the concern of the legislation but whether the transaction as a whole is one to which it would be proper to maintain as having been freely consented to by the debtor. If one looks at it from the point of view of English law it might be classified as an extension of the doctrine of undue influence. As pointed out by the Attorney General for Quebec, if one looks at it from the point of view of the civil law, it can be classified as an extension of the doctrine of lesion dealt with in articles 1001 and 1012 of the *Civil Code.* The theory of the legislation is that the Court is enabled to relieve a debtor, at least in part, of the obligations of a contract to which in all the circumstances of the case he cannot be said to have given a free and valid consent. The fact that interference with such a contract may involve interference with interest as one of the constituent elements of the contract is incidental.

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[10] [1939] A.C. 468 at p. 482, [1939] 3 D.L.R. 1, [1939] 3 All E.R. 98, [1939] 2 W.W.R. 566, 21 C.B.R. 1.

[11] [1963] S.C.R. 570, at pp. 577-578, 42 D.L.R. (2d) 137.

And Cartwright J., as he then was, said at page 579:

The Unconscionable Transactions Relief Act appears to me to be legislation in relation to Property and Civil Rights in the Province and the Administration of Justice in the Province, rather than legislation in relation to Interest. Its primary purpose and effect are to enlarge the equitable jurisdiction to give relief against harsh and unconscionable bargains which the courts have long exercised; it affects, but only incidentally, the subject-matter of Interest, specified in head 19 of s. 91 of the *British North America Act*.

Regarding the validity of s. 165(1) of the *Winding-up Act*, which reads:

165. (1) The funds and securities of the company in Canada that may be on deposit with any government in Canada or with trustees or otherwise held for the company or for the protection of the policyholders of the company of the class or classes that are affected by the winding-up order shall, on order of the court having jurisdiction, be transferred to the liquidator.

(2) Where the company is a Canadian company that has deposited with the government of any state or country outside of Canada, or with any trustee or other person in such state or country, any of its funds or securities for the protection of the company's policyholders in such state or country, the liquidator may request such government trustee or other person to transfer to him the said funds and securities and on such transfer being made, the said funds and securities shall be used for the benefit of all the company's policyholders in the same manner as any other assets of the company.

(3) Where the said government, trustee or other person does not transfer the said funds and securities within such period commencing with the date of the liquidator's request therefor as the Court may fix, the policyholders of the company, for whose protection the said deposit was made, shall be deemed to have refused the reinsurance, if any, arranged by the liquidator, and, whether reinsurance has been arranged or not, to have forfeited all right and claim to any share of the assets of the company other than the funds or securities so deposited for their protection outside of Canada.

it is significant to note that Parliament tried unsuccessfully to regulate the conduct of the insurance business in Canada by enacting that all insurers must obtain a licence. The device employed was by purporting to make it an offence under the *Criminal Code* for any insurer to do business without a Dominion Licence. The field of criminal law is unquestionably in the exclusive competence of Parliament just as is bankruptcy and insolvency under s. 91 of the *British North America Act*. The Privy Council struck down that attempt in the *Reciprocal Insurers* case previously referred to.

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The next attempt was by the *Insurance Act of Canada*, R.S.C. 1917, c. 29. Sections 11 and 12 of the *Insurance Act of Canada* read:

11. It shall not be lawful for (a) any Canadian company; or (b) any alien, whether a natural person or a foreign company, within Canada to solicit or accept any risk, or to issue or deliver any receipt or policy of insurance, or to grant, in consideration of any premium or payment, any annuity on a life or lives, or to collect or receive any premium, or, except as provided in section one hundred and twenty-nine of this Act, to inspect any risk or adjust any loss, or to advertise for or carry on any business of insurance, or to prosecute or maintain any suit action or proceeding, or to file any claim in insolvency relating to such business, unless under a licence from the Minister granted pursuant to the provisions of this Act.

