33, 1939

In the Privy Council

NO. 103 OF 1939

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO, CANADA

BETWEEN:

EDGAR F. LADORE, BURLEY W. BENNETT, HORACE W. CUNNINGHAM AND HARRIE R. DINGWALL

suing on behalf of themselves and all other ratepayers of the Corporation of the Town of Walkerville; and suing on behalf of themselves and all other holders of debentures of the Town of Walkerville; and suing on behalf of themselves and all other holders of debentures of the Walkerville-East Windsor Water Commission; and suing on behalf of themselves and all other holders of debentures of the Essex Border Utilities Commission; and suing on behalf of themselves and all other holders of debentures issued by the Walkerville Hydro-Electric Commission; and suing on behalf of themselves and all other holders of Local Improvement Debentures issued by the Town of Walkerville; and suing on behalf of themselves and all other holders of debentures issued by the Essex Border Utilities Commission and chargeable against the ratepayers of the Town of Walkerville.

(Plaintiffs in the Supreme Court and Appellants in the Court of Appeal).

APPELLANTS

—and—

GEORGE BENNETT, HARRY J. MERO, W. DONALD McGREGOR, RUSSELL A. FARROW

The Corporation of the Town of Walkerville; the Corporation of the City of East Windsor; the Corporation of the City of Windsor; the Corporation of the Town of Sandwich; the Essex Border Utilities Commission; the Walkerville-East Windsor Water Commission; the Water Commissioners of the City of Windsor; the Board of Water Commissioners of the Town of Sandwich; the Hydro-Electric Commission of the City of East Windsor; the Hydro-Electric Commission of the City of Windsor; the Hydro-Electric Commission of the Town of Walkerville; the Hydro-Electric Commission of the Town of Sandwich; the Corporation of the City of Windsor, and The Windsor Utilities Commission, bodies alleged to have been incorporated pursuant to the provisions of Statutes of Ontario, 1935, Chapter 74, being the City of Windsor (Amalgamation) Act, 1935; and the ATTORNEY-GENERAL OF THE PROVINCE OF ONTARIO.

(Defendants in the Supreme Court and Respondents in The Court of Appeal)

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CASE FOR THE APPELLANTS

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1. This is an Appeal from the judgment of a majority of the Court of Appeal for Ontario, pronounced by Masten, J.A., and Henderson, J.A., on the 17th day of May, 1938, affirming the judgment at Trial of the Honourable Mr. Justice Hogg, dismissing the plaintiffs' action for a declaration that the Plan providing for the postponement and cancellation of the debenture and other indebtedness of the several municipalities of the former City of Windsor and East Windsor, and the Towns of Walkerville and Sandwich, known as the Plan for funding and refunding the debts of the Amalgamated municipalities first approved by the order of the Ontario Municipal Board dated December 21st, 1936, and finally adopted as amended by order of the Board dated June 15th, 1937, and the Statutes of the Legislative Assembly of Ontario which authorized the same and terminated the existence of the above municipalities without payment of their several indebtedness was ultra vires of the Legislative Assembly of the Province of Ontario.

PART I

HISTORY AND FACTS

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2. This action is brought by the Plaintiffs on their own behalf and on behalf of all other debenture holders of Walkerville, Walkerville-East Windsor Water Commission, The Walkerville Hydro-Electric Commission, The Essex Border Utilities Commission and the holders of Local Improvement Debentures of Walkerville, as well as all ratepayers of Walkerville. The Plaintiff, Ladore, is a debenture holder of each of the several classes of debentures and a ratepayer and resident of Walkerville. The Plaintiff, Dingwall, resides in the United States of America and is a holder of debentures issued by Walkerville. The Plaintiffs, B. W. Bennett and Cunningham are resident ratepayers of Walkerville.

p. 3, l. 31

3. The individual defendant, George Bennett, Mero, McGregor and Farrow are joined in the action as members of the Windsor Finance Commission, appointed pursuant to The City of Windsor (Amalgamation) Act, 1935, and the corporate defendants are the said municipalities and the new City of Windsor, and their subsidiary corporate local boards and commissions whose existence The Amalgamation Act purports to terminate.

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4. The Attorney-General for Ontario is a party defendant, firstly as the validity of certain statutes of Ontario are questioned and secondly because the Province of Ontario is a creditor of the

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former defendant municipalities to the amount of $6,762,986.65 in default on Street Railway debenture account, $703,947.00, partly in default on Housing Act loans, and $18,000.00 in default for Highway paving or a total of $7,484,933.65.

p. 200, l. 3-20 Exhibit 2(a)—27

5. On October 1st, 1931, the defendant, The City of East Windsor, being in financial difficulty stopped payment of its debentures and debenture interest coupons then due and such default continued in respect of all subsequently maturing debentures and interest coupons, and other indebtedness until the time of the trial, the total amount in default on December 31, 1935, being $5,421,890.34 and representing 64.1% of the total indebtedness of the City, $8,448,264.28.

p. 201, L. 3 Exhibit 2(a)—27

6. On March 1st, 1932, the defendant, The Town of Sandwich, being in financial difficulty stopped payment of its debentures and debenture interest coupons then due and such default continued in respect of all subsequently maturing debentures and interest coupons, and other indebtedness until the time of the trial, the total amount in default on December 31, 1935, being $3,193,452.28, and representing 56.6% of the total indebtedness of the Town, $5,642,265.36.

p. 200, l. 30 Exhibit 2(a)—27 p. 121, l. 8

7. On December 1st, 1932, the Defendant, the former City of Windsor, being in financial difficulty stopped payment of its debentures and interest coupons then due and such default continued in respect of all subsequently maturing debentures and interest coupons, (except a 3% payment on interest in 1935), and other indebtedness until the time of the trial, the total amount in default on December 31, 1935, being $13,051,665.83, and representing 53.4% of the total indebtedness of the City, $23,988,129.53. The said Defendant had already applied to the Ontario Municipal Board for an Order under Part VI of the Ontario Municipal Board Act, 1932, when it appeared that it had become so financially involved or embarrassed that Default in meeting its obligations might probably ensue and the Order was made accordingly on November 23rd, 1932.

p. 131, l. 12 p. 201, l. 20

8. On May 23, 1933, the Essex Border Utilities Commission made application to the Ontario Municipal Board for an Order under Part VI of the Ontario Municipal Board Act, 1932. On the hearing it appeared that the Commission had failed to pay its obligations as they fell due as a result of financial difficulties and it was so financially involved and embarrassed that further defaults might ensue.

