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*Feb. 8, 9.
*May 17.

THE PROVINCIAL TREASURER FOR THE PROVINCE OF MANITOBA (PETITIONER) ..... } APPELLANT;

AND

THE MINISTER OF FINANCE FOR CANADA (RESPONDENT) ..... } RESPONDENT.

THE ATTORNEY-GENERAL FOR THE PROVINCE OF MANITOBA (PETITIONER) ..... } APPELLANT;

AND

THE MINISTER OF FINANCE FOR CANADA AND THE IMPERIAL CANADIAN TRUST COMPANY (RESPONDENTS) ..... } RESPONDENTS.

AND

THE ATTORNEY-GENERAL OF CANADA (INTERVENANT) .....

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Companies—Bankruptcy—Constitutional law—Conflict between federal and provincial statutes—Trust agreement between trust company and loan company—Undertaking by the former to pay claims of the latter's depositors—Moneys left unclaimed in hands of trust company

PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.

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—Winding-up of trust company—Whether moneys are property of Dominion as unclaimed dividends, or of the province as bona vacantia or under Vacant Property Act—Moneys held by liquidator as trustee for depositors—Winding-up Act R.S.C. 1927, c. 213, sections 139 and 140—Vacant Property Act, Man. 1940, c. 57.

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.

Held, reversing the judgments appealed from (48 Man. R. 45 and [1942] 1 W.W.R. 65) that the first appeal should be allowed in so far as the judgment *a quo* directed the moneys in question to be paid to the Minister of Finance under the provisions of sections 139 and 140 of the *Winding-up Act;* and that the second appeal should also be allowed and that it be directed that the moneys be paid to the Provincial Treasurer for Manitoba under the provisions of the *Vacant Property Act*.

Held that such fund was held by the liquidator in order to fulfil the trust agreement entered into in 1924 by the Trust Company and the Loan Company, and can be treated in no other way. Accordingly, sections 139 and 140 of the *Winding-up Act* can have no application These moneys were held by the liquidator as trustees for the individual depositors and not for the trust estate or anybody else.

Held that, as to the first action, the moneys in question cannot be treated as *bona vacantia:* they may have a discoverable owner, the possi-

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bility cannot be excluded that there may be many depositors still alive who have merely forgotten about their deposits, and, on the evidence, a general finding of abandonment cannot be made.

Held that, as to the second action, these moneys were held by the liquidator in trust for the depositors within the meaning of the provisions of the *Vacant Property Act* and that the claim of the Attorney-General for Manitoba made under that Act should be maintained.

APPEAL, in the first action, from a judgment of the Court of Appeal from Manitoba (1), reversing the judgment of the trial judge, McPherson C.J. K.B. (2); and

APPEAL, in the second action, from a judgment of the Court of Appeal for Manitoba (3), affirming the judgment of the trial judge, Donovan J.

Both appeals concern the disposition of a certain fund of $9,844.40, being in the hands of the liquidator of the Imperial Canadian Trust Company and claimed by the Minister of Finance of Canada and the Provincial Treasurer of Manitoba respectively. The material facts of the case and the questions at issue are stated in the above head-note and in the judgment now reported.

H. A. Bergman K.C. for the appellant in both appeals.

O. M. Biggar K.C. and *Christopher Robinson* for the respondents in both appeals.

The judgment of the Court was delivered by:

HUDSON J.—These two appeals were heard together. Both concern the disposition of a fund of $9,844.40, at present in the hands of the Montreal Trust Company, and claimed by the Minister of Finance of Canada and the Provincial Treasurer of Manitoba respectively.

In 1924, two companies closely associated in management and with head offices in Winnipeg entered into an agreement, the material provisions of which are as follows:

(1) (1941) 48 Man. R. 45; [1940] 2 W.W.R. 395; [1940] 3 D.L.R. 391; 21 C.B.R. 451.
(2) [1939] 3 W.W.R. 232; [1939] 4 D.L.R. 75; 21 C.B.R. 48.
(3) [1942] 1 W.W.R. 65; [1942] 1 D.L.R. 93; 23 C.B.R. 161.

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Memorandum of Indenture made this 22nd day of April, 1924
Between:

The Imperial Canadian Trust Company (Hereinafter called the "First Party")

Of the first part

and

The Great West Permanent Loan Company (Hereinafter called the "Second Party")

Of the second part.

Whereas the Second Party has been receiving moneys on deposit at its head office in the city of Winnipeg in Manitoba and also at its branch office in the city of Calgary in Alberta.

And whereas the deposits which the Second Party has on this date in the said two places amount to about one hundred and twenty-four thousand two hundred and forty-nine 16/100 dollars ($124,249.16).

And whereas the Second Party intends almost immediately to cease taking deposits at the said two points and has made an offer to the First Party for the taking over by the First Party of the said deposits on certain terms hereinafter set out, and the First Party has agreed to take over the said deposits on the said terms and conditions.

Now therefore this indenture witnesseth that in consideration of the premises and of the agreement to assign securities herein provided for and of the sum of one dollar now paid by the second party to the first party, it is covenanted and agreed between the parties hereto as follows:—

1. The Second Party hereby assigns and turns over to the First Party all its deposits at the points above mentioned and any rights it has in connection therewith.

2. The Second Party in order to secure the First Party on account of the obligation it assumes in undertaking to take over and pay off the said deposits as and when the depositors may demand their money agrees to assign and transfer to the First Party good securities and cash which together will amount to one hundred and twenty-four thousand two hundred and forty-nine 16/100 ($124,249.16) said cash and securities to be good and sufficient to provide for the said sum of money without any deficiency or loss to the First Party.

3. It is provided that the First Party shall have the right to select and determine on the securities to be accepted by it for the above-mentioned purpose.

4. The First Party covenants and agrees to and with the Second Party to earmark and specially set aside the securities which shall be taken over in pursuance hereof 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 the First Party but shall be held and used only as above provided, but the First Party shall nevertheless have the right to sell the said securities or any of them which shall be assigned in pursuance hereof, such sales to be made from time to time as this may become necessary in order to pay off depositors demanding their money, and the First Party for such purpose of paying off depositors shall also be entitled to and have the right to use any rents or interest that may be received from the said securities and the First Party agrees to pay the said depositors as they demand their money.

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In accordance with the terms of this agreement the Imperial Canadian Trust Company selected securities aggregating in estimated value $124,249.16 and such securities were formally appropriated by the loan company to and accepted by the trust company on the 15th of January, 1925. There is no evidence of concurrence by all of the depositors in this arrangement. But, thereafter, the trust company proceeded from time to time to dispose of trust assets and to pay depositors and by the 27th of December, 1927, had paid off such deposits to an amount of $105,968.87, which left an unpaid balance of only $18,280.20. The trust company still held undisposed of one of the trust securities turned over to it by the loan company, namely, the Strathcona Block, Calgary.

On the last above-mentioned date, the 27th of December, 1927, the trust company was ordered to be wound up under the *Winding-Up Act,* chapter 144 of the statutes of Canada 1906, and on the 24th of February following, the Montreal Trust Company was appointed as permanent liquidator. The Strathcona Block came into the possession of the liquidator who disposed of same in August, 1929, realizing $30,336.65.

The liquidator, pursuant to an order of the court in March, 1928, gave notice to all creditors to file their claims. This was given by (1) advertisements published in newspapers in Winnipeg, Saskatoon, Calgary, Vancouver, Toronto and Victoria respectively; (2) copies of similar notices mailed to all creditors including depositors addressed to each at his or her address as they appeared in the books of the company. A large percentage of these notices were returned by the Post Office to the liquidator.

At least sixty per cent of the deposit accounts had been dormant and inactive for many years prior to 1924 and had remained dormant and inactive thereafter until the date of the liquidation. The liquidator's manager said that he had no way of locating the depositors or the representatives of such depositors.

On the 28th of May, 1930, an order was made by the Master in Chambers in the winding-up proceedings, dealing with the several different matters and among them

the claims and priorities of persons who were formerly depositors in the Great West Permanent Loan Company.

It was therein provided:

> It is further ordered that the liquidator be and it is hereby authorized to pay to depositors whose deposits were taken over by The Imperial Canadian Trust Company from The Great West Permanent Loan Company pursuant to the terms of a certain agreement between the said companies dated the 22nd day of April, 1924, the balance of their respective accounts which were not paid by The Imperial Canadian Trust Company prior to the date of the winding-up order herein; that is to say the minimum balances of such depositors respectively between 22nd April, 1924, and the date of liquidation. The total of such deposits (which aggregate $12,413.15), the names of the depositors and the amount of their respective deposits being shown on exhibits "D", "E" and "F" to the said affidavit of Loua Edgar Banner.
>
> It is further ordered that the liquidator be and it is hereby authorized to defer payment on all claims under $10 and to those depositors whose claims are designated in said exhibits "D", "E" and "F" as "unclaimed balances", the aggregate of which total $5,481.06. Provided that the liquidator may pay any such depositors whose address come to its notice.

The amount of $12,413.15 referred to in this order was found to be incorrect and was subsequently admitted to be $18,280.29. The latter sum was placed in a separate bank account.

Additional depositors were thereafter paid off by the liquidator, leaving the balance of $9,844.40 which is now in dispute. This sum is made up of a very large number of very small deposits, most of them amounting to less than $2 each and all made prior to the agreement of 1924.

The winding-up proceedings having been substantially completed, these moneys were claimed by the Minister of Finance under sections 139 and 140 of the *Winding-Up Act*, and by the Provincial Treasurer of Manitoba as *bona vacantia*. The liquidator applied to the court for directions as to the disposition of the money and it was agreed between counsel for the liquidator and the Attorney-General that the court should deal with the matter on the basis that the final winding-up of the company had been completed and that the deposits and dividends in question had been left in the bank for more than three years since the final winding-up of the business of the company. The application was heard before Chief Justice McPherson of the Court of King's Bench who held: (1) that the general creditors had no claim, that the funds had been the property of the depositors only and were not payable out of the assets as dividends and did not fail to be transferred to the Minister of Finance under sections 139 and 140 of the

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Winding-Up Act; (2) that considering the small amount of each deposit and the time which had elapsed, he was of the opinion that the depositors had no intention of asserting any claims and that the amounts should be held to have been abandoned and should go to the Crown in the right of the province of Manitoba as *bona vacantia.*

On appeal, it was held by the Manitoba Court of Appeal that, as there was no evidence that the depositors were dead or, if dead, had not left heirs or next of kin, the funds could not be pronounced *bona vacantia.* Secondly, that, if as held by Chief Justice McPherson, the property had been abandoned, then it would not vest in the Crown but would become the property of the trust company in the same way as if the courts had released the company from carrying out the agreement. Thirdly, that the agreement was not a contract between the trust company and the depositors and the depositors could not obtain relief at their own instance. The court, therefore, directed the moneys to be paid to the Minister of Finance of Canada under the above sections.

Special leave to appeal from that decision to this court was granted by Mr. Justice Rinfret on the 10th of October, 1940. The security was perfected but the appeal was not proceeded with then because in the meantime the Manitoba legislature had passed an Act called the *Vacant Property Act,* which was assented to on the 5th of April, 1940, and came into force by proclamation on the 1st of June, 1940, and before the above-mentioned decision of the Court of Appeal was given. In that Act it was provided:

1. This Act may be cited as *The Vacant Property Act.*

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 or 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.

3. The property set out in section 2 of this Act shall be subject to the application of *The Escheats Act,* being chapter 64 of the Revised Statutes of Manitoba, 1940.

4. This Act shall apply only so far as the legislature of Manitoba has jurisdiction to enact.

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On or about the 29th of July, 1940, the Attorney-General of Manitoba presented a petition to the Court of King's Bench in Manitoba, claiming the moneys in question under the above-mentioned statute. This petition was heard before Mr. Justice Donovan who held that the legislature had power to deal with the deposits made in Manitoba, that such deposits could not be considered as "unclaimed" within the meaning of the Act until the order of the 28th of May, 1930, had been made, which was less than twelve years prior to the presentation of the petition. He reserved to the petitioner the right, by amended or new petition, to claim as against the liquidator for the loan company or trust company or anyone who might appear to have an interest.

An appeal to the Court of Appeal was dismissed and a cross-appeal allowed striking out the above-mentioned proviso in the judgment of Mr. Justice Donovan. The learned judges in appeal were apparently unaware of the fact that the *Vacant Property Act* had come into force prior to their decision in the first case and at a time when the decision of Chief Justice McPherson was still undisturbed.

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. 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

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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.

As was said by Lord Eldon in *Ex parte Pye and Dubost* (1):

> It is clear that this court will not assist a volunteer: yet, if the act is completed, though voluntary, the court will act upon it. It has been decided, that upon an agreement to transfer stock, this court will not interpose: but if the party had declared himself to be the trustee of that stock it becomes the property of the *cestui que trust* without more: and the court will act upon it.

In Godefroi on Trusts, 5th ed. at p. 60:

> * * * there is a distinction between a voluntary covenant to create a trust and a complete voluntary trust of a covenant enforceable at law. The latter is enforceable, and the cases in which it is enforceable may be conveniently dealt with under the following two heads:—
>
> 1. Where it appears that the true intent and effect of the contract is to give a person not a party some beneficial right, as a *cestui que trust*, under it.

Similar statements are made in Underhill on Trusts, 9th ed., pp. 11 and 40.

The position is stated very clearly by Lord Justice Cotton in the case of *Gandy* v. *Gandy* (2):

> Now, of course, as a general rule, a contract cannot be enforced except by a party to the contract; and either of two persons contracting together can sue the other, if the other is guilty of a breach of or does not perform the obligations of that contract. But a third person—a person who is not a party to the contract—cannot do so. That rule, however, is subject to this exception: if the contract, although in form it is with A, is intended to secure a benefit to B, so that B is entitled to say he has a beneficial right as *cestui que trust* under that contract; then B would, in a Court of Equity, be allowed to insist upon and enforce the contract. That, in my opinion, is the way in which the law may be stated.

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 appears that when the property in the possession of the trust company was taken, the liquidator was not aware of the trust. At any rate the Strathcona Block was sold and, for a time at least, the proceeds were treated as

(1) (1811) 18 Ves. Jr. 140, at 149. (2) (1885) 30 Ch. D. 57, at 66.

estate funds. However, this situation was corrected. The order of the 28th of May, 1930, was made and the trust fund segregated in a separate bank account.

It was contended that the accounts in the winding-up proceedings disclosed that prior to the liquidation the trust company had paid out to depositors more than it could have received from trust securities sold. We have not here any full information of what took place between these two associated companies prior to the liquidation, but we do know that at the time of the winding-up order the trust company had in its possession trust property more than sufficient to pay the depositors then unpaid.

Some point was made of the consent signed on behalf of the Attorney-General and counsel for the liquidator in the first action, by which it was to be assumed that the final winding-up of the company had been completed and that the deposits and dividends in question had been left in the bank for more than three years since the final winding-up of the business of the company. It does not seem to me that there is any force to this objection. What we are concerned with now is the ownership of the money, and this consent was merely filed for the purpose of giving the court jurisdiction.

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 claim of the Crown in the right of Manitoba is twofold: in the first action as *bona vacantia,* and in the second action under the statute, *The Vacant Property Act.*

The law regarding *bona vacantia* is summed up in 6 Halsbury's Laws of England, 2nd ed, at p. 827, as follows:

> The term *bona vacantia* is applied to things in which no one can claim a property, and includes the residuary estate of persons dying intestate and without husband or wife or near relatives, wreck, treasure trove, waifs, and estrays, and the personal property of a dissolved corporation, but not goods lost or designedly abandoned, the property in which is vested in the first finder and is good against all, except the true owner in the case of goods lost. *Bona vacantia* extends to an equity of redemption or leaseholds.
>
> The property in *bona vacantia* is vested in the Crown to prevent the strife and contention to which title by occupancy might otherwise give rise.

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In Godefroi, at p. 124, it is stated:

> As a general rule, where personalty is vested in trustees upon private trusts which have failed, it is held upon trust for the Crown.

The cases cited in support of this statement are: *Middleton* v. *Spicer* (1); *Re Higginson and Dean* (2). Both were cases of *bona vacantia.*

The nature of the right was considered by this Court in *Attorney-General for British Columbia* v. *Royal Bank of Canada* (3), and there Mr. Justice Kerwin speaking for the Court quoted with approval the remarks of Lord Justice Romer *In re Wells* (4):

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

and again:

> 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 question is: have these deposits any owner, that is to say, any discoverable owner? Chief Justice McPherson thought they had not, basing this opinion on the lapse of time and the small amounts. He concluded that the depositors must be taken to have abandoned their claims. The facts give much weight to this view but, on the other hand, we cannot exclude the possibility that there may be many depositors still alive who have merely forgotten about their deposits and cannot be said to have abandoned them. On the evidence I do not think that a general finding of abandonment can be made.

In the second action, the claim is under the *Vacant Property Act* which applies to personal property including moneys or securities 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, moneys or securities were first payable. The moneys in question are certainly held by the liquidator in trust for the depositors. The liquidator is in Manitoba.

The argument, however, is that the property has not remained "unclaimed" for twelve years. Mr. Biggar contended that the deposits could not be considered as

(1) (1783) 1 Bro. C.C. 201.
(2) [1899] 1 Q.B. 325.
(3) [1937] S.C.R. 459.
(4) [1933] Ch. D. 29, at 55, 56.

unclaimed until payment was due and that there was no evidence to show that there were not some restrictions on the withdrawal by depositors in their original agreement with the loan company. On this point there is no definite evidence but, in the agreement between the loan company and the trust company, the covenant of the trust company is to pay the depositors on demand the moneys in question and, holding the views that I do as to the agreement constituting a trust, it seems to me that the depositors had a right to their money at any time after the securities were handed over and the trust was executed.

The deposits were all made prior to the agreement of 1924. The securities representing them came into the hands of the trust company at that time and what remained came into the hands of the liquidator in 1927.

Mr. Justice Donovan thought that the moneys could not be regarded as unclaimed until the order for segregation was made in 1930. With respect, this does not seem to me to be correct. The twelve-year limitation is against the depositors, not the trust company or the liquidator. In any event, more than twelve years have now passed since the moneys were segregated in a separate bank account by the liquidator. I think that the Attorney-General is entitled to succeed in the second action.

As Mr. Bergman pointed out in argument, the provisions of the *Winding-up Act* do not deal with ownership but only with the immediate possession of the funds, leaving the matter of ownership to be established later.

Some suggestion was thrown out that claims might be made either by representatives of the loan company or of the trust company in the nature of a resulting trust. As to this, the loan company parted with its property absolutely in 1924 and there could be no reversion in so far as the trust company is concerned. It is clear that a trustee is not entitled to a reversion.

In the case of *Higginson* v. *Dean* (1), it was stated by Mr. Justice Wright at p. 329:

> From the time of Lord Thurlow's decision in *Middleton* v. *Spicer* (2), it has been an accepted proposition of law that chattels real or personal vested in a person as a mere trustee upon private trusts which have failed are as a general rule held by him as a trustee for the Crown of *bona vacantia;* and during all the period which has elapsed since that decision no exception from the rule seems to have been established. It has been

(1) [1899] 1 Q.B. 325. (2) (1783) 1 Bro. C.C. 201.

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illustrated by many cases which shew that the possession conferred on the trustees for purposes of jurisdiction or administration gives him no beneficial title, as by occupancy or otherwise, which he can conscientiously set up against the Crown.

It would appear from the evidence that representatives of neither company are pressing any claims in this matter. The liquidator, of course, does not do so. I then conclude that the Attorney-General is entitled to succeed in his petition in the second case.

In the first case, there was a small amount of $600 which, the court held in the first instance, should not be treated as *bona vacantia* but as part of the general funds in the winding-up. The Court of Appeal agreed with this view and I agree with their disposition of same.

In the first case, I would allow the appeal without costs in so far as the judgment below directed the fund in question to be paid to the Minister of Finance under the provisions of sections 139 and 140 of the *Winding-up Act*, and also in respect of the orders as to costs.

In the second case, I would allow the appeal and set aside the order of the Court of Appeal and direct that the fund held by the Montreal Trust Company be paid to the Provincial Treasurer of the province of Manitoba under the provisions of the *Vacant Property Act*, statutes of Manitoba 1940, chapter 57, and that there should be no costs to any party either here or below, except that I think that the Montreal Trust Company must be assumed to have acted in good faith and should be entitled to its costs out of the fund in respect of the applications in the court below.

Appeals allowed, no cost.