12. (1) It shall not be lawful for any British company, or for any British subject not resident in Canada, to immigrate into Canada for the purpose of opening or establishing any office or agency for the transaction of any business of or relating to insurance, or of soliciting or accepting any risk or issuing or delivering any interim receipt or policy or insurance, or granting, in consideration of any premium or payment, any annuity on a life or lives, or of collecting or receiving any premium, or except as provided in section one hundred and twenty-nine of this Act, of inspecting any risk or adjusting any loss, or of carrying on any business of or relating to insurance, or of prosecuting or maintaining any suit, action or proceeding or filing any claim in insolvency relating to such business, unless under a licence from the Minister granted pursuant to the provisions of this Act.

(2) A company shall be deemed to immigrate into Canada within the meaning of this section if it sends into Canada any document appointing or otherwise appoints any person in Canada its agent for any of the purposes mentioned in subsection one of this section.

Sections 65 and 66 of the same act prescribed penalties for contravention of sections 11 and 12. The validity of these provisions were dealt with by the Privy Council in the case of *In Re Insurance Act of Canada*[12]. The judgment of the Privy Council was delivered by Viscount Dunedin, who said:

It is not in their Lordship's opinion necessary for them, as it was for the judges in the Courts below, to examine in detail the various cases that have arisen in the Canadian Courts. They think that the questions raised can be conclusively dealt with in the light of four cases which have reached this Board. These are in chronological order: *Citizens Insurance Co. v. Parsons* (1881) 7 App. Cas. 96; *John Deere Plow Co. v. Wharton* (1915) A.C. 330; *Attorney General for Canada v. Attorney-General for Alberta* (1916) 1 A.C. 588; and *Attorney-General for Ontario v. Reciprocal Insurers* (1924) A.C. 328.

The case of the *Citizens Insurance Co. v. Parsons* (1881) 7 App. Cas. 96, was not fought directly between the Dominion and the Provinces, either as parties or inteveners. It was an action by a private individual

[12] [1932] A.C. 41, [1932] 1 D.L.R. 97, 53 Que. K.B. 34.

to recover money under an insurance contract for a loss by fire. The defence was non-compliance on the part of the insured with certain statutory conditions imposed by a Provincial Ontario Act and applicable to insurers, to which the answer was made that the provisions were ultra vires as trespassing on the province of Dominion legislation. It was held that the conditions were not ultra vires, and the defence was good. The arguments turned on what may be called the competing claims of ss. 91 and 92 of the British North America Act. The principle laid down was clear. It is within the power of the Dominion legislature to create the person of a company and endow it with powers to carry on a certain class of business to wit, insurance; and nothing that the Provinces can do by legislation can interfere with the status so created; but none the less the Provinces can by legislation prescribe the way in which insurance business or any other business shall be carried on in the Provinces. The great point of the case is the clear distinction drawn between the question of the status of a company and the way in which the business of the company shall be carried on. This distinction was clearly acted on in the next case, which was not an insurance case.

John Deere Plow Co.'s case (1915) A.C. 330; related to a company incorporated under Dominion legislation to carry on the business of trading in agricultural implements throughout Canada. The Parliament of British Columbia sought means to restrain any such trade by enacting that the trader should have no power to sue unless he had obtained a licence to trade from the Provincial authorities. It was held that this was ultra vires of the Province, as being an attempt to interfere with the status of the company.

Then came the case of *Attorney-General for Canada v. Attorney-General for Alberta* (1916) 1 A.C. 588; this was the first direct trial of strength between a Province and the Dominion. By s. 4 of the Dominion Insurance Act of 1910 it was provided that no company or person should do insurance business unless they had received a Dominion license so to act. This provision was fortified by a penalty for contravention under s. 70. Two questions were put to the Court: (1) Are ss. 4 and 70 of the Act or any part thereof ultra vires of the Parliament of Canada? (2) Does s. 4 operate to prohibit a foreign company carrying on business without a licence even though its business is confined to one Province?

The Board answered the first question in the affirmative. Here again the arguments turned on the competing claims of ss. 91 and 92, and the decision on this question conclusively and finally settled that regulations as to the carrying on of insurance business were a Provincial and not a Dominion matter. It really only carried to their logical conclusion the two cases already cited.

As to the second question, Lord Haldane said: (1916) 1 A.C. 588, 597: "The second question is, in substance, whether the Dominion Parliament has jurisdiction to require a foreign company to take out a licence from the Dominion Minister, even in a case where the company desires to carry on its business only within the limits of a single province. To this question their Lordships' reply is that in such a case it would be within the power of the Parliament of Canada, by properly framed legislation, to impose such a restriction. It appears to them that such a power is given by the heads in s. 91, which refer to the regulation of trade and commerce and to aliens. This question also is therefore answered in the affirmative."

The first question in the present appeal really turns upon whether the sections impugned fall within the sentence of the Board just quoted.

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But before discussing this it will be well to examine the remaining case mentioned—namely, the *Reciprocal Insurers' case* (1924) A.C. 328. After the decision against them on the first question in the last case in 1916, the Dominion legislation on this subject was altered. A new Act was passed in 1917. In place of the old s. 4, which had been declared ultra vires by the decision, there were now enacted ss. 11 and 12 in these terms:—(See ss. 11 and 12 previously quoted)

Contravention of these provisions was dealt with by sections imposing penalties. But besides that, there had been inserted in the Criminal Code two new sections, 508C and 508D, which constituted as a criminal offence the doing of insurance business without a Dominion license. Meantime Ontario had passed an Act dealing with mutual insurance. This led to the case in which the questions proposed were as follows: (1) Is it within the legislative competence of the legislature of the Province of Ontario to regulate or license the making of reciprocal contracts by such legislation as that embodied in the Reciprocal Insurance Act, 1922? (2) Would the making or carrying out of reciprocal insurance contracts licensed pursuant to the Reciprocal Insurance Act, 1922, be rendered illegal or otherwise affected by the provisions of ss. 508C and 508D of the Criminal Code as enacted by c. 26 of the Statutes of Canada 7 and 8 Geo. 5 in the absence of a license from the Minister of Finance issued pursuant to s. 4 of the Insurance Act of Canada, 7 & 8 Geo. 5, c. 29? (3) Would the answers to questions 1 or 2 be affected, and if so, how, if one or more of the persons subscribing to such Reciprocal Insurance contracts is: (a) a British subject not resident in Canada immigrating into Canada? (b) an alien?

Mr. Justice Duff, who delivered the judgment of the Board, expressed himself thus (1): "The provisions relating to licenses in the Insurance Act of 1910, which" (by the judgment of 1916) "was declared to be ultra vires, and the regulations governing licenses under the Act and applicable to contracts and to the business of insurance, did not, in any respect presently material, substantially differ from those now found in the legislation of 1917; but the provisions of the statute of 1910 derived their coercive force from penalties created by the Insurance Act itself. The distinction between the legislation of 1910 and that of 1917, upon which the major contention of the Dominion is founded, consists in the fact that s. 508C is enacted in the form of an amendment to the statutory criminal law, and purports only to create offences which are declared to be indictable, and to ordain penalties for such offences. The question now to be decided is whether in the frame in which this legislation of 1917 is cast, that part of it which is so enacted can receive effect as a lawful exercise of the legislative authority of the Parliament of Canada in relation to the criminal law. It has been formally laid down in judgments of this Board, that in such an inquiry the Courts must ascertain 'the true nature and character' of the enactment: *Citizens Insurance Co. v. Parsons* 7 App. Cas. 96; its 'pith and substance': *Union Colliery Co. v. Bryden* (1899) A.C. 580..."

The Board proceeded to decide that the amendment of the criminal law by s. 508C was not a genuine amendment of the criminal law, but was really an attempt by a soi-disant amendment of the criminal law to subject insurance business in the Province to the control of the Dominion, that which had exactly been determined to be ultra vires by the judgment of 1916. This decided the main question.

As regards question 3, it was answered in the negative, but there was added the following addendum: "Their Lordships do not express

any opinion as to the competence of the Dominion Parliament, by virtue of its authority in relation to aliens and to trade and commerce, to enact ss. 11 and 12, sub-s. 1, of the Insurance Act. This, although referred to on the argument before their Lordships' Board, was not fully discussed, and since it is not directly raised by the question submitted, their Lordships, as they then intimated, considered it inadvisable to express any opinion upon it. Their Lordships think it sufficient to recall the observation of Lord Haldane, in delivering the judgment of the Board, in *Attorney-General for Canada v. Attorney-General for Alberta* (1916) 1 A.C. 588, to the effect that legislation, if properly framed, requiring aliens, whether natural persons or foreign companies, to become licensed, as a condition of carrying on the business of insurance in Canada, might be competently enacted by Parliament."

Following on this judgment, the Dominion Parliament, by an amending statute in 1924, repealed sub-s. 2 of s. 12 of the Act of 1917. The Act of 1927, which is the Act with which the present case has to do, reproduces, as has been seen, ss. 11 and 12 and the corresponding penal sections renumbered as 66 and 67, and in the Criminal Code of 1927 the old 508C reappears as 507, but with an exception as to reciprocal insurance companies so as to avoid the direct result of the judgment of 1924.

Their Lordships are now in a position to address themselves directly to the first question in this case. It is clear from the quotations from the *Reciprocal Insurers'* case (1924) A.C. 328, that the question is technically still open, and it is clear from the judgment in the 1916 case that the sections in question can only be justified if to them can be applied what was there said by Lord Haldane in his answer to query 2. Their Lordships will repeat it: "To this question their Lordships' reply is that in such a case it would be within the power of the Parliament of Canada, by properly framed legislation, to impose such a restriction. It appears to them that such a power is given by the heads in s. 91, which refer to the regulation of trade and commerce and to aliens."

The state of opinion in the Court below was as follows: Two learned judges thought that the sections were ultra vires, whether applied to British or to foreign insurers; but three judges, while holding the sections ultra vires as to British subjects, held that they were intra vires as to aliens. Now so far as British subjects were concerned the view was that Lord Haldane's dictum showed clearly that the only power of restriction given rested upon its being possible to connect it with alien legislation, and that therefore it was impossible to bring British subjects within the scope of the dictum. So far as this argument goes, their Lordships think it is sound, but at the same time they think it unnecessary because they think it is swallowed up in the wider consideration which makes the sections bad as regards both aliens and British subjects. Their Lordships consider that although the question was studiously kept open in the *Reciprocal Insurers'* case (1924) A.C. 328, it was really decided by what was then laid down. The case decided that a colourable use of the Criminal Code could not serve to disguise the real object of the legislation, which was to dominate the exercise of the business of insurance. And in the same way it was decided that to try by a false definition to pray in aid s. 95 of the British North America Act, 1867, which deals with immigration, in order to control the business of insurance, was equally unavailing. What has got to be considered is whether this is in a true sense of the word alien legislation, and that is what Lord Haldane meant by "properly framed legislation." Their Lordships have no doubt that the Dominion Parliament might

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pass an Act forbidding aliens to enter Canada or forbidding them so to enter to engage in any business without a license, and further they might furnish rules for their conduct while in Canada, requiring them, e.g., to report at stated intervals. But the sections here are not of that sort, they do not deal with the position of an alien as such: but under the guise of legislation as to aliens they seek to intermeddle with the conduct of insurance business, a business which by the first branch of the 1916 case has been declared to be exclusively subject to Provincial law. Their Lordships have therefore, no hesitation in declaring that this is not "properly framed" alien legislation.

As regards British subjects, who cannot be styled aliens, once the false definition is gone, the same remark applies as to alien immigrants. This is not properly framed law as to immigration, but an attempt to saddle British immigrants with a different code as to the conduct of insurance business from the code which has been settled to be the only valid code, i.e., the Provincial Code.