p. 200, l. 21

9. On December 15th, 1934, the Defendant, The Town of Walkerville, as a result of its financial difficulties stopped payment of its debentures then due and on June 15th, 1935, on its matured debenture interest coupons and such default continued in respect

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Exhibit 2(a)—27

of its subsequently maturing debentures and interest coupons and other indebtedness until the time of the trial, the total amount in default on December 31, 1935, being $2,157,523.74, and representing 44.0% of the total indebtedness of the Town, $4,893,706.43.

p. 201, l. 16

10. On June 15th, 1936, the Defendant, The Walkerville-East Windsor Water Commission, as a result of its financial difficulties stopped payment of the interest coupons on its debentures then due and such default continued until the time of the trial.

p. 217, l. 12

11. On March 29th, 1932, the Ontario Municipal Board Act, 1932, came into force, and Part VI thereof gave exclusive power to the Board in relation to:—

p. 220, l. 38

(a) Retirement and cancellation of the whole of the Debenture debt and the compulsory acceptance of new debentures.

p. 221, l. 10

(b) The postponement or variation in terms of payment of the whole indebtedness and the interest thereon and variation of such rates of interest.

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(c) The varying of the basis, terms and times of payment of any such indebtedness and the interest thereon.

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(d) The sale or other disposition of its assets.

p. 222, l. 19

(e) The compulsory compromise of debts for tax arrears of the municipality.

p. 221, l. 19, l. 38

(f) The custody and application of its sinking funds and reserves.

12. On May 4, 1932, the Ontario Municipal Board under the above Statute made Part VI thereof applicable to the defendants, the City of East Windsor and The Town of Sandwich and vested in the supervisors and Board the powers set out in paragraph 11. Both these orders set forth that upon inquiry it appeared the municipalities had failed to meet and pay their debenture indebtedness and interest thereon and after payment had been duly demanded and it further appeared that the default had been occasioned from financial difficulties and they are so financially involved and embarrassed in meeting their obligations that further defaults may ensue. And, a similar order was made on the 5th of May, 1933, in respect of the Essex Border Utilities Commission. An order as to Windsor was made as stated in paragraph 7 hereof.

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13. By an Order-in-Council dated December 5th, 1934, a Royal Commission was appointed to inquire into the municipal and other local affairs of the four defendant municipalities; the Royal Commission made inquiry and made its report to the Lieutenant-Gover-

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nor-in-Council under date the 10th of April, 1935. The accuracy of the facts in the report is not disputed.

p. 35, l. 31-46

14. In December, 1934, the question of whether the ratepayers of Walkerville were in favour of amalgamation was submitted to the vote of the ratepayers and defeated by 4 to 1.

p. 229, l. 33

p. 229, l. 39

15. On April 18th, 1935, Part VI of the Ontario Municipal Board Act, 1932, was repealed and the committees of Supervisors appointed thereunder were abolished. By Part III of the Department of Municipal Affairs Act, 1935, similar but extended powers were placed in the hands of a newly-created Department of the government, called the Department of Municipal Affairs.

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16. On the 18th of April, 1935, the Legislative Assembly of Ontario enacted, not as a Private Act but as a Public Statute of the Province, the City of Windsor (Amalgamation) Act, 1935, by which it purported to create a new municipality and a new Utilities Commission, at the same time dissolving the existing four municipalities and their Local Boards and commissions. The new municipality and its Local Boards were to remain subject to Part III of the Department of Municipal Affairs Act, 1935. The appointment of a committee known as The Windsor Finance Commission was authorized whose duties were to determine and adjust all the assets among the municipalities, and with other municipalities, prepare assessment rolls and voters lists, prepare the administrative system, estimate the expenditures for the succeeding year, revise and consolidate the Bylaws of the four defendant municipalities for the new city; in short, the commission was authorized to carry out many important functions, that, under the Municipal Institutions Act, R.S.O., 1927, cap. 233, are the prerogative of the municipal council. By virtue of these two Acts, the Department of Municipal Affairs Act, 1935, and the City of Windsor (Amalgamation) Act, 1935, the new corporation council was created but bereft of almost all powers and administrative functions.

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p. 11, l. 2

p. 2, l. 2

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17. By section 7(c) of the Amalgamation Act, The Windsor Finance Commission was directed forthwith to undertake the preparation and submission to the Ontario Municipal Board of a plan for the funding and refunding the debts of the amalgamated municipalities upon the general basis that each municipality shall bear its own debt (Repealed by the Act of 1936). The Statements of Defence, except that of the Attorney-General for Ontario, admit that the plan was prepared and submitted to the Ontario Municipal Board. The Writ in this action was issued on the 29th of April, 1936, and during the course of the trial and for some time thereafter, the Ontario Municipal Board heard evidence with respect to

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the plan for funding and refunding the indebtedness and on December 21st, 1936, rendered its decision. Later, a majority of the debenture holders represented at the hearing concurred in amendments with respect to the plan and on June 15th, 1937, the Board amended its order and approved of the plan as amended. The amendments did not alter the substance of the plan, which was ratified and declared binding by statutes of Ontario, 1938, cap. 45, sec. 2, and the Court of Appeal for Ontario on an application by the non-consenting debenture holders held there was no right to appeal from the Order of the Board and further stated that all the issues which the appellant seeks to raise in this appeal, including the validity of the acts which the appellant challenges have been raised in this present action and that the case had been tried and was now standing for judgment. Re - Wilson vs. City of Windsor, 1937, O.W.N. 440, Judgment delivered June 30, 1937.

18. The position at the time of the issue of the Writ was therefore, that the Act of 1935 had purported to abolish the four former municipalities and had provided a single method for paying their respective indebtedness and that method was by means of the refunding plan compulsorily forced upon the bondholders in two ways: not only that two-thirds of the bondholders could bind the whole but also by saying to the bondholders in effect "We have abolished the old municipalities and you can't collect from them and we have created a new municipality and if you surrender your securities, we will allow you to collect from the new municipality on the terms laid out in the plan—otherwise you will get nothing."

p. 234, l. 21

19. By the City of Windsor (Amalgamation) Amendment Act, 1936, which was proclaimed on August 6th, 1936, sections 5, 6 and 7 of the Amalgamation Act which provided for the appointment and duties of the Windsor Finance Commission were repealed and the individual defendants accordingly ceased on that day to hold office, and as stated above, it also abolished the area basis upon which the debts were to be paid by repealing section 7 of the Act of 1935. The Act also purported to confirm all the Acts of the Commission whether done with authority or not.

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p. 244, l. 8

Exhibit 2(a)—73
Exhibit A

20. As the new debentures are not made a charge upon any specific asset, the plan of funding and refunding, by compelling the acceptance of such debentures, has forced the debenture holders to surrender their lien and charge upon the lands and utility plants of the former municipalities, e. g., the filtration plant of the Essex Border Utilities Commission, the system of the Walkerville-East Windsor Water Commission, and the Public Parks; the object being to compel the ratepayers of Walkerville to assist in paying the debts

p. 217, l. 8

p. 215, l. 24

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of the other municipalities in spite of the provisions of section 31 of the Department of Municipal Affairs Act, 1935.

21. The Report of the Royal Commission, the Statement of Default, the Plan of refunding and the Auditors Reports all show that the Town of Walkerville was in a substantially better position than any of the other three municipalities and compared to the Town of Sandwich and the City of East Windsor, the contrast was extreme.

22. The gross debt of Walkerville is $4,492,942.28 and the assessed value of the property of the ratepayers liable for the debt is $14,555,730.00 or the debt is 36.8% of the property liable. For the amalgamated municipalities the total debts are $40.642,674.14 and the property liable therefor is $92,255,950.00 or the debt is 44% of the property of the ratepayers liable. The amending and confirmatory Act of 1936 which abolished the area basis for the liquidation of the debts and the refunding plan founded upon it was intended to have the result and has the result of compelling the ratepayers of Walkerville to assist in paying the debts of the other three municipalities and this has been accomplished by the imposition of a uniform tax rate throughout the four municipalities, and the creditors of Walkerville only receive 70% of the money collected in taxes from Walkerville ratepayers for payment of their debts. It has also prevented the ratepayers of Walkerville from recovering their credit much as they desire to do so.

p. 167, l. 2
p. 177, l. 11
p. 167, l. 2
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23. The postponement of the payment of the indebtedness for 40 years combined with the uncertain results attainable by the sinking fund is a hardship on the creditors because at the end of the postponed maturity, forty years hence, many of the works for which the monies were loaned will long since have been worn out and be valueless. The whole scheme is illusory because the new City is by Statute declared to be subject to Part III of the Department of Municipal Affairs Act, and subject to supervision and control, or in other words, a defaulting or insolvent municipality and so it remains. The legislation was founded on a basic error in that it set up an arbitrary power not bound by rules of law or practice of the Courts, instead of leaving the whole matter to be worked out by the ordinary procedure of the Court which is able to protect debtor and creditor in every contingency without doing such serious wrong. The appellant ratepayers complain that they do not and never did wish to join in any amalgamation and were forced into it against the will of their electors. And, if they are compelled to join in this amalgamation, the terms provided are harsh, onerous and most unfair.

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PART II

THE DEPARTMENT OF MUNICIPAL AFFAIRS ACT, 1935

24. Dealing firstly with Part III of the Department of Municipal Affairs Act, 1935, and its forerunner, Part VI of the Ontario Municipal Board Act, 1932, there are three main grounds upon which the attack is made.

A. The Act deals with rates of Interest.

p. 230. l. 28 to p. 236, l. 26

25. The first ground of the appellants' case against Part III of the Department of Municipal Affairs Act is that sections 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 36, 37, 40, 53, 54, 57, 59 and 66 empower the Ontario Municipal Board and the Department of Municipal Affairs to override the provisions of the Dominion Interest Act, (R.S.C. cap. 102) for by section 2, of that Act, it is provided that "Except as otherwise provided by this or by any other Act of the Parliament of Canada, any person may stipulate for, allow and exact, on any contract or agreement whatsoever, any rate of interest or discount which is agreed upon." Every debenture issued by a municipal corporation or any of its local boards is a contract with the holder thereof to pay interest at the rate set out therein and accordingly the section of the Interest Act quoted governs such interest stipulation.

p. 245, l. 18

26. Section 33 of the Department of Municipal Affairs Act allows the exaction of only such rate of interest as the Ontario Municipal Board may authorize but under head 19 of section 91 of The British North America Act, the subject "interest" is within the exclusive legislative competence of the Dominion Parliament. The rate of interest provided in the debentures held by the plaintiff has been voided by the provision both in the original and amended scheme of funding and refunding for reduced rates of interest. The appellants submit that it is not competent for the Provincial Legislature to enact these sections and accordingly on this branch of the case all the provisions of Part III of the Department of Municipal Affairs act that deal with or authorize or empower the dealing or interference with agreed rates of interest are ultra vires the Legislature.

Ross et al vs Torrance es-qual. The City of Montreal, (1879) 2 Cartwright 352.

Royal Trust Company vs Attorney-General (Alberta), (1937). 1 W.W.R. 376.

Independent Order of Foresters vs The Board of Trustees of Lethbridge Northern Irrigation District, (1937), 1 W.W.R. 414; (1937) 3 W.W.R. 424, (C.A.).

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B. The Act deals with Insolvency.

27. The appellants claim secondly that Part III of the Department of Municipal Affairs Act, is ultra vires on the ground that it deals solely and exclusively with bankruptcy or insolvency, which
p. 213 is by section 91, head 21 of The British North America Act reserved
p. 230, l. 16 exclusively to the Dominion Parliament. Part III is headed "Special Jurisdiction over Defaulting municipalities" and vests in the Ontario Municipal Board certain powers and special jurisdiction only when the Board is satisfied upon inquiry that the municipality has failed to pay its debenture debt when due and demanded or to pay other
p. 230, l. 28 debts when due as a result of financial difficulties, or when it is so financially involved or embarrassed that it is likely to default. Each of these three conditions are well known and recognized as states of insolvency and form a definite foundation for bankruptcy and
p. 230, l. 28 insolvency proceedings, and it is entirely upon such a foundation that the whole of the jurisdiction contained in Part III rests.

28. When the Board is satisfied by inquiry that the conditions are present to give it jurisdiction under that Statute, it may make
p. 231, l. 6 an order vesting the control and charge over the Municipality in the Department of Municipal Affairs. This control covers among other
p. 232, l. 24 matters the appointment of officers and employees, the collection,
p. 232, l. 27 receipt and payment of revenues and expenditures; control (including custody and investment) of sinking funds; the system of auditing and accounting; dealing with the assets, liabilities, revenues and
p. 232, l. 28 expenditures; the sale or other disposition of its assets; and numerous other matters that cover practically the whole range of municipal business dealings. At the same time the Board is empowered to take complete control over its debt structure including the
p. 233, l. 12 compulsory funding of current indebtedness, consolidation of debenture
p. 233, l. 16 debt, compulsory refunding and the retirement and cancellation of
p. 233, l. 22 refunded debentures, postponement of payment of debts and interest,
p. 233, l. 25 reduction in the amount of principal and writing off of interest
p. 233, l. 30 arrears; compulsory changing of interest rates and terms of payment thereof and amendment of sinking fund provisions. The
p. 234, l. 1 appellants submit that the removal from the municipality of its powers as a distinctively Municipal institution and vesting them in a Board or Department is the exact counterpart of such vesting in an Official Receiver and Trustee in Bankruptcy under a Bankruptcy Act. There is, however, this distinction that under the Statute herein challenged absolute and arbitrary power is given to the Trustee while under a Bankruptcy Act protection is given to both the debtor and creditor by the right of appeal to the Court in regard to any step taken throughout the whole proceeding.

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29. The question of what is meant by and included in the term insolvency was considered in Attorney-General (B.C.) vs. Attorney-General (Can.)., (1937), A.C. 391. (The Farmers Creditors Arrangement Act). Lord Thankerton in delivering the opinion of the Committee says at page 402, "In a general sense, insolvency means inability to meet one's debts or obligations; in a technical sense, it means the conditions or standard of inability to meet debts or obligations, upon the occurrence of which the Statutory law enables a creditor to intervene, with the assistance of a Court, to stop individual action by creditors and to secure administration of the debtor's assets in the general interest of creditors; the law also generally allows the debtor to apply for the same administration". An examination of Part III of the Act in question will make it abundantly clear that it comes directly within Lord Thankerton's definition. Without lengthening this document unduly, it is submitted that sections of the Act herein challenged are much more than paraphrases of the Dominion Bankruptcy Act. The heading boldly asserts the Part deals with insolvent municipalities and the sections contain all the substance, procedure and most of the details of that or any Bankruptcy Act as extant in the United Kingdom or any of the Associate Commonwealths.

Cushing vs. Dupuy 5 A.C. 409.

Schoolbred vs. Clarke, in re Union Fire Insurance Co., (1890) 17, S.C.R. 265.

Attorney-General (Canada) vs. Attorney-General (Ontario) et al, (1898) A.C. 700. (The Fisheries Case).

Union Colliery Co. of British Columbia, Limited, et al, vs. Bryden et al, (1899) A. C. 580.

John Deere Plow Company, Limited, vs. Wharton, et al, (1915) A. C. 330.

Great West Saddlery Company, Ltd., vs. The King (1921) 2 A. C. 91.

In re The Companies Creditors' Arrangement Act, (1934) S.C.R. 659.

Attorney-General (British Columbia) vs. Attorney-General (Canada) et al, (1937), A. C. 391. (The Farmers' Creditors Arrangement Act).

30. The respondents may raise the objection that the Act in question makes no provision for the final distribution of the debtors assets among its creditors; in other words that the realization of the assets and distribution of the proceeds is an essential element in any scheme of insolvency legislation and no doubt that was an argument that could be seriously taken before the decision in Attorney-General (B.C.) vs. Attorney-General (Can.) (supra) upon the Farmers Creditors Arrangement Act, as that Act of the Dominion Parliament specifically provided for the retention of the debtor's business in his possession without realization and its validity was upheld both in the Supreme Court of Canada, ((1936) S.C.R. 384)

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and by the Judicial Committee, (1937) A.C. 391. Lord Thankerton in that case says at page 404, line 3, "The appellant laid stress on the provisions of subsection 8 of section 12, but that does not appear to Their Lordships to be an illegitimate or unusual element to be taken into account in the consideration of composition schemes, and indeed the retention of the business under the management of the debtor may well be a consideration in the interests of the creditors as well as of the debtor - - Their Lordships are unable to accept the contention that the Act is not genuine legislation relating to bankruptcy and insolvency". The Judicial Committee also cites, in that case, with approval the Judgment of the Supreme Court of Canada on the reference with respect to the Companies Creditors Arrangement Act (In Re The Companies Creditors Arrangement Act, (1934) S.C.R. 659) in which that Statute was found to be valid as the exercise of Dominion jurisdiction under head 21 of the British North America Act: Bankruptcy and Insolvency. That Statute provides for the retention and control by the debtor of its business. Also the Dominion Bankruptcy Act, (R.S.C. 1927, c. 11) makes provisions for the retention by the debtor under certain circumstances of his assets and control of his business (sections 11 - 14 and 46). Such legislative enactments which make provision for settlements in the nature of compositions by which bankruptcy is avoided but which assumes insolvency, have been held by the Judicial Committee and the Supreme Court of Canada to be properly within the sphere of bankruptcy legislation.

Attorney-General (B.C.) vs. Attorney-General (Can.) 1937, A.C., 391, at page 402.

In Re Companies Creditors Arrangement Act, 1934, S.C.R. 659.

31. The appellants desire to draw to the attention of the Committee that there is a fundamental distinction as to the basis upon which taxation for municipal purposes is imposed upon real estate in Ontario and that is that the rate is charged upon the "actual value" which means, market value and not value as determined by its power to produce income so that the taxes imposed may exceed the gross income. (The Assessment Act, R.S.O. 1927, cap. 238, sec. 40.) Such taxes are collected by the imposition of a lien and the sale of or vesting in the municipality of the lands themselves, so that the imposition of a rate beyond the immediate capacity of the real estate to bear does not result in an increase in the amount realized. The reason for this is that when a further attempt is made to collect, a condition then arises which results not only in a reduction of the number of parcels rateable, owing to large numbers being vested in the municipality, but in a general reduction in the value of the whole of the real estate, owing to the municipality in its embarrassment selling lands so vested at sacrifice prices.

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32. It is clear that such a state had been reached in the four defendant Municipalities from the evidence of the Treasurer, Cock, that the new City had acquired through failure to pay taxes more than 10,000 parcels of real estate (the witness says "acres" but it obviously requires the above correction).

33. If the above limit has been reached physical assets, highways, pavements. sidewalks and sewers have no immediately realizable value and the remainder, its waterworks, parks and municipal buildings and the equipment for carrying on the ordinary services rendered to its inhabitants will realize but a very small fraction of the capital invested. Consequently, the argument that the Act in question does not deal with Bankruptcy in this case because the debts of any one of the four Municipalities or of all are less than the assessed values has no more application than it does in the case of ordinary debtors for the assessment is merely the valuation by the debtor of the assets of its ratepayers and is no criterion of what may be ultimately realized or whether a state of bankruptcy or insolvency exists; further the criterion is specifically provided by the Dominion Bankruptcy Act, itself, which is inability to meet its obligations as they generally become due. R.S.C. cap. 11, section 2 ss. (u), reads as follows:

"insolvent person" and "insolvent" includes a person, whether or not he has done or suffered an act of Bankruptcy,

(i) who is for any reason unable to meet his obligations as they generally become due.

(iii) The aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due, thereout;

34. One of the most distinctive tests of bankruptcy is when the debtor arrives at such a state that he has to go to his Bank or to his creditors or to the Court and say, "my debts are so pressing and my current incomings are so far behind my needs that if any one brings action, I must throw up my hands" and he asks either for an immediate compromise of his debts, or the winding up of his business, which then takes place either by the Court, or by seizure and sale under execution. Now, what was the main object of the four orders of the Municipal Board, dated May 4, 1932, November 23, 1932, May 23, 1933, providing for control of the municipalities? It is contained in section 30, ss. (1), which stays all actions and executions and prevents the commencement of any action against the municipalities or the levying under any execution against its assets, (this is identical with section 95, ss. 1, of the original Part VI of the Municipal Board Act, of 1932, in force at the time of the orders), and that is exactly what occurred with these municipalities.

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Then the provincial legislature having set up their own Board with the power of investigating and finding whether it was necessary to stay actions and executions, in other words, to find whether they were insolvent, and the Board having so found and having taken action thereon by means of the plan and further legislation, can the legislature or the Attorney-General now say these municipalities were not in an insolvent condition and contradict the acts of their own special agent in that behalf. If insolvency existed then any question of over-lapping of power between "bankruptcy" under section 91 of the B.N.A. Act and "municipal institutions" under section 92, is resolved in favor of the Dominion power by virtue of the concluding words of section 91, "And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

p. 213, l. 30-34

Ontario & Minnesota Power Co., vs. Rex, (1925) A.C. 196, P.C.

C. The Act abrogates rights enforceable outside the province.

35. The third ground of the appellants case against Part III of the Department of Municipal Affairs Act is that it is in derogation of civil rights existing and enforceable outside the Province. The evidence is that substantial sums were advanced, for instance, for the construction of utility plants within the province, but the debentures issued as security for those debts by the former municipalities and some of which are held by the plaintiffs were payable at places outside of Ontario, thus $2,926,765.73 of East Windsor are payable at Montreal in the Province of Quebec and in New York in the United States of America, and $753,000.10 of Walkerville-East Windsor Water Commision debentures are payable in the City of Montreal. The Evidence also is that very substantial amounts of Municipal debentures both of defendant municipalities and generally of Ontario Municipalities are held by foreign insurance companies and others; for example, the Metropolitan Life Insurance Company of New York are the holders of $11,653,818.16 of Ontario Municipal debentures of which $968,000.00 are issued by the former City of Windsor. The right to claim demand and sue for the principal and interest due under such debentures is a civil right existing and enforceable at any place of payment and is therefore a civil right existing outside the Province and it is submitted the Legislature of the Province cannot legislate validly in derogation thereof.

p. 133, l. 2
p. 135, l. 33
p. 207, l. 2
p. 135, l. 42
p. 203, l. 39
p. 204, l. 19
p. 204, l. 43
p. 204, l. 11

36. This point was considered by the Judicial Committee in The Royal Bank of Canada vs. The King (1913) A.C. 283, in which there was held to be a right to demand payment of certain bonds at Montreal. The Legislature of Alberta had purported by Statute to

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destroy this right. Viscount Haldane, L.C.. says at page 298: "In the opinion of Their Lordships the effect of the statute of 1910 if validly enacted, would have been to preclude the bank from fulfilling its legal obligation to return their money to the bondholders, whose right to this return was a civil right which had arisen, and remained enforceable outside the province. The statute was on this ground beyond the powers of the Legislature of Alberta, inasmuch as what was sought to be enacted was neither confined to property and civil rights within the province nor directed solely to matters of merely local or private nature within it." 10

Lecoutrurier et al, vs Rey et al, (1910) A.C. 262.
Ottawa Valley Power Co., et al., vs The Hydro-Electric Power Commission of Ontario, et al, (1937) O.R. 265.
Beauharnois Light, Heat & Power Company, Ltd., et al, vs The Hydro-Electric Power Commission of Ontario (1937) O.R. 796.

D. The Ontario Municipal Board Act, 1932.

37. The submissions advanced in paragraphs 25 to 36 hereof that Part III of the Department of Municipal Affairs Act, 1935, is ultra vires of the Provincial Legislature on the grounds that it deals with interest, bankruptcy and civil rights outside the Province, also apply to Part VI of the Ontario Municipal Board Act, 1932, which 20 was repealed by section 5 of the Ontario Municipal Board Amendment Act, 1935, but was also impugned by the appellants in order that no question might arise as to that Act coming into effect again, from a declaration that Part III of the Department of Municipal Affairs Act, 1935, is invalid.

PART III

THE AMALGAMATION ACT

38. The second branch of the appellants' case is that The City of Windsor (Amalgamation) Act, 1935, is ultra vires the Legislature of Ontario and this upon several grounds. 30

A. The Act deals with Insolvency.

39. The first of these grounds is that it is insolvency or bankruptcy legislation and consequently by section 91 (21) of the British North America Act, 1867, is within the exclusive jurisdiction of Parliament. The appellants submit that the defendant Municipalities and their boards were and are insolvent. The evidence of such a condition is contained in the following documents:

p. 200, l. 1

(a) Statement of Default:—An admission by Counsel at the trial that the defendant municipalities had defaulted in payment of their debenture and other indebtedness for periods of as long as 40 five years and more and were still in default at the date of the trial.

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p. 119, l. 12
p. 121, l. 6
p. 123, l. 2
p. 131, l. 12

(b) Four Orders of the Ontario Municipal Board:—(Exhibits 2(a) - 29, 2(a) - 37, 2(a) - 40, 2(a) - 46), declaring the defendant municipalities, City of East Windsor, Windsor, and Sandwich and The Essex Border Utilities Commission subject to Part VI of the Ontario Municipal Board Act and setting out the grounds upon which such orders were made.

p. 188, l. 36
p. 47. l. 32

(c) The Report of the Royal Commission on Amalgamation (Exhibit 10):—A document printed by the King's Printer and therefore evidence under the Evidence Act, R.S.O. 1937, cap. 119 and the accuracy of which is admitted by counsel for the new City of Windsor and The Windsor Utilities Commission. The findings of that commission on the financial situation in April, 1935, indicate clearly that the municipalities are far from being solvent.

p. 160, l. 21
p. 167, l. 2
p. 167, l. 5-17
p. 162, l. 22
p. 180, l. 8

(d) The plan of funding and refunding the debts of the amalgamated municipalities approved by order of the Ontario Municipal Board indicates clearly the municipalities were unable to pay their debts as they matured and this condition it is proposed to remedy by a long extension of time with interest rates reduced by as much as 63.3% of the original rate and by the cancellation of interest arrears amounting to $3,293,503.00 or over 56¾ per cent thereof.

(e) The Reports of the auditors of the several defendant municipalities for the years 1934 and 1935, which were made exhibits by consent and were before the Court of Appeal; among other things, these reports set out many columns of figures detailing by-law by by-law the issues of debentures upon which there are very substantial amounts of overdue and unpaid principal and interest. The total of the amounts in default as set out in paragraphs 5, 6, 7 and 9 hereof is $23,824,532.19 representing 55.4% of the total debts of the four municipalities.

p. 239, l. 15

(f) Section 7(c) of the City of Windsor (Amalgamation) Act, 1935, providing for refunding the debts of the defendant municipalities:—there would be no necessity for this provision in regard to solvent municipalities and as the instruments creating the debts made no provision for retirement prior to maturity the plan as authorized is particularly indicative of a state of financial embarrassment when compulsion is required to refund indebtedness.

p. 243, l. 21
p. 238, l. 40

(g) Section 5 of the City of Windsor (Amalgamation) Act, 1935, as enacted by section 2 of the City of Windsor (Amalgamation) Amendment Act, 1936, and section 6 (1) of the Amalgamation Act.—these sections declare the new City to be subject to Part III of the Department of Municipal Affairs Act and therefore a de-

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faulting municipality, or in other words insolvent from the day of its alleged birth.

p. 243, l. 21
p. 239, l. 15
p. 187, l. 31
p. 161, l. 5

(h) Section 2 of the City of Windsor (Amalgamation) Amendment Act, 1936;—this section repeals section 7(c) of the Amalgamation Act of 1935 including the area basis upon which the debts of each defendant municipality were to be paid and it is a fair deduction from the fact this section was repealed by proclamation some six weeks prior to the hearings by the Ontario Municipal Board on the refunding plan which made no provision for the area basis for payment, that the more insolvent municipalities were in such bad condition financially that such a basis was unworkable and contribution from the more solvent municipalities had to be provided to obtain a workable plan.

It is submitted that if the evidence enumerated in this paragraph were presented to any Court exercising bankruptcy or insolvency jurisdiction, a declaration of insolvency would follow as a matter of course.

40. It is submitted that the insolvency of the municipalities was the true reason for the passing of the Amalgamation Act of 1935 and it becomes apparent upon considering the legal position of the former Municipalities at the time of the orders of the Board dated May 4, 1932. May 4, 1932, Nov. 23, 1932 and May 23, 1933, and the appointment of the supervisors thereunder. Walkerville

p. 200, l. 21

was paying its debts and continued to do so until December 15, 1934; the other municipalities had found it impossible to carry on; until about the latter date or a month or so before there had been no method devised of putting them on a new or secure foundation or finding a means of allowing them to carry on. With Walkerville in that position not only was there no talk or suggestion of amalgamation, nor could there have been without a favourable vote of the electors of Walkerville (The Municipal Act, R.S.O. 1927, cap. 233, s. 23 amended by The Municipal Amendment Act, 1931, cap. 50, s. (2). In November, 1934, the proposal of amalgamation

p. 35, l. 42

was spread abroad and the question was submitted to the ratepayers

p. 188, l. 44

of Walkerville who voted against it by 4 to 1. On December 5th, the day of the voting, the province appointed the Royal Commission to report on a means of dealing with the financial position of these municipalities. Then, in December, 1934, Walkerville was forced

p. 200, l. 21

into default and in 1935 as the means of obtaining a palliative for the bond holders of the municipality, the Act of 1935 was passed and Walkerville was forced into amalgamation. This has resulted not only in the bonussing of the debenture holders of the three other municipalities by throwing Walkerville into the pool, but also in taking away from the debtors their assets as if they had been seized

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p. 185, l 11

under execution and sold, and in giving them, whether in effect as distribution or as a gift, to a new person against whom apart from the plan the bond holders have no remedy.

41. It is further submitted that if the conclusions in paragraphs 27 to 34 and 39 to 40 hereof are drawn and the bankruptcy provisions of the Amalgamation Act are deleted therefrom, what remains is practically meaningless and ineffectual and they are therefore inseparable.

B. The Sequence and Combined Effect of the Legislation and Relevant Facts.

42. It is submitted that it is for this Court to give weight to the sequence of the Res Actae, that is, the defaults of the municipalities, the Municipal Board Act, (1932), providing in Part VI for insolvent municipalities generally. The Orders of the Board made thereunder, the administration by supervisors, the realization by the government that Walkerville would not willingly amalgamate, the Report of the Royal Commission, the Department of Municipal Affairs Act, (1935), the compulsory amalgamation by the Amalgamation Act of 1935, and the ratification of the acts of the Finance Commission, and the Amalgamation Amendment Act, 1936, which also repealed the area basis for the payment of indebtedness.

p. 244, l. 8

Eastman Photographic Material Company, Limited, vs The Comptroller-General of Patents, (1898) A.C. 571.

43. The appellants' submission is that the history recited in the preceding paragraph clearly shows a general scheme of insolvency legislation of which the Amalgamation Act is a component part. The extent to which the Courts have gone in finding and acting on a general scheme of legislation is well illustrated in the judgment of Sir Lyman Duff, C.J.C., and Davis, J.A., at pages 106, 130 and 132 of the decision of the Supreme Court of Canada in the Reference Re Alberta Statutes (1938) S.C.R. 100.

C. The Act deals with rates of interest and rights enforceable outside the Province.

44. The submissions advanced in paragraphs 25, 26, 35 and 36 hereof that Part III of the Department of Municipal Affairs Act, 1935, is ultra vires of the Provincial Legislature on the grounds that it deals with interest and civil rights outside the Province also apply to the City of Windsor (Amalgamation) Act, 1935, as amended and the evidence and authorities therein referred to is, it is submitted, are applicable to this branch of the argument.

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PART IV

THE DEBT REFUNDING PLAN.

45. Dealing now with that branch of the appellants case which claims a declaration that the refunding plan is not within the powers
p. 7. l. 35 of the municipalities or of the Windsor Finance Commission and that the Ontario Municipal Board has no authority to approve of the same, the appellants recognize that in view of the confirmation by statute in 1938 of the refunding plan (1938, Statutes of Ontario, cap. 45, sections 2 and 3) their attack is now limited to an attack on the sole ground of jurisdiction. Their submission is that the Statutes, the Department of Municipal Affairs Act, 1935, Part III, and The City of Windsor (Amalgamation) Act are ultra vires for the grounds set out in Parts II and III hereof and accordingly the preparation, submission and approval of the refunding plan was without legislative authority, the plan is a nullity and any attempt by the legislature to confirm by Statute that which it had no power to do in the first place is abortive and an attempt to do indirectly what it cannot do directly.

In re the Insurance Act of Canada, (1932) A.C. 41;

Great West Saddlery Co. vs The King, (1921) 2 A.C. 91, at p. 100.

PART V

THE JUDGMENT AT TRIAL

46. The trial judge, Hogg, J., dismissed the action on a matter of procedure, finding that it was premature in that the preparation
p. 85, l. 1 and submission of the plan had no legal consequences. His words are, "Nothing is found in this section or in the whole Act nor in any of the other material Statutes which gives any effect to the plan that the Commission prepared and which it has submitted,"
p. 85, l. 13 again, "I am of opinion, that the mere preparation and submission of the plan in question by The Windsor Finance Commission in
p. 85, l. 40 itself results in no legal consequences upon which the plaintiffs can found a right of action". . . . "If, then, no consequential or substantive relief can be awarded to the plaintiffs, have the plaintiffs the right to request or has the Court the right to declare, that the
p. 86, l. 15 Statutes attacked are ultra vires of the Province of Ontario", and further: "It may be said that the plaintiffs here, in my opinion, have had no legal right invaded by the preparation of the plan by the Finance Commission complained of, and the question as to whether their rights as debenture holders are prejudiced would not be ascertained until action was taken by The Ontario Municipal Board with respect to such plan".

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47. In making the above statements the trial judge has overlooked the position at the time of the issue of the writ as set out in paragraph 18 hereof and it is submitted that the legislation and the plan must be read together. The plan is the fruition of the legislation, the legislation is general applying to all municipalities, and the
p. 244, l. 8 plan is a concrete plan applicable to these municipalities. The above then being the grounds for the decision, it is evident that the Judge overlooked the effect of section 2 of the City of Windsor (Amalgamation) Act, 1936, which makes the plan not only a legal Act but binding on all persons concerned. It was passed after the plaintiffs had suffered loss by being prevented from collecting interest and principal and were, by the plan itself, threatened not only with the further loss of interest, but also loss by depreciation in the value of their bonds in the future. This threat was not only a real one at the time of the writ, but was actually carried out by the Order of the Board, dated the 15th day of June, 1937.

48. Even if the plaintiffs had not already suffered actual loss, it is submitted that the above is really a decision that the plaintiffs are not entitled to a declaratory judgment as to their rights under the circumstances, and it is, therefore, directly in contravention of section 15 (b) of the Judicature Act, R.S.O. 1927, cap. 88. (Now R.S.O. 1937, cap. 100.)

49. The next ground upon which the learned Judge based his judgment may be that set out in Smith vs. the Attorney-General of Ontario, (1924) S.C.R. 331, that the plaintiffs have no status to maintain an action "restraining a wrongful violation of a public right, unless he is exceptionally prejudiced by the wrongful act". It is not, however, clear whether he intends that to be a ground, as he
p. 86, l. 14 goes back in the next paragraph and states that it is not necessary to rely on this principle except that it may be said that the plaintiffs have no legal right invaded by the preparation of the plan. That uncertainty makes it, however, necessary to discuss shortly the effect of that case. The decision was that where an order was sent for liquor outside the province and the vendor in the other province refused to comply with it because the Canada Temperance Act was in force in Ontario, no action could be brought to ascertain whether that Act was in force in Ontario or not. The judgment of the Supreme Court of Canada decided the action upon the ground that the plaintiff had been subjected to no actual threat and no actual risk, and that it was entirely speculative as to whether any proceedings might be taken or not. Dyson vs. the Attorney-General (1911) 1 K.B. 410, and Burghes vs. the Attorney-General (1911) 2 Ch. 139, were distinguished upon this specific point, in those cases, "there was no decision upon a hypothetical state of facts, and the demand in

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each case . . . was an illegal attempt to constrain the plaintiff by an illegal threat". The other ground suggested was that the action could not be brought because it was common to every citizen which is merely restating the same ground in other words. It is submitted the facts here go far beyond a state of hypothesis, and it is impossible to get over the fact that the plaintiffs have lost certain of their rights and have not been paid owing to this legislation and plan.

50. It is to be noted that in the judgment in the Court of
p. 96, l. 25 Appeal, Henderson. J.A., states that during the argument he expressed the view that the action was premature but that he had not in mind that the Act of Amalgamation came into force prior to the writ and therefore altered his view to some extent; that means that the action was not premature as far as the legislation is concerned and that, it is submitted, is sufficient for the Court to give the appellants relief.

Lord Auckland vs. Westminster District Board of Works (1872) 7 Ch. App. 597.

The King vs. The Electricity Commissioners, ex parte London Electricity Co. Ltd. (1924) 1 K.B. 171.

PART VI

THE JUDGMENT OF THE COURT OF APPEAL

A. The action is not premature.

p. 97, l. 43 51. Henderson, J.A., in his judgment held the action to be premature, because the plan prepared by the Finance Commission was a tentative plan only; it was never put into force and no legal right of the appellants was affected by it. The learned Trial Judge and the majority of the Court of Appeal all appear to have overlooked the evidence that the Amalgamation Act prejudiced the plaintiffs rights in the following ways, among others:

(1) It took away their right as ratepayers to elect members of the Municipal Council of Walkerville;

p. 242, l. 8
p. 242, l. 15
p. 200, l. 1 (2) It took assets accumulated as the result of contributions of the appellants as ratepayers and vested them in a new organization some parts of which were in an extreme state of insolvency, to the great benefit of the creditors of the insolvent portions and greatly to the detriment of the plaintiffs as debenture holders and ratepayers.

(3) It took away from the plaintiffs as ratepayers their right of local self-government and gave them another form of government under the complete control and administration of an outside

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body with autocratic powers, namely, the Department of Municipal Affairs.

p. 160, l. 20

(4) It subjected the plaintiffs as debenture holders to having their debentures cancelled, refunded, altered or amended both in principal and interest to their detriment.

p. 239, l. 8

(5) It placed the municipal government for an indeterminate period in a body with autocratic powers, not elected by the ratepayers and answerable only to the Department of Municipal Affairs and The Ontario Municipal Board for its conduct in office, namely, The Windsor Finance Commission.

It is submitted therefore that the appellants were justified in bringing their action at the time they did, as otherwise the respondents might have raised a plea of laches.

p. 7, l. 35

52. The appellants claimed in their pleadings and in the Writ of Summons a declaration that the Windsor Finance Commission derived no power from the legislation to bring in the plan of funding and refunding the debts of the municipalities. The defendants, other than the Attorney-General, by their statement of defence, admit the preparation and submission of such plan to the Municipal Board. This action was not brought until over eleven months after the commission was appointed to prepare the plan which the Act provided should be prepared forthwith, and the Board was acting upon the plan at the time of the trial and it was finally confirmed by order of the Board of June 15, 1937, nine months before the hearing of the Appeal.

p. 11, l. 2
p. 13, l. 5
p. 2, l. 2
p. 137, l. 30
p. 161, l. 5
p. 90, l. 18
p. 162, l. 8
p. 101, l. 13

p. 84, l. 41

53. The Trial Judge admitted the plan over the objection of the respondents, and no objection was taken against his ruling thereon before the Court of Appeal. The plan in its final form and the amending order of the Ontario Municipal Board was admitted on the hearing of the appeal under Rule 232, of the Rules of Practice and Procedure of the Supreme Court of Ontario which is as follows:

> 232. (1) On all appeals . . the Court appealed to . . shall have . . full discretionary power to receive further evidence.
>
> (2) Such further evidence may be given without special leave as to matters which have occurred after the date of the judgment, order or decision on which the appeal is brought.
>
> (3) Upon appeals from a judgment at the trial such further evidence (save as mentioned in subsection (2) shall be admitted on special grounds only, and not without leave of the Court.

The appellants submit that this plan which was prepared as the result of a statutory duty imposed upon the Windsor Finance Commission was more than a mere threat to the appellants and was

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in fact, as stated above put into effect and was therefore admissable and relevant evidence. In any event the plan was made evidence under the above rule by virtue of the Statute already referred to in paragraph 17 which not only ratified it but made it part of the Statute itself which was passed on the 8th day of April, 1938, immediately after the argument in the Court of Appeal which was completed on the 23rd day of March, 1938, and before its Judgment.

B. The Municipalities Were Insolvent.

p. 98, l. 9

54. As to the appellants appeal on the grounds of Bankruptcy and insolvency, Henderson, J.A., says: "granting that these municipalities were and are in great financial difficulties it by no means follows in my opinion that they or any of them can be declared bankrupt or insolvent and if this were not so there is not, in my opinion, any evidence before this Court that they are bankrupt or insolvent . . ." This apparently means that unless a declaration under some statutory authority is made by an authorized tribunal and such declaration is before the Court, then there is no evidence before such Court that they are insolvent or bankrupt: The learned judge apparently limits the meaning of bankrupt or insolvent to those conditions resulting from the action of a tribunal and not those that may result in such action. In other words no person or corporation can be said to be in an insolvent condition, no matter how seriously he is involved financially, until he has been duly declared so by a bankruptcy Court. It is submitted that the Farmers' Creditors Arrangement Act case (Attorney-General for British Columbia vs. Attorney-General for Canada, (1937) A.C. 391), effectively negative this statement. Lord Thankerton says at page 402: . . . In a general sense, insolvency means inability to meet one's debts or obligations; in a technical sense, it means the condition or standard of inability to meet debts or obligations, upon the occurrence of which the statutory law enables a creditor to intervene with the assistance of a Court, to stop individual action by creditors and to secure administration of the debtor's assets in the general interest of creditors; the law also generally allows the debtor to apply for the same administration . . .

55. The learned Justice of Appeal overlooked a substantial amount of documentary evidence, much of it put in by consent, to the effect that the respondent municipalities were in a condition or

p. 97, l. 5

state of insolvency for he uses the expressions: "It is said that East

p. 97, l. 16

Windsor defaulted, etc.," "It is also said that orders were made by the Ontario Municipal Board"; "It is also said that a Royal

p. 97, l. 24

Commission was appointed" . . . "Various references in this report to the financial condition of these municipalities are relied on by the plaintiffs to establish bankruptcy or insolvency, but in my opinion

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even if admissable neither bankruptcy nor insolvency could be so established". The appellants did not at the trial, nor before the Court of Appeal, nor do they now rely entirely on that Report to prove the insolvent condition of the municipalities as the learned Justice of Appeal seemed to think. It is submitted the evidence set out in paragraph 39 is ample for the purpose.

C. *Right to enforce debentures is not a local right.*

p. 98, l. 23

56. On the appellants second ground, the judgment states that the enforcement of their rights against the municipality was necessarily and essentially from its very nature something that must be done in the Province because the municipality is situate in Ontario and regardless of the location of the creditor or place of payment, it is a right existing in Ontario. