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THE ATTORNEY-GENERAL OF THE PROVINCE OF BRITISH COLUMBIA ..... APPELLANT;

*Feb. 8, 9
Apr. 27, 28.
*June 1.

AND

THE ROYAL BANK OF CANADA AND ISLAND AMUSEMENT COMPANY LIMITED ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bona vacantia—Company—Dissolution—Company funds in bank—Striking off register—Subsequent order for restoration to register—Motion for declaration that moneys property of Crown—Companies Act, R.S.B.C., 1924, c. 38, ss. 167, 168; B.C. statute of 1929, c. 11, ss. 199, 200.

On the proper constructions of sections 199 and 200 of the British Columbia *Companies Act* of 1929 (c. 11), the doctrine of *bona vacantia* does not apply so as to include moneys of an incorporated company which had its name stricken from the register under the provisions of the *Companies Act* of 1924 (ss. 167, 168 of c. 38) and restored under the provisions of the 1929 Act—Such company, while "dissolved," cannot be considered to be dead for all purposes when, *inter alia*, by the very part of the Act that refers to dissolution (s. 199 (1) of the Act of 1929), provision is also made enabling the company to apply to the court for an order of revivor, with the express enactment that, upon the order being made, "the company shall be deemed to have continued in existence * * * as if it had not been struck off."

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of Robertson J. (2) and dismissing the appellant's action for a declaration that the moneys deposited in the respondent bank to the credit of the respondent company at the time said company was struck off the register, pursuant to section 167 of the *Companies Act* of 1924, was the property of the Crown as *bona vacantia*.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgments now reported.

H. Alan Maclean for the appellant.

E. F. Newcombe K.C. for the respondent.

*PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin and Hudson JJ.

(1) (1936) 51 B.C. Rep. 241; [1937] 1 W.W.R. 273.

(2) (1935) 50 B.C. Rep. 268; [1936] 1 W.W.R. 168.

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The judgment of Duff C.J. and Rinfret, Kerwin and Hudson JJ. was delivered by

KERWIN J.—This is an appeal by the plaintiff, the Attorney-General of British Columbia, from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of Mr. Justice Robertson (2) which dismissed the plaintiff's motion for judgment upon admissions made in the pleadings. In the action the plaintiff claimed a certain sum of money on deposit with the Royal Bank of Canada standing in the name of Island Amusement Company, Limited, as *bona vacantia*. The courts below, with Mr. Justice Martin dissenting in the Court of Appeal, have disallowed this claim, and in my view they were correct in so doing.

Island Amusement Company, Limited, was incorporated in 1912 under the British Columbia *Companies Act* then in force. In 1917 the company went into voluntary liquidation and one A. S. Innis was appointed liquidator. On October 25th, 1928, the Registrar of Companies struck the company off the Register of Companies in pursuance of section 167 of the *Companies Act*, R.S.B.C., 1924, chapter 38, for failure on the part of the liquidator to make the returns required by the Act. This action of the Registrar followed the publication in the *British Columbia Gazette* of the required notice, and in accordance with subsection 4 of section 167 of the Act, the Registrar published notice of the striking of the company off the register, and according to the same subsection, upon the latter publication, the company was "dissolved." It will be necessary to revert to the provisions of the 1924 Act in order to determine the meaning and effect of this dissolution.

On July 2nd, 1933, Mr. Innis, the liquidator, died. Some time before the making of an order, April 5th, 1935, by the Supreme Court of British Columbia, the Crown made a claim to the moneys on deposit with the Royal Bank of Canada standing in the name of the company. No explanation is forthcoming as to how this deposit had been overlooked by the liquidator and those interested in the company. The order referred to was made on the appli-

(1) (1936) 51 B.C. Rep. 241; [1937] 1 W.W.R. 273.

(2) (1935) 50 B.C. Rep. 268; [1936] 1 W.W.R. 168.

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cation of three shareholders of the company pursuant to the terms of the *Companies Act* then in force, being chapter 11 of the British Columbia Statutes of 1929. That order is as follows:

Upon the application of Bernard Sigismund Heisterman, Joseph Eilbeck Wilson, and Joseph Charles Bridgman, members of the above-named company, by petition dated the 28th day of March, 1935, and upon hearing the solicitor for the applicants, and upon reading the affidavits of the said Bernard Sigismund Heisterman and of William Henry Langley, respectively, both filed herein, and it appearing that the Registrar of Companies does not oppose such application:

It is ordered that the name of the above-named Island Amusement Company, Limited, be restored to the Register of Companies for a period of one year from the date of its restoration to said Register for the purpose of enabling the company to be wound up voluntarily, and that pursuant to the *Companies Act* the company shall be deemed to have continued in existence as if its name had never been struck off, without prejudice, however, to the rights of any parties which may have been acquired prior to the date on which the company is restored to the register.

And it is ordered that the time within which an office copy of this order shall be filed with the Registrar of Companies and his lawful requirements (if any) in respect to the company fulfilled shall be thirty days from the date of this order.

While this order does not so state, we were informed that counsel for the Attorney-General of British Columbia appeared on the motion although we were also informed that the order was issued without having been approved by him.

On June 10th, the Attorney-General, suing on behalf of His Majesty the King in the right of His Province of British Columbia, brought action against the Royal Bank of Canada for a declaration that the money on deposit in the bank to the credit of Island Amusement Company, Limited, was *bona vacantia* and had been ever since October 25th, 1928, the date on which the company was struck off the register, and for an order directing the bank to pay to the plaintiff the said money. On June 19th, 1935, on the application of the defendant bank, it was ordered that the company be joined as a party defendant in the action. As the company was without a liquidator, no appearance was entered for the added defendant. On November 15th, 1935, the plaintiff's motion for judgment was dismissed and the plaintiff appealed to the Court of Appeal for British Columbia. The appeal first came before that court on January 24th, 1936, and then again on January 29th, May 14th, June 26th and October 13th. At

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some date prior to November 4th, 1936, when judgment was delivered by the Court of Appeal, a new order was made under the *Companies Act*, 1929, and while this order does not appear in the case, we were informed that it was made in terms similar to the order of April 5th, 1935. The Court of Appeal had found it impossible to determine the real matter in dispute by reason of the fact that Island Amusement Company, Limited, was not represented but by agreement, after a new liquidator had been appointed, the company was represented by counsel before the Court of Appeal, which counsel adopted the argument that had already been advanced on behalf of the defendant bank. The members of the court were unanimous that the appeal should be allowed as against the Royal Bank, and an order was made for payment of the money into court by the bank. As against the Island Amusement Company, Limited, the appeal was dismissed, and it was ordered that the money was the property of that company. Mr. Justice Martin dissented as to the latter provision, being of opinion that the plaintiff was entitled to succeed in its claim.

What is the nature of a claim to *bona vacantia?* This matter was discussed at length by the Court of Appeal in England in *In re Sir Thomas Spencer Wells* (1), where it was held that the doctrine of *bona vacantia* extended to leaseholds, and that the equity of redemption in the mortgaged premises there in question passed to the Crown as *bona vacantia* on the dissolution of the company. It was pointed out in the judgment of Lord Hanworth, the Master of the Rolls, at page 43 (1):

> The principle under which the Crown takes *bona vacantia* is badly stated in the argument of the Attorney-General in *Middleton* v. *Spicer* (2): "The King is the owner of everything which has no other owner."

The Master of the Rolls further pointed out that that view was accepted by Lord Thurlow in his judgment in that case and also by the Privy Council in *Dyke* v. *Walford* (3). At page 49 (1), Lawrence L.J. quotes Blackstone's definition of "bona vacantia" as "goods in which no one else can claim a property," and refers to the fact that

> the expression "goods" in this definition has admittedly a larger significance that "goods" properly so-called and has long since been construed and accepted by the Court as extending to personal property of every kind.

(1) [1933] Ch. D. 29. (2) (1782) 1 Bro. C.C. 201, at 202.
(3) (1846) 5 Moo. P.C. 434.

Romer L.J., at page 55 (1), states:

In my opinion it is established law that the Crown is entitled to all personal property that has no other owner,

and on page 56 emphasizes the point

that the rule at common law is that property must belong to somebody and where there is no other owner, not where the owner is unknown, that is the distinction, it is the property of the Crown.

The exact point for determination in that case was as to the applicability of the doctrine of *bona vacantia* to an equity of redemption in mortgaged leasehold premises. The company had been dissolved and there were no enactments in question, such as we have in the instant case.

The actual decision in *Russian and English Bank and Florence Montefiore Guedalla* v. *Baring Brothers and Company* (2), does not assist on the point that arises for determination here. The head-note of the report correctly sets forth the decision:—

A foreign company which after carrying on business in this country has been dissolved in the country of its incorporation may, notwithstanding its dissolution in that country, be wound up as an unregistered company under s. 338, ss. 1 and 2, of the *Companies Act*, 1929, although the dissolution took place before the passing of that Act; and, with the leave of the Registrar in Companies Winding-up, on the instruction of the liquidator with the approval of the committee of inspection, an action may be brought in the name of the foreign company to recover sums which at the date of its dissolution were due to the company and unpaid.

So held, by Lord Blanesburgh, Lord Atkin and Lord Macmillan, Lord Russell of Killowen and Lord Maugham dissenting.

At the conclusion of the report appears this note:—

Order appealed from reversed: Ordered that the stay of proceedings be recalled and that the action be allowed to proceed, and that the respondents do pay to the appellants their costs in the Court of Appeal and in this House.

From this it appears that the only point decided was that the action might be brought in the name of the company.