And regarding the claim that Parliament had a right to provide by section 16 of the *Special War Revenue Act*, R.S.C. 1927, c. 179 that:

"(16) Every person resident in Canada, who insures his property situate in Canada, or any property situate in Canada in which he has an insurable interest, other than that of an insurer of such property, against risks other than marine risks: (a) with any British or foreign company or British or foreign underwriter or underwriters, not licensed under the provisions of the Insurance Act, to transact business in Canada; or (b) with any association of persons formed for the purpose of exchanging reciprocal contracts of indemnity upon the plan known as interinsurance and not licensed under the provisions of the Insurance Act, the chief place of business of which association or of its principal attorney-in-fact is situate outside of Canada; shall on or before the thirty-first day of December in each year pay to the Minister, in addition to any other tax payable under any existing law or statute a tax of five per centum of the total net cost to such person of all such insurance for the preceding calendar year."

Viscount Dunedin said:

Now as to the power of the Dominion Parliament to impose taxation there is no doubt. But if the tax as imposed is linked up with an object which is illegal the tax for that purpose must fall. Sect. 16 clearly assumes that a Dominion license to prosecute insurance business is a valid license all over Canada and carries with it the right to transact insurance business. *But it has been already decided that this is not so; that a Dominion license so far as authorizing transactions of insurance business in a Province is concerned, is an idle piece of paper conferring no rights which the party transacting in accordance with Provincial legislation has not already got, if he has complied with Provincial requirements. It is really the same old attempt in another way.* (emphasis added)

Their Lordships cannot do better than quote and then paraphrase a portion of the words of Duff J. in the *Reciprocal Insurers'* case (1924) A.C. 328, 342. He says: "In accordance with the principle inherent in these decisions their Lordships think it is no longer open to dispute that the Parliament of Canada cannot, by purporting to create penal sanctions under s. 91, head 27, appropriate to itself exclusively a field of

jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the Provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid." If instead of the words "create penal sanctions under s. 91, head 27" you substitute the words "exercise taxation powers under s. 91, head 3," and for the word "Criminal" substitute "taxing", the sentence expresses precisely their Lordships' views.

It was after this decision in the *Insurance Act of Canada* case that s. 165(1) of the *Winding-up Act* was enacted. This would appear to be the last attempt by Parliament to control a facet of insurance operations by purporting to do so through legislation dealing with insolvency. Bankruptcy and insolvency is, by head 21 of s. 91 of the *B.N.A. Act* within the exclusive jurisdiction of Parliament. This is not questioned any more than criminal law was within the jurisdiction of Parliament in the *Reciprocal Insurers'* case or that immigration was in the case of *In Re Insurance Act of Canada*, or interest in the *Barfried* case, or bankruptcy and insolvency in *Ladore v. Bennett*.

It is not the fact that bankruptcy and insolvency is within the exclusive jurisdiction of Parliament that is vital to the question here, but rather that Parliament, by enacting s. 165(1), sought again to intrude into a field of legislation, namely insurance, which by virtue of s. 92, and the cases previously referred to, is committed exclusively to the jurisdiction of the Provinces.

Sections 40 to 73 of *The Insurance Act of Ontario* as well as ss. 225 to 240 of Part VI of *The Corporations Act* respecting Insurance Corporations are part and parcel of the law of Ontario respecting insurance, and the relevant sections, insofar as they relate to the administration of a deposit, deal with bankruptcy and insolvency only as incidental to the right to legislate regarding insurance.

The effect of s. 165(1) of the *Winding-up Act* and of s. 162 of the same Act is to make available to all creditors of an insolvent insurance company the deposit which the Province has required for the protection of policyholders in Ontario for a number of reasons. The requirement that the deposit be handed over to the liquidator may be in itself innocuous. It is the fact that once it is in his hands the liquidator must distribute the deposit as provided in s. 162 of the *Winding-up Act*. This means a distribution different from that called for in s. 48 of *The Insurance Act*. The

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liquidator under the *Winding-up Act* and the receiver under s. 52(1) of *The Insurance Act* may, by s. 52(2), be the same person. I see nothing repugnant in this procedure. It is the manner in which the deposit is to be administered that is the vital issue here, not by whom it is to be distributed. Parliament has chosen by the seemingly innocuous direction in s. 165(1) of the *Winding-up Act* to divert the deposit from its true purpose to a purpose wholly repugnant to the intent of the Legislature of Ontario which, in providing for the deposit, did so for the protection of policyholders as set out in s. 48.

With deference to contrary opinion, the contention that there is no room for any suggestion that s. 165(1) is merely colourable ignores, I think, the history of Parliament's attempts to invade the field of insurance legislation following upon the decision in *Citizens Insurance v. Parsons*[13]. Having attempted to invade the insurance field:

(a) Through the licensing requirement door (*Attorney General for Canada v. Attorney General for Alberta*[14]);

(b) Through the criminal law door (*The Reciprocal Insurers case*[15]);

(c) Through the immigration door (*In Re Insurance Act of Canada*[16]);

and having been repulsed on these three attempts, Parliament then chose immediately after the *Insurance Act of Canada* decision in 1932 to gain entry through another door by s. 165(1) which is not a section dealing with bankruptcy and insolvency generally but one of limited application specifically aimed at insurance companies only. It must be seen as an attempt to make that which is not an asset of an insolvent insurance company into an asset by some sort of legislative transmutation.

Surely it cannot be said that this is valid Dominion legislation. It is patently a foray into the field of insurance, an area forbidden to Parliament. It is colourable legislation and, because of this, *ultra vires*. It ignores completely that by s. 41(5) the deposit is vested in the Minister. There can be no legislative divesting of the deposit under the guise of bankruptcy and insolvency. The effective answer, it appears

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[13] [1881] 7 App. Cas. 96, 51 L.J.P.C. 11.

[14] [1916] 1 A.C. 588, 26 D.L.R. 288, 10 W.W.R. 505, 25 Que. K.B. 185.

[15] [1924] A.C. 328, [1924] 1 D.L.R. 789, 2 W.W.R. 397, 41 C.C.C. 336.

[16] [1932] A.C. 41, [1932] 1 D.L.R. 97, 53 Que. K.B. 34.

to me, is that s. 165(1) attempted to deal with something which is not an asset of the bankrupt by purporting to say that it is. The deposit is vested in the Minister (The Attorney General of Ontario) to be held by him under s. 48(2) "...for the benefit of all insured persons under Ontario contracts..."

The case of *Royal Bank of Canada v. Larue*[17], was cited as supporting the proposition that bankruptcy legislation enacted by Parliament took precedence over the provisions of Art. 2121 of the *Civil Code* of Quebec regarding the priority of a judicial hypothec upon real assets of a debtor in that province. It was held that it was within the powers of the Parliament of Canada to enact, in relation to bankruptcy and insolvency, the relative priorities of creditors under a bankruptcy or authorized assignment. That proposition is not questioned, but it is not relevant here. The *Bankruptcy Act* is general bankruptcy legislation validly enacted under Head 21 of s. 91 of the *British North America Act*.

Larue (Viscount Cave L.C. at p. 197) recognizes that an execution creditor who has realized upon his execution and become satisfied by payment is not affected by a receiving order. In other words, the asset which has been realized upon or the proceeds therefrom are not regarded as belonging to the bankrupt. *A fortiori* an asset which is not the property of the insurance company but is vested in the Minister who can deal with it independently of the company is necessarily beyond the reach of the receiver.

Section 165(1) of the *Winding-up Act* is not a case of a general provision applying to all bankruptcies and insolvencies. It is a section specifically aimed at deposits put up by insurance companies as a condition of being licensed to do business in the Province by which that deposit *vested* in the Minister is sought to be *translated* into an asset of the insolvent insurance company and the title of the Minister to the deposit so vested in him is extinguished. *Larue* dealt with the rights of creditors *inter se* to property of the bankrupt and did not purport to make available to creditors an asset which was not the property of the bankrupt at the time of the bankruptcy.

[17] [1928] A.C. 187, 8 C.B.R. 579, [1928] 1 W.W.R. 534.

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The decision of this Court in *Provincial Treasurer of Manitoba v. Minister of Finance for Canada*[18], is, in my opinion directly applicable to the present case. The facts as set out in the headnote are as follows:

> The Imperial Canadian Trust Company and the Great West Permanent Loan Company, both having charter power to receive moneys on deposit, were closely associated in management. In 1924, the Loan Company, having decided to discontinue its deposit business, entered into an agreement with the Trust Company whereby the latter took over the deposits of the former on terms set out in the agreement. The amount of deposits so turned over was $124,249.16, and the Loan Company delivered to the Trust Company securities aggregating that amount in estimated value. The Trust Company proceeded from time to time to dispose of these trust assets and to pay depositors and, on December 27th, 1927, had paid off $105,968.87, leaving an unpaid balance of $18,280.29. On that same date, the Trust Company was ordered to be wound up under the *Winding-up Act* and the Montreal Trust Company was appointed as liquidator. In August, 1929, an immovable property, the only remaining security still undisposed of, was sold by the liquidator for $30,336.65 and the liquidator "set aside and earmarked", in May, 1930, the above sum of $18,280.29. The liquidator paid out of that sum $8,435.89 to depositors who had filed claims pursuant to an order made by the Master in Chambers, leaving a balance of $9,844.40. The Provincial Treasurer of Manitoba, by an application filed in December, 1937, claimed that sum as *bona vacantia*, and this is the subject-matter of the first appeal. Then, in April, 1940, the Manitoba legislature passed an Act called the *Vacant Property Act*, and, in July, 1940, the Attorney-General for Manitoba claimed the same moneys under the provisions of that Act, and this is the subject-matter of the second appeal. The Minister of Finance for Canada contended in both cases that the moneys were the property of the Crown in right of the Dominion as unclaimed dividends under sections 139 and 140 of the *Winding-up Act*. The appellate court held that the Dominion had jurisdiction over these moneys as part of its jurisdiction over bankruptcy and that its legislation should prevail.

This Court held that the judgments in the Manitoba Court should be reversed and directed that the moneys be paid to the Provincial Treasurer for Manitoba under the provisions of *The Vacant Property Act*. The unanimous judgment of this Court (Rinfret C.J., Davis, Kerwin, Hudson and Taschereau JJ.) was delivered by Hudson J. who, after having discussed the facts and the various transactions which resulted in the sum of $9,844.40 being in dispute, said:

> The fund here in question represents what remains of the securities transferred under the agreement of 1924. That agreement was primarily a contract between the loan company and the trust company to effect a substitution of the latter for the former in relation to the depositors.

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[18] [1943] S.C.R. 370, [1943] 3 D.L.R. 673, 24 C.B.R. 320.

The agreement, however, incorporated a trust which upon the transfer of the securities to the trust company became an "executed" trust, the beneficiaries of which were the depositors. Although these depositors were not parties to the agreement they were interested. The assets transferred by the loan company diminished *pro tanto* the capacity of that company to pay the depositors and the provision for the trust was for their protection.

The language of clause 4 is explicit: the trust company covenants and agrees

"to earmark and specially set aside the securities which shall be taken over...and to retain them solely and only as security and provision to take care of and pay off the deposits above referred to and said securities shall not fall into or become part of the assets"

of such party, "but shall be held and used only as above provided." When the securities were allocated to the trust company, the trust was irrevocable without the consent of the beneficiaries who thereupon acquired an independent right to enforce the trust.

* * *

When the order was made for winding-up, the securities undisposed of were held by the trust company as trustee for the unpaid depositors and, as such, they did not form any part of the assets of the estate. See Palmer's Company Law (Winding-Up) 1937 ed., p. 252 and also p. 672.

* * *

It would appear then that the fund in question is held to fulfil the trust of 1924 and can be treated in no other way.

In this view of the matter, sections 139 and 140 of the *Winding-Up Act* can have no application. The moneys were held by the liquidator as trustee for the individual depositors and not for the trust estate or for anybody else.

The Privy Council in *Attorney-General for Canada v. Attorney-General for the Province of Quebec and Attorneys-General for Saskatchewan, Alberta and Manitoba*[19], in referring to *Provincial Treasurer of Manitoba v. Minister of Finance for Canada,* said:

Indeed, the Chief Justice would himself have decided in favour of the appellants had he not felt himself constrained by the reasoning of the Supreme Court of Canada in *Provincial Treasurer of Manitoba v. Minister of Finance for Canada,* (1943) S.C.R. (Can.) 370 to hold otherwise. That case decided that certain trust money in the hands of a trustee which had not been, and some of which could not be, distributed to the cestuis que trustent could not be regarded as bona vacantia, but that it passed to the Province under an Act which provided that: "2. All personal property, including money or securities for money deposited with or held in trust by any person in the province, which remains unclaimed by the person entitled thereto for twelve years from the time when such property, money or securities were first payable shall notwithstanding that the depositee or trustee has delivered or paid or transferred such personal property, money or securities to any other person or official within cr

[19] [1947] A.C. 33 at pp. 44-45, [1947] 1 D.L.R. 81.

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without the province as depositee or trustee vest in and be payable to His Majesty in the right of the province of Manitoba subject only to His Majesty's pleasure with respect to any claim thereafter made by any person claiming to be entitled to such property, money or securities." The only question in that case material to that which their Lordships are now considering was whether the special Act was in conflict with ss. 139 and 140 of the Winding-up Act of the Dominion Parliament or trenched on the field of bankruptcy and insolvency. It was held that the special Act was not invalidated for either reason. The money in question was not simply a debt—it was trust money—a fund secured on immovable property, and was not an asset of the liquidator in the winding-up but held as trustee for the individual depositors. There was no reason therefore why the Province should not transfer the possession, which the court held to be all that passed, to the Attorney-General for Manitoba as trustee for the depositors, or, indeed, for that matter, to him as bona vacantia. Winding-up and insolvency were not interfered with—only property and civil rights; the sum in dispute being trust money could not be used by the liquidator in the winding-up.

To paraphrase Hudson J. in the quotation given above, the deposit in question here was vested in the Minister as trustee for the policyholders in Ontario pursuant to the provisions of *The Ontario Insurance Act* and not for the Wentworth Insurance Company or for anybody else.

It is clear from s. 33 of the *Winding-up Act* that the property which vests in the liquidator upon his appointment is "...all the property, effects and choses in action to which the company is or appears to be entitled...", and s. 93 of the *Act* says that the property of the company is to be applied in satisfaction of its debts and liabilities and the charges, costs and expenses incurred in winding up its affairs. The liquidator, therefore, has no right under the general provisions of the *Act* to property unless that property is property which comes within the meaning of s. 33. It cannot be said that a deposit *vested* in the Minister is property to which the company is or appears to be entitled. The deposit is not the property of the company at all although in certain circumstances it may revert to the company, but that is much different from saying that the company is or appears to be entitled to it at the relevant time, namely, at the time of the bankruptcy. It cannot be suggested that immediately prior to the making of the receiving order Wentworth Insurance Company could have maintained an action against the Minister for the return to it of the deposit. The receiver has no greater rights in that respect than the insolvent company.

A statement by Lord Atkin in *Lymburn v. Mayland*[20], where he said:

> The provisions of this part of the Act may appear to be far-reaching; but if they fall, as their Lordships conceive them to fall, within the scope of legislation dealing with property and civil rights the legislature of the Province, sovereign in this respect, has the sole power and responsibility of determining what degre of protection it will afford to the public.

is, in my view, very, very apt here. The province has the sole power and responsibility to determine what degree of protection it will stipulate from insurers in favour of insureds in the Province of Ontario.

I would accordingly allow the appeal and restore the judgment of Hartt J. with costs in this Court and in the Court of Appeal.

Appeal dismissed, RITCHIE, HALL, SPENCE and PIGEON JJ. *dissenting.*

Solicitor for the Attorney-General for Ontario: F. W. Callaghan, Toronto.

Solicitors for those policyholders and others claiming for losses: Siegal, Fogler and Greenglass, Toronto.

Socilitors for those policyholders claiming for refund of unearned premiums: Catzman and Wahl, Toronto.

Solicitor for the liquidator: Morawetz and Strauss, Toronto.

[20] [1932] A.C. 318 at p. 326, [1932] 2 D.L.R. 6, [1932] 1 W.W.R. 578, 57 C.C.C. 311.