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*Feb. 2, 3.
*May 2.

ANDREW STEWART, LIQUIDATOR OF THE DOMINION TRUST COMPANY (DEFENDANT) ..... APPELLANT;

AND

BRADFORD W. LEPAGE AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL IN EQUITY OF PRINCE EDWARD ISLAND.

Procedure—"Winding-up Act"—Suit in P. E. I.—Winding-up in B.C. —Leave of court of B. C.—R.S.C. c. 144, ss. 22 and 23.

Where a trust company incorporated by the Parliament of Canada with headquarters in Vancouver is being wound up in British Columbia, leave of the Supreme Court of that province is necessary before suit can be brought in Prince Edward Island against the liquidator and the company to have the latter declared a trustee of moneys deposited with it for investment, for its removal from office and appointment of a new trustee and for the vesting in such new trustee of the securities representing said moneys. Davies J. dissenting.

Judgment appealed against (24 D.L.R. 554) reversed.

APPEAL from a decision of the Court of Appeal in Equity of Prince Edward Island(1) affirming the judgment of the Vice-Chancellor who refused to set aside the bill of complaint on the ground that the plaintiffs had not obtained leave to bring the suit from the Supreme Court of British Columbia.

The only question raised on this appeal was whether or not a suit of the nature stated in the above headnote could be brought in the courts of Prince Edward Island without the leave of the Supreme Court of British Columbia. In other words, whether or not

*PRESENT:—Davies, Idington, Duff, Anglin and Brodeur JJ.

(1) 24 D.L.R. 554.

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section 22 of the "Winding-up Act" applies to such a case. The courts below held that it does not.

Lafleur K.C. and *A. E. MacDonald K.C.* for the appellant.

Gaudet K.C. for the respondents.

DAVIES J. (dissenting)—This is an appeal from the Court of Appeal in Equity in Prince Edward Island dismissing an appeal from a judgment of Vice-Chancellor Fitzgerald dismissing in turn an application made to him by the appellant, as liquidator of the Dominion Trust Company, to have a bill of complaint filed in his court against the said Trust Company and the liquidator thereof dismissed on the ground that the action was commenced without the leave of the Supreme Court of British Columbia as required by the 22nd and 23rd sections of the "Winding-up Act."

The question for our determination is whether those 22nd and 23rd sections are applicable to proceedings such as these or whether they come within section 133 of the Act.

To determine that question it is necessary to see in what relation the complainants stand to the company and its estate and effects.

To do this, we have only before us the statements in the complainant's bill of complaint. The liquidator has not put in any answer to that bill and it seems to me that on this application we are bound to assume the truth of the statements in the bill.

There is no charge of any breach of trust or any claim that the complainants are creditors of the company. The bill seeks a declaration that certain moneys paid by the complainants to the Trust Company and received by it are trust moneys held by it

for the use and benefit of the complainants and that certain mortgages set out in the schedule to the Act were obtained as securities by the defendant company for loans made with complainants' money, and that the company may be declared to be a trustee of such mortgages for the complainants and that as such company is now insolvent it may be removed from the office of trustee and some other person or company substituted for it.

The certificate or declaration of trust which complainants received from the company when they paid over their moneys to it is set out in the bill.

Assuming therefore the truth of the statements in the bill of complaint the question arises whether section 22 of the Act applies at all.

This section is one taken from the Imperial "Winding-up Act" and has been the subject of numerous decisions in the English courts. In construing it and its application the Appeal Court has held in several cases that it did not extend to the case of a landlord distraining upon the goods of the insolvent company which were found upon the land leased and that the landlord's common law right of distraint was not interfered with by the section which "dealt only with *the company*, its *creditors* and its *contributories*.

In the case of *In re Lundy Granite Co.; ex parte Heavan*(1), the Lords Justices, reversing a decision of Lord Romilly, M.R., held that the sections 163 and 87 of the English Act (corresponding to sections 22 and 23 of our Act), did not prevent a landlord from distraining upon the goods of the company for rent accrued since the winding-up. Sir W. M. James, at p. 467, said:

(1) 6 Ch. App. 462.

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It must be the true meaning of the Act to consider these provisions as confined to proceedings by a creditor of the company against the goods of the company; and the Act must be read according to the manifest intention, which could not have been that during the many years over which the winding-up may extend the court should have power to interfere with the rights of every one who happened to have goods of the company in his possession. The landlord has a right to proceed against his tenant, and against the goods of every stranger which happen to be upon the land, and subject to distress.

In a later case of *In re Regent United Service Stores*(1), the Appeal Court, reversing a judgment of Malins Vice-Chancellor, held that the landlord was not a creditor of the company and that his legal right as landlord could not be interfered with under these sections.

Jessel M.R. at page 618, says:

The first question that arises is, whether the statutory provision applies where the landlord is not a creditor of the company. On this point, I need not say more than that it was decided by the Lord Justices in the case of *In re Lundy Granite Company*(2) that it does not apply. That decision is binding upon us, and we need go no further to find a reason for reversing the decision of the Vice-Chancellor.

The other justices concurred with him and Thesiger L.J., referring to *In re Lundy Granite Company*,(2) said, at page 620:

The *ratio decidendi* was not the difference between claims existing at the time of the winding-up order and claims subsequently arising, but that, where a person has no right to claim as a creditor against the company, the court has no jurisdiction to interfere with his legal right against the company's property.

In the case of *In re Longdendale Cotton Spinning Co.*(3), it was held that the mere fact that an order has been made for winding-up a company does not prevent a debenture holder or mortgagee of the company from bringing an action to realize his security

(1) 8 Ch. D. 616. (2) 6 Ch. App. 462.
(3) 8 Ch. D. 150.

and for that proposition the authority of the Court of Appeal in *In re David Lloyd & Co.*(1) was cited as emphatically negativing the existence of any such right.

In *The Longdendale Cotton Case*,(2) Jessel M.R. says (p. 153):

> Then the third objection is that the mortgagors are themselves desirous of selling the property, and that, if the mortgagee sells the property in the action, the probability is that nothing will be left for the general creditors; whereas if the mortgagors sell it, the result may be better for all parties. The answer to that is, the mortgagors had better redeem. If the mortgagee wants to sell he has the right to sell, and to prevent him from selling would be an interference with his rights, and I see no equity in the mortgagors which should deprive him of those rights.
>
> Then the only other point is whether the winding-up makes any difference or confers any new rights. The mere fact that a winding-up order has been made makes no difference, and does not confer upon the company the right of preventing a mortgagee from realizing his security; and for that proposition I have the authority of the Court of Appeal in *In re David Lloyd & Co.*(1), an authority which emphatically negatives the existence of any such right.

It has been suggested that this case is not a binding authority because it was a *voluntary* winding-up. But the judgment of the Master of the Rolls is not based upon that, but broadly upon the construction of the statute and the authority of *In re David Lloyd & Co.*(1) above cited which was a company being wound up under a *compulsory* winding-up order.

I think we are bound by the decisions of the courts of appeal and should not grant the order dismissing the action under sections 22 and 23.

Then section 133 is relied upon, but it seems to me that the same reasoning which confined the operation of sections 163 and 87 of the English Act to claims of creditors only, must apply to this section also. That section reads as follows:—

(1) 6 Ch. D. 339. (2) 8 Ch. D. 150.

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All remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, lien or right of property upon, in or to any effects or property in the hands, possession or custody of a liquidator, may be obtained by an order of the court on summary petition, and not by any action, suit, attachment, seizure or other proceeding of any kind whatsoever.

To give the section 133 the broad construction claimed for it and to extend it to all persons creditors and non-creditors would have the effect not only of practically reversing several English decisions of the Court of Appeal, but would result in transferring the exclusive jurisdiction over trusts and the property trustees hold as such, which is now vested in the Court of Chancery of the Province of Prince Edward Island with regard to trust property held in that province, to the court winding-up an insolvent company in another province.

The result would be that the winding-up court in British Columbia could determine on "summary petition" the legal rights of trustees and *cestuis qui trustent* in Prince Edward Island whether these *cestuis qui trustent* were creditors of the insolvent company or not.

Now I can well understand that such an enactment, however far reaching it might be and however much it might interfere with civil rights in the province in so far as it dealt with the creditors or contributories or assets of the company and so was reasonably necessary for the purpose Parliament was legislating upon, would be *intra vires* of the Dominion Parliament, but I should more than doubt the power of Parliament when legislating upon the subject matter of bankruptcy and insolvency to deal with and take away the rights of third parties not creditors or conributories of the company and not claiming any right to share in the distribution of the assets of the insolvent company.

Surely the negative words of section 133 prohibiting

an action, suit, attachment, seizure or other proceeding of any kind whatsoever

being brought

to enforce any claim for debt, privilege, mortgage, lien or right of property

have reference only to actions of creditors or contributories and do not extend to third parties who are not creditors and are not concerned in the distribution of the assets but seek to assert a legal or equitable right to property they claim as theirs and which the company holds in trust for them.

Of course, I can appreciate the fact that in a case such as the one before us there ought not to be and there would not be any difficulty in obtaining leave from the judge of the British Columbia court having charge of the winding-up proceedings to bring and prosecute this action under section 22, but if the construction of section 133 is as broad and comprehensive as contended for, the only way complainants could enforce their claim as set forth in this action would be a summary petition before the court in British Columbia.

I am strongly inclined to adopt the view of Mr. Justice Haszard that at any rate the application to dismiss the action is premature. It is possible that at the trial if a defence is put in and the crucial statements of fact made in the complainants' bill are controverted and found against the complainants, or if at the hearing they should be found to be creditors or their claim one which affected the distribution of the assets of the company, in other words, if the court found that these moneys and mortgages in

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controversy were really assets of the company and not trust property held for the claimants, a condition would then be found to exist which would make sections 22 and 133 applicable.

In my opinion and as the suit stands at present, they are not so applicable and the courts below were right in so holding.

I would therefore dismiss the appeal.

IDINGTON J.—The appellant is the liquidator of the Dominion Trust Company which was incorporated by an Act of the Dominion Parliament and ordered by the Supreme Court of British Columbia, acting by virtue of the powers conferred upon it by the "Winding-up Act" and amendments thereto, to be wound up.

The respondents instituted thereafter proceedings by way of a bill filed in the Court of Chancery in Prince Edward Island against the said company to have it removed as trustee of certain parties for purposes within the scope of its Act of incorporation and another substituted.

The appellant as liquidator moved the said court to have the said bill dismissed on the ground that leave to bring the suit had not been obtained from the Supreme Court of British Columbia as required by section 22 of the "Winding-up Act" which is as follows:—

22. After the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company, except with the leave of the court and subject to such terms as the court imposes.

The language of this section seems so clear and comprehensive that I can see no room for doubt as to its meaning.

The Dominion Trust Company is a corporate creature of Parliament and everything relative to its

existence or extinction in any way its creator chooses to direct and the relation of those contracting with it pursuant to its corporate powers must be governed by what it chooses to enact.

The "Winding-up Act" seems to apply to any such corporations as the one in question. Indeed there are only a few classes of the Dominion corporations which are excluded from its operation. This is not one. I am, therefore, unable to follow the reasoning upon which the court below has proceeded.

The term assets therein relied upon so much is not defined by the Act and is of somewhat variable meaning according to the context in which it is used. Indeed the Act uses the word in one or two places, as for example, in referring in section 47 to "money and assets" and section 93 "any property or assets," in a way that is illustrative of this.

The ascertainment of the assets distributable amongst the creditors, so far as unsecured, is part of the duty of the liquidator under the direction of the court. He cannot do that efficiently if everyone is to be at liberty to interfere and pursue his own notions of his rights of litigation.

Section 133, for example, furnishes a summary remedy which might be made applicable to respondent's claims, if of the clear and undoubted character their counsel suggests.

If not of that character it is quite competent for the court, in charge of the proceedings, to permit some more suitable remedy either in that court or in such court as it may direct.

The scheme of the Act does not in any way imply that any one is to be deprived of his right in law or equity.

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To say that some of the trust funds are traceable in such a way that in law they must be appropriated to meet the demands of particular *cestuis que trustent* creditors, possibly in priority to others not so fortunate, means nothing in this connection.

All such rights as any man or class of men may have in that regard or any way, must be followed and enforced in a due and orderly manner such as the "Winding-up Act" contemplates and in part prescribes, and evidently intends should be pursued.

The Act in many of its provisions may fall short of meeting what might well have been provided and prescribed for the emergencies of such a case as the respondents present.

The evident scope of the Act, however, clearly is that the courts should be resorted to in order to determine the rights of any creditor or claimant, whatever they may be, according to the settled principles of law applicable thereto.

I see no difficulty in the claims of the respondents, if what they assert be correct, being established just as much as a mortgagee may be permitted to assert his claim.

It is not to be presumed that the court will refuse, in a proper case properly presented, the right to establish any such claim.

It is therefore incumbent upon the court having the matter in charge to give every person the liberty to prosecute his rights, whatever they may be in law, to enforce same.

All that the Act by section 22, as I understand it, means is that reckless and undesirable litigation should be avoided and the consequent waste or ruin thereby of the estate averted.

But whenever there is a fair claim of right in the

way of lien or otherwise presented, he having it or the class he belongs to having it, should be given the right to prosecute and establish same.

Trust funds may thus be traceable as in bankruptcy cases, and a prior claim thereto be established.

I observe that the learned Vice-Chancellor has pointed out the re-incorporation of the company by Prince Edward Island legislation. But that is not what the bill of complaint presents and we must be limited in our view to what it does shew as respondents' ground of complaint.

It is to be observed, moreover, that the effect of re-incorporation by a provincial legislature of a Dominion company, in light of the decision of the Judicial Committee of the Privy Council in the case of *City of Toronto* v. *The Bell Telephone Co.*(1), does not seem to hold out much encouragement to the founding an action or suit on the re-incorporation.

Incidentally it may well be that such legislation, treated as of a contractual nature, may help respondents in asserting their rights.

I think the appeal must be allowed with costs but without prejudice to the parties respondent, or any of them, asserting their right to apply for leave and prosecuting their rights under the direction of the court seized of the proceedings under the "Winding-up Act."

DUFF J.—I would allow the appeal.

ANGLIN J.—Section 133 of the "Winding-up Act" provides a method whereby the complainants may obtain in a summary and inexpensive way the declara-

(1) [1905] A.C. 52.

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tion of trust which they seek. The English statute does not contain a similar provision. I am, therefore, with respect, of the opinion that the reason for which the prohibitive clause of the English "Companies' Act" of 1862 (sec. 87), corresponding to section 22 of our statute, was held inapplicable in some of the cases referred to in Halsbury at p. 538, cited by the learned Chief Justice of Prince Edward Island, not to actions or suits against the company, but to proceedings by way of distress—most of them cases where there was no liability of the company itself, *In re Lundy Granite Co.*(1); *In re Trimsaran Coal, Iron and Steel Co.* (2); *In re Regent United Service Stores* (3), —does not exist here. The complainants' interests are provided for and may be asserted by proceedings in the winding-up. No ground has been shewn, in my opinion, for excluding this suit from the operation of section 22, and a remedy in the winding-up being available, leave to maintain it would not improbably be refused, *In re David Lloyd Co.*(4), although it would otherwise be readily granted, *In re Longdendale Cotton Spinning Co.*(5).

I incline to think, however, that section 133 is prohibitive of any action or suit, such as that brought by the complainants in so far as they seek a declaration of trust and an allocation to the trust of certain "effects or property in the hands, possession or custody of a liquidator," and prescribes an application by summary petition as the exclusive means of obtaining this part of the relief sought. Once the trust has been established the appointment of a new trustee would seem almost a matter of course.

(1) 6 Ch. App. 462.
(2) 24 W. R. 900.
(3) 8 Ch.D. 616.
(4) 6 Ch. D. 339, at p. 3
(5) 8 Ch. D. 150.

Counsel for the respondents urges the grave inconvenience to his clients in Prince Edward Island involved in their being obliged to proceed in the courts of British Columbia. But by section 125 of the Act provision is made for the transfer of any matter relating to the winding-up to any of the several provincial courts. That section contemplates the application for transfer being made in the first instance to the court charged with the liquidation, with the concurrence of the court to which removal is sought —orders of both courts being obtained if thought advisable. I decline to assume that upon its being shewn to the Supreme Court of British Columbia that the questions as to the existence of the trust alleged by the plaintiffs and the earmarking of certain property held by the liquidator as trust assets can be best inquired into in Prince Edward Island—as from what is now before us would seem to be the case—an order of transfer will not be made, preceded or accompanied by the necessary leave under section 22.

No doubt some inconvenience will be involved in such exceptional cases as this where the winding-up of the company is conducted in a province of the Dominion far distant from that in which persons interested as creditors or claimants may reside. But Parliament probably thought it necessary in the interest of prudent and economical winding-up that the court charged with that duty should have control not only of the assets and property found in the hands or possession of the company in liquidation, but also of all litigation in which it might be involved. The great balance of convenience is probably in favour of such single control though it may work hardship in some few cases.

For these reasons I would allow this appeal.

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BRODEUR J.—The appellant is the liquidator of the Dominion Trust Company and the respondents, on behalf of themselves and other *cestuis qui trustent* began proceedings in the Court of Chancery of Prince Edward Island and prayed that the Dominion Trust Company be removed from the office of trustee for the respondents and the other *cestuis qui trustent* and that a new trustee be appointed in its place. They asked also that certain mortgages in the Island taken as security for loans made by the company with moneys received from the respondent and other inhabitants of the Island be vested in the new trustee.

The insolvent company, through its liquidator, has asked that the complaint of the respondents be dismissed on the ground that leave to the Supreme Court of British Columbia to bring the suit was not first obtained as required by section 22 of the "Winding-up Act."

The courts below decided against the appellant and the company on the ground that the trust funds were not affected by the "Winding-up Act" and that the courts of Prince Edward Island alone have jurisdiction over trusts and trustees in that province and must determine whether or not the moneys received by the Dominion Trust Company from the respondents are trust funds.

I am unable to agree with the proposition that the proceedings could be instituted against the insolvent company without leave of the court in whose jurisdiction the liquidation takes place.

Section 22 of the "Winding-up Act" is very wide and reads as follows:

> After the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

The object of this legislation is to prevent litigation being carried on by any one prejudicial to the estate, to prevent the assets being dissipated by law suits, and to have all such matters decided promptly by a summary petition (sec. 133).

The Dominion Trust Company was incorporated by the Federal Parliament and its chief place of business was declared by its Act of incorporation to be in the Province of British Columbia. The proceedings to wind up that company were naturally instituted in the Supreme Court of British Columbia.

It may be that by some provision of the Act suits against the company could be brought in some other province (sec. 125); but the courts of the various provinces are declared auxiliary to one another for the purpose of the "Winding-up Act" and the proceedings may be transferred from one court to another with the concurrence, or by the order, of the two courts or by an order of the Supreme Court of Canada.

That provision of the law, however, would not prevent the court in which the liquidation takes place from granting its leave for the continuance or the instituting of suits or proceedings against the company. The distinction which is sought to be made between actions instituted by ordinary creditors and those instituted by or against trustees could not apply because the law is general and declares formally that no suit or proceeding can be commenced or proceeded with without the leave of the court. The courts have in different cases granted leave to proceed against the company, *In re David Lloyd & Co.*(1), but so far as I have been able to see they have not decided that

(1) 6 Ch. D. 339.

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proceedings even by mortgagees or *cestuis qui trustent* could be instituted without leave.

In this case it looks to me as if the ends of justice would be better served by having the question raised in this proceeding disposed of by the courts of Prince Edward Island. However, it was the duty of the respondents to have the leave of the court of British Columbia which they did not secure.

This is a suit in which all the creditors of the company might be interested, because its purpose is to have a declaration that some funds should belong exclusively to the plaintiffs and should not be disposed of for the benefit of the creditors. Besides, the company, by the agreement with the plaintiff creditors, has an interest in those funds; because the interest and profits resulting from the investment of the principal sum over the rate of interest payable to the investor is the property of the company.

For those reasons, I would allow the appeal with costs.

Appeal allowed with costs.

Solicitor for the appellant: *Aeneas A. MacDonald.*

Solicitor for the respondents: *Gilbert Gaudet.*