At page 422, Lord Blanesburgh states:—

I would only add, by way of a general observation, that any difficulties in this liquidation will, I doubt not, be met as they arise. It will be open to the Court completely to control the liquidator at every step. In the present action the Court will doubtless be vigilant to see that no order possibly affecting either the Attorney-General on behalf of the Crown or the Soviet Government is made without due notice to each.

Lord Atkin in his speech, at page 426, states that:—

On the assumption adopted by the judgments under appeal * * * there is the further difficulty that all that which had been the moveable property of the company has become vested in the Crown as *bona vacantia*.

(1) [1933] Ch. D. 29. (2) [1936] A.C. 405.

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And later, on the same page, in discussing the effect of the judgments under review, he points out:—

> What has been the property of the company now belongs to a third person, the Crown, and there is no power to vest the property of a third person in the liquidator;

but, on the assumption Lord Atkin preferred to adopt,

> the Crown acquired a defeasible title defeated upon the making of a winding-up order.

Lord Macmillan, the third member of the House, who concurred in allowing the appeal, refers at page 439 to sections 294 to 296 of the Act there in question and pointed out that the provisions of section 296 as to the property of a dissolved company becoming *bona vacantia* were in his view, inapplicable to the *Russian and English Bank* case (1).

> But (he continues), if the assets of the bank on its dissolution become *bona vacantia,* either at common law or by statute, the Attorney-General on behalf of the Crown was present when the winding-up order was pronounced and in acquiescing in that order he must be taken to have had in view all its consequences, including the consequence that it would involve the effective collection and distribution of the assets which belonged to the company.

I must confess that, with respect, I find it difficult to follow this last statement since the report of the decision on the petition for a winding-up order, *In re Russian and English Bank* (2), shows, at page 666, that the Crown took the position that "the Court has no power to accede to the present petition," and further,

> in the present case the Crown has a claim to the goods as *bona vacantia* if it is able to obtain possession of them.

However, I have referred to these extracts from the speeches of their Lordships who, comprising the majority, allowed the appeal, merely to show that each one took a different view as to the possible claim of the Crown to *bona vacantia.*

Of the dissenting Judges, Lord Russell of Killowen, at page 434, states:

> The property which it owned in this country thereupon became the property of the Crown,

and Lord Maugham at page 444:

> It would seem that unless the Crown waives its claim to the assets in question (as in the case of *In re Hendersons' Nigel Co.* (3) there will be no assets available for distribution. In the absence of the Crown I do not wish to be taken as expressing a final opinion on this question, but it seems to me to suggest a further difficulty in the way of the nominal plaintiff.

(1) [1936] A.C. 405. (2) [1932] 1 Ch. D. 663.
(3) (1911) 105 L.T. 370.

Except, therefore, for such assistance as may be gleaned from the expressions of opinion of their Lordships in the *Russian and English Bank* case (1), it would appear that one must find the solution to the problem in this appeal from a consideration of the extent of the doctrine of *bona vacantia* and of the sections of the Act itself. The case of *The King* v. *Attorney-General of British Columbia* (2), affords no guide since, as remarked by Lord Sumner at page 215:—

> All that need be noted about the actual subject-matter of the dispute is that as the parties have admitted it to be in itself *bona vacantia*, their Lordships have proceeded on the footing of this admission *inter partes* to consider the right to it.

And accordingly, on the basis of that admission, it was determined that *bona vacantia* are "royalties" within section 109 of the *British North America Act*, 1867, and belong to the Province and not to the Dominion. In view of the admission in that case, it is not important to consider how the company referred to in the proceedings had been dissolved.

The applicants for incorporation of Island Amusement Company, Limited, had filed a memorandum of association with the Registrar of Companies, and under the provisions of the *Companies Act* in force at that time, the company became incorporated upon the Registrar retaining and registering the memorandum. It has already been mentioned that the company went into voluntary liquidation in 1917 and thereupon it became the duty of the liquidator, from time to time, to make returns to the Registrar, and it was for failure in this respect that on October 25th, 1928, the Registrar struck the company off the register.

Section 167 (R.S.B.C., 1924, chapter 38) which is the section under which the Registrar acted, appears in Part IX of the Act which deals with "Dissolution." The first division of this Part is headed "Cancellation of Incorporation" and section 166, which is the only section in that division, empowers the Lieutenant-Governor in Council to revoke and cancel the incorporation of a company and declare the company to be dissolved. The second division,

(1) [1936] A.C. 405. (2) [1924] A.C. 213.

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headed "Removal from Register of Companies in Default or Defunct," comprises sections 167 to 171 dealing with failures to file certain returns. The third division is headed "Winding up," and it is interesting to note that by section 233 provision is made for the dissolution of a company at the expiration of three months from the receipt by the Registrar of Companies of a return showing how the property of the company had been disposed of. We are not concerned with the dissolution provided for by sections 166 or 233 but with the dissolution under section 167. That section (the underlining is mine) is as follows:

167. (1) Where a company or an extra-provincial company has failed to file any return, notice, or document required to be filed with the Registrar pursuant to this Act or any former *Companies Act* for two consecutive years after the return, notice, or document should have been so filed, or the Registrar has reasonable cause to believe that a company or extra-provincial company is not carrying on business or in operation, he shall send to the company by post a registered letter notifying it of its default or inquiring whether the company is carrying on business or in operation.

(2) If within one month of sending the letter no reply thereto is received by the Registrar, or the company fails to fulfil the lawful requirements of the Registrar, or notifies the Registrar that it is not carrying on business or in operation, he may, at the expiration of a further fourteen days, publish in the *Gazette* a notice that at the expiration of two months from the date of that notice the company mentioned therein will, unless cause is shown to the contrary, be struck off the register, and the company will be dissolved, or, in the case of an extra-provincial company, will be deemed to have ceased to carry on business in the province.

(3) In any case where a company or extra-provincial company is being wound up, if the Registrar has reasonable cause to believe that no liquidator is acting or that the affairs of the company are fully wound up, or if the returns required to be made by the liquidator have not been made for a period of three consecutive months, after notice by the Registrar demanding the returns has been sent by post to the registered office of the company, or, in the case of an extra-provincial company, to the attorney of the company under Part VIII, and to the liquidator at his last-known place of business, the Registrar may publish in the *Gazette* a like notice as is provided in subsection (2).

(4) At the expiration of the time mentioned in the notice, and also in any case where a company has by resolution requested the Registrar to strike it off the register, and has filed with him a statutory declaration of two or more directors proving that the company has no debts or liabilities, the Registrar may, unless cause to the contrary is previously shown, strike the company off the register, and shall publish notice thereof in the *Gazette*, and on the publication in the *Gazette* of this notice the company shall be dissolved, or in the case of an extra-provincial company, shall be deemed to have ceased to carry on business in the province: Provided that the liability (if any) of every director, manager, officer, and

member of the company shall continue and may be enforced as if the company had not been struck off the register.

At the time the restoring order of April 5th, 1935, was secured, the *Companies Act* in force was chapter 11 of the statutes of 1929, sections 199 and 200 of which are as follows (the underlining again being mine):—

199. (1) Where a company or an extra-provincial company or any member or creditor thereof is aggrieved by the company having been struck off the register, the Court, on the application of the company or member or creditor, may subject to section 200 and if satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the company to be restored to the register, and thereupon the company shall be deemed to have continued in existence, or in the case of an extra-provincial company, to be a company registered under Part VII, as if it had not been struck off.

Provided that the Court shall not make an order:

(*a*) In the case of a company formed for the purposes of a club, without the written consent of the Attorney-General; or

(*b*) In the case of a company struck off the register at its own request without the written consent of the Registrar; or

(*c*) In the case of a public company incorporated before the first day of July, 1910, without the written consent of the Registrar.

(2) Where the period fixed for the duration of a company expired before the first day of September, 1921, without a grant of perpetual existence having been obtained by the company under any Act in that behalf, an application to restore the company to the register may nevertheless be made under this section, and if the Court makes an order restoring the company, the company shall be deemed to have been granted perpetual existence as from the date when its time of existence expired, but no member of the company shall be liable for anything done between the time when the company ceased to exist and the date of the order, unless he has consented in writing to the application under this section to restore the company.

(3) A company may for the purposes of its restoration to the register hold such meetings and take such proceedings as may be necessary as if the company had not been dissolved, or in the case of an extra-provincial company as if the company were registered under Part VII, R.S. 1924, c. 38, s. 168.

200. (1) The Court may make an order restoring a company to the register for a limited period or for the purpose of carrying out a particular purpose, and after the expiration of that period or the execution of that purpose the company shall forthwith be struck off the register by the Registrar.

(2) The Court may by an order restoring a company to the register give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the company had not been struck off, but, unless the Court otherwise orders, the order shall be made without prejudice to the rights of parties acquired prior to the date on which the company is restored by the Registrar.

(3) The Court shall not make an order restoring a company to the register, unless notice of the application, together with a copy of the

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petition and any document filed in support thereof with the Court, has been sent to the Registrar, and, except where the application is for an order under subsection (1), notice of the application has also been advertised in two issues of the *Gazette*.

(4) The Court shall by the order restoring a company to the register fix a time within which an office copy of the order shall be filed with the Registrar and his lawful requirements (if any) in respect of the company fulfilled, and may extend such time, but no order shall take effect until an office copy is so filed and such lawful requirements are so fulfilled; and when the office copy is so filed and such lawful requirements are fulfilled, the Registrar shall issue under his seal of office a certificate that the company is restored to the register.

(5) Where the application is not made within one year from the date on which the company was struck off, and another company or extra-provincial company has been incorporated or registered, as the case may be, under the same or a similar name, and the Registrar objects to the restoration of the company to the register under its own name, the Court shall by the order provide that the company be restored under another name approved by the Registrar in writing and the order shall, subject to subsection (4), take effect in the same manner as if the company had changed its name and the Registrar had issued a certificate thereof in accordance with this Act, but in the case of an extra-provincial company the Court shall not make an order unless the company has changed or undertakes to change its name in accordance with its charter and regulations, but this provision shall not apply to a Dominion company.

(6) The expression "lawful requirements" in subsection (4) shall, in addition to any requirement of this Act, be deemed to authorize the Registrar to require a public company incorporated before the first day of July, 1910, to comply with sections 40 or 41 before it carries on business, and to require a company any of whose shares are of a nominal or par value of less than fifty cents for each share to consolidate and divide such shares into shares of a nominal or par value of not less than fifty cents for each share. R.S. 1924, c. 38, s. 168.

While the order restored the company to the register for a limited period and for a particular purpose, it seems plain that in determining the effect of the order regard must be had to the provisions of section 199 as well as the provisions of section 200.

Firstly, it is only section 199 which refers to those who may apply for an order.

Secondly, by subsection 3 of section 200 the court is not to make an order restoring a company to the register unless notice of the application has been sent to the Registrar and except where the application is for an order under subsection 1 notice of the application has also been advertised in two issues of the Gazette. The part underlined contains the provision for notice of the application appearing in the *Gazette* but excepts therefrom the case where an application is for an order under subsection 1 of section 200.

Thirdly, the provisions of subsections 4 and 5 must refer as well to a general order made under section 199 as to an order under subsection 1 of section 200 when it is borne in mind that the powers of the court to restore companies to the register were given in the Act of 1924 (chapter 38) in one section, 168.

Reading these sections together, therefore, the effect of the order was, as stated in subsection 1 of section 199, that

> thereupon the company shall be deemed to have continued in existence * * * as if it had not been struck off.

The enactment in subsection 2 of section 200 that

> unless the Court otherwise orders, the order shall be made without prejudice to the rights of parties acquired prior to the date on which the company is restored by the Registrar,

when read in the light of the terms of section 199 that "the company shall be deemed to have continued in existence" causes no difficulty as I have concluded that the making of the order in 1928, striking the company from the register, never gave the Crown a right to the money as *bona vacantia*. (It should be added that the insertion in the order restoring the company to the register, of the "without prejudice" clause adds nothing to the effect of subsection 2 of section 200.)

Such a right arises only when there is no other owner, and how can it be said that the money on deposit was without an owner when the company was not really dead for all purposes? By subsection 1 of section 199, the company itself may apply for the order, and by subsection 3 the company

> may for the purposes of its restoration to the register hold such meetings and take such proceedings as may be necessary as if the company had not been dissolved * * *

Added to which is the explicit statement as to the effect of the order.

This view is strengthened by a perusal of the earlier legislation. In 1910 the *Companies Act* appeared as chapter 7, and section 265 thereof provides that where a company has failed for any period of two years to send or file any return, notice or document required to be made or filed or sent to the Registrar pursuant to this Act, or the Registrar has reasonable cause to believe that such company is not carrying on business or in operation, he shall send an inquiry as to whether such company is carrying on business or in operation and notifying it of its default (if any).

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By subsection 2, if within one month no reply to such letter is received, etc., the Registrar may at the expiration of another fourteen days publish in the *Gazette* and send to such company a notice that at the expiration of two months the name of such company will, unless cause is shown to the contrary, be struck off the register and the company will be dissolved. By subsection 3, at the expiration of the time mentioned in such last-mentioned notice, the Registrar shall, unless cause to the contrary is previously shown by such company, strike the name of such company off the register and shall publish notice thereof in the *Gazette* for one month, and on such last-mentioned publication the company shall be dissolved.

By subsection 4

if any such company or a member or creditor thereof feels aggrieved by the name of such company having been struck off the register in pursuance of this section, the company or member or creditor may before the completion of the last-mentioned publication apply to the Court;

and the court may order the name of the company to be restored to the register

and thereupon the company shall be deemed to have continued in existence as if the name thereof had never been struck off.

By subsection 6:—

(6) Where a company is being wound up, and the Registrar has reasonable cause to believe either that no liquidator is acting or that the affairs of the company are fully wound up and the returns required to be made by the liquidator have not been made for a period of three consecutive months, after notice by the Registrar demanding the returns has been sent by post to the registered address of the company and to the liquidator at his last known place of business, the provisions of this section shall apply in like manner as if the Registrar had not within one month after sending the letter first mentioned received any answer thereto.

It seems therefore that subsection 2 and the other subsections would then apply so that in the case of a winding up, as well as other cases where default occurred, the company or member or creditor were obliged to apply to the court, before the completion of the month's notice in the *Gazette*, giving notice that the name of the company had been struck off the register. That is, under the Act of 1910 the court was empowered to act on an application to restore the company to the register only if such application were made within the time limited.

Then came the revision in the Revised Statutes of 1911, chapter 39, in which section 268 replaced section 265 of the 1910 Act except for an unimportant amendment made in 1911.

In 1913, by chapter 10, section 21, an important change was made. Subsection 4 of section 268 of the 1910 Act was repealed and a new subsection inserted. By it the application to the court could be made at any time but the new subsection provided that if the application was not made within one year any other company might change its name to the same or a similar name, etc. Subsection 3 was left as it was and it is that subsection which provides that the Registrar shall at a certain period strike the name of the company off the register and publish notice thereof in the *Gazette* for one month

> and on such last-mentioned publication the company * * * shall be dissolved.

Then in 1921, by chapter 10, these provisions were removed from Part IX of the 1911 Act, headed "Winding up," of which Part section 268 was the last, and incorporated in Part IX of the *Companies Act,* which Part is headed "Dissolution." Division I is headed "Cancellation of Incorporation"; Division II is headed "Removal from Register of Companies in Default or Defunct," and Division III is headed "Winding up." The important provisions are separated and appear in two sections, 167 and 168.

The amendments to the 1921 Act, by 1921 (Second Session), chapter 8, section 4, and by 1922, chapter 11 section 22, are not important. Then came R.S.B.C., 1924, chapter 38, sections 167 and 168, under the first of which the company was on October 25th, 1928, struck from the register.

It will, therefore, be seen that the legislature removed the time limit within which an application might be made to the court to restore the name of the company to the register, but the effect of any order so made was as it always was that

> thereupon the company shall be deemed to have continued in existence as if the name thereof had never been struck off.

The effect of the removal order of October 25th, 1928, was by the terms of section 167 of the Act then in force (R.S. B.C., 1924, chapter 38) that the company was struck from the register and "dissolved." In view of the provisions of section 168, which would apply to any order of the court restoring the company to the register, made while that Act was in operation, and of sections 199 and 200 of the relevant Act of 1929, can it be said that the "dissolu-

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tion" was an end of the company for all purposes, and particularly for the purpose of the applicant's contention that the money on deposit in the bank ceased to have an owner, so as to permit the operation of the doctrine of *bona vacantia?* I conclude that the answer must be in the negative and that is sufficient to dispose of the present appeal.

Counsel for the appellant, however, referred to the *Escheats Act,* R.S.B.C., 1924, chapter 81, as amended. The amendment of 1924, chapter 18, section 2, added section 3 (*a*) to the Act. Subsection 1 of section 3 (*a*) provides that where a corporation is dissolved, the lands, tenements and hereditaments, etc., shall for all purposes be deemed to escheat to the Crown in right of the province. By subsection 2 of section 3 (*a*) the Lieutenant-Governor in Council shall not within one year from the date of the dissolution of the corporation make any grant or other disposition of escheated lands. By subsection 3 of section 3 (*a*) where a corporation is within one year from its dissolution revived pursuant to any Act, by order of any court, the order shall have effect as if the lands, etc., had not escheated, and subject to the terms of the order such lands, etc., shall *ipso facto* vest in the corporation.

Section 7 of the *Escheats Act* as amended by section 3 of 1924, chapter 18, reads as follows, the words underlined being those which were inserted by the amendment:—

> 7. The Lieutenant-Governor in Council may make any assignment of personal property to which the Crown is entitled by reason of the person last entitled thereto having died intestate and without leaving any kin or other persons entitled to succeed thereto, or by reason of the same having become vested in the Crown as *bona vacantia,* or by reason of the same having become forfeited to the Crown, or may make an assignment of any portion of such personal property, for the purpose of transferring or restoring the same to any person or persons having a legal or moral claim upon the person to whom the same had belonged, or for carrying into effect any disposition thereof which such person may have contemplated, or of rewarding the person making discovery of the right of the Crown to such property, as to the Lieutenant-Governor in Council may seem meet.

While section 3 (*a*) deals with escheats, counsel adduced from its provisions the argument that the legislature having therein made definite provision for the case of a company being revived within one year of its dissolution and no

similar provision having been made in section 7 referring to personal property to which the Crown is entitled, "by reason of the same having become vested in the Crown as *bona vacantia*," the Lieutenant-Governor in Council, under the last section, is the only authority to determine the disposition of the money. However, for the reasons already given, I am of opinion that this money never was, under the circumstances, *bona vacantia*. On the proper constructions of sections 199 and 200 of the 1929 Act the doctrine of *bona vacantia* does not apply so as to include money of a company which, while "dissolved," cannot be taken to be dead for all purposes when, by the very Part of the Act that refers to dissolution, provision is also made for an order of revivor, with the consequence that the company is deemed to have continued in existence as if it had not been struck off.

The appeal should be dismissed. When the matter first came on for argument before us no one appeared for the Island Amusement Company, Limited, and the hearing was adjourned to give an opportunity to the appellant to arrange that the company should be represented by counsel so that we might have the benefit of his argument. In view of this, we deem it unnecessary to make any order as to the costs of this appeal.

DAVIS J.—There can be no doubt of the right of the Crown to the personal property of an incorporated company which has become extinct by complete and effective dissolution and in this case we may well ask ourselves at the outset the question whether upon the proper construction of the statute under which the company was incorporated and under whose provisions its name was stricken from, and subsequently restored to, the register, there was at the time the company was stricken from the register an absolute and complete, or merely a qualified, dissolution because while section 167, which provides the machinery for the Registrar to strike a defaulting company from the register, says "and the company will be dissolved," section 199 enables the company subsequently to apply to the court for an order restoring it to the register and for the purposes of its restoration, to hold such meetings and take such proceedings as may be necessary as if the company

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had not been dissolved, and expressly enacts that upon the order being made

> the company shall be deemed to have continued in existence as if it had not been struck off (the register).

Cunnack v. *Edwards* (1) was the case of an unincorporated society, under the protection of the *Friendly Societies Acts,* which had lasted for nearly ninety years but had then become extinct. All the members were dead but a remnant of the common fund amounting to something over £1,200 remained. Chitty J. held that there was a resulting trust in favour of the personal representatives of those who had contributed to the fund but the Court of Appeal (Lord Halsbury L.C., A. L. Smith and Rigby L. JJ.) were all of the opinion that that view could not be maintained because the entire beneficial interest had been exhausted in respect of each contributor and the funds were *bona vacantia* and belonged to the Crown in that character. That case is easy to understand because all the members of the unincorporated society had been natural persons and they were all dead.

In re Higginson and Dean ex parte The Attorney-General (2) was the case of a corporation created by statute that had proved in the bankruptcy of a trading firm, along with other creditors. The corporation subsequently was dissolved by an order of the court under the *Companies Act.* Afterwards it was discovered that the bankrupts had been entitled to certain railways shares and the official receiver recovered the value of the shares and held the proceeds as trustee in the bankruptcy. Another creditor moved to expunge the proof of the dissolved corporation, claiming that the money to which the corporation had been entitled as a creditor, and which was then in the hands of the official receiver as trustee, was divisible among the still existing creditors. The county court judge made an order expunging the proof. On appeal by the Attorney-General on behalf of the Treasury, it was held by the court (Wright and Darling JJ.) reversing the order, that on the dissolution of the corporation the proceeds of the shares in the hands of the official receiver as trustee in the bankruptcy had passed to the Crown as *bona vacantia,* and the Crown was entitled to the amount. But the cor-

(1) [1896] 2 Ch. 679. (2) [1899] 1 Q.B. 325.

poration there was treated as one "who has become extinct without successor or representative." R. S. Wright J. at p. 331 said that in the 17th and 18th centuries corporations aggregate, constituted by charters or letters patent, were numerous and questions frequently occurred as to the effect upon their rights and obligations of dissolution, revival and reincorporation, with or without change of name or constitution.

I cannot find that in any case the rights or obligations of a corporation were held to be affected by a technical dissolution. Nor, on the other hand, can I find a case in which such a question has been decided, where the corporation had not been revived, or some provision made by statute or charter with reference to its obligations. In *Mayor, &c., of Colchester* v. *Seaber* (1), the revived corporation sued in its own name on a bond given to the dissolved corporation, and succeeded. Sir Fletcher Norton, for the plaintiff corporation, argued that the goods and chattels of the old corporation, including its choses in action such as the bond, had on its dissolution passed to the Crown, and that the Crown in granting a charter of revival had regranted them to the revived corporation. Mr. Dunning, on the other side, neither admitted nor denied this, and the Court is not reported to have expressed any opinion on this point, it being held that there was only a qualified dissolution, and no absolute break of continuity.

In *The King* v. *Pasmore* (2) Lord Kenyon speaks of a corporation being dissolved "to certain purposes" and in considering very old cases goes on to say that

by the new charter the King did not consider the old corporation as dissolved "to all purposes."

Lord Maugham (Maugham J. as he then was) in *In re Home and Colonial Insurance Company Limited* (3), says that it was settled by the decision in *In re Higginson and Dean* (4) that "on a company being dissolved in the strict sense" the whole of its assets undistributed at the date of dissolution passed to the Crown as *bona vacantia.*

Lord Macmillan in *The Russian and English Bank* case (5), said:

Now the purpose of pronouncing a winding-up order is to secure the collection and distribution of the assets of the company to which it relates. The logical inquirer may ask how a company which has ceased to exist can have any assets. But when the Legislature authorized the making of a winding-up order in the case of a dissolved company it must be presumed to have intended such order to be effective and to result in the collection and distribution of assets. To hold that the Legislature has authorized the collection of the assets of a dissolved company, but

(1) (1766) 3 Burr. 1866.
(2) (1789) 3 Term Rep. 199.
(3) (1928) 44 Times L.R. 718.
(4) (1899) 1 Q.B. 325.
(5) [1936] A.C. 405, at 437.

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has withheld the power of recovering these assets, would be to attribute a singular ineptitude to Parliament.

And again at p. 438:

> The truth is that the whole procedure is highly artificial. Once it is conceded, as it must be, that a non-existent company may be the subject of a winding-up order it is inevitable that anomalous consequences must ensue, some of which may not have been foreseen by the Legislature.

Section 167 of the British Columbia statute permits the Registrar of Companies to strike off the register any company which has failed to

> file any return or notice or document required to be filed with the Registrar.

The language is sufficiently comprehensive to include defaults of the slightest nature—for instance, mere omission to make some annual or other return called for by the Act. Having regard to the provisions of the entire statute, the dissolution referred to in section 167 necessarily excludes in my opinion "a general dissolution," to adopt the term used by Lindley on Companies, 6th ed., p. 821. The company does not "become extinct without successor or representative," to use the words of Wright J. in the *Higginson* case (1). The statute plainly negatives a complete dissolution whereby the company becomes extinct because the statute clearly recognizes that subsequent to the dissolution referred to in section 167 the company itself may apply to the court to be restored and for that purpose may hold meetings and take proceedings as if it had not been dissolved. In that view of the statute there was no such dissolution of the company in this case as to entitle the Crown to acquire ownership of the money on deposit at the bank as against the company and its creditors.

But assuming that we are not entitled to regard the dissolution under section 167 as anything but a real and effective dissolution that in itself entitled the Crown to the personal property of the corporation, as property having no other owner, the subsequent order of the court restoring the company to the register enjoins us to treat the company, "in the words of the statute," as if it had "continued in existence" and "had not been struck off." In that view it might be held that the Crown acquired at the time the company was stricken off the register title to the personal property of the company as *bona vacantia* subject to being

(1) (1899) 1 Q.B. 325.

defeated upon the subsequent making of a restoration order. But personally I find it exceedingly difficult, dealing with the matter as one of practical administration, to think of the Crown's right to ownership of goods in the character of *bona vacantia* in terms of a qualified or defeasible title. It appears to me to be a contradiction in terms to regard the property of a company as being without an owner and at the same time to recognize the possibility that at some undefined period of time in the future the corporation may be revived and the title of the Crown defeated.

It is argued on behalf of the Crown, however, that on the assumption that the dissolution can be set aside and the Crown's claims defeated, the order of the court in this particular case preserved the Crown's right by the provision in the order that the company should be restored and continued in existence as if its name had never been struck off,

> without prejudice, however, to the rights of any parties which might have been acquired prior to the date on which the company is restored to the register.

But when one considers the scheme of the statute as a whole and the various methods provided for the final winding up of a company (*a*) by voluntary winding up, or (*b*) by a court order in winding-up proceedings, and the provisions of the statute for the effectual collection of the assets and the distribution of them among the creditors and the final certificate to the Registrar of winding up whereby the company becomes ultimately dissolved (in the strict sense I take it of the word) in contradistinction to the dissolution referred to in section 167 (which precedes the special machinery set up for reviving the company and the carrying out of its liquidation in the ordinary course), it becomes apparent that the without prejudice clause in the statute, and which is found in the order restoring the respondent company, is intended to preserve legitimate claims of third parties which have arisen subsequent to the date that the company was stricken off the register because officers and agents of the company may not have heard of the striking of the name of the company from the register and may have gone ahead for some time carrying on the operations of the company in absolute good faith without notice or knowledge that the Registrar had stricken the name of the company off the register. That I believe is

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a fair interpretation to be put upon the without prejudice clause. I cannot bring myself to the view urged upon us that those words, properly construed, apply to such a claim as the claim of the Crown under the rule of *bona vacantia*.

Lord Blanesburgh in *Morris* v. *Harris* (1) in the House of Lords observed the apparent reason for the difference in phraseology and effect between section 223 and subsection 6 of section 242 in the *Companies (Consolidation) Act*, 1908:

> A dissolution under sec. 242, as I have said, is preceded by no winding-up, and the section had to envisage a dissolution which might have taken place without the knowledge of any one concerned in the company. Hence the wide powers given to the Court by subsection 6. Section 223, on the other hand, is confined to cases where the dissolution succeeds the complete winding up of the company's affairs and cannot take effect at all except at the instance or with the knowledge of the liquidator, the company's only executive officer. The Legislature has not seen fit to make provision for validating any intermediate acts done on behalf of such a company so dissolved.

Adapting the language of Lord Blanesburgh to this case, the Legislature has seen fit in section 200 to make provision for validating any intermediate acts done on behalf of a company so dissolved. I cannot read the provision as intended to validate a vesting of all the personal property of the company in the Crown as a vesting which automatically took effect at the moment of the dissolution of the company under the provisions of section 167.

The appeal must be dismissed.

Appeal dismissed.

Solicitor for the appellant: *H. Alan Maclean.*

Solicitors for the respondent The Royal Bank of Canada: *Crease & Crease.*

Solicitor for the respondent Island Amusement Co. Ltd.: *W. H. Langley.*

(1) [1927] A.C. 252, at 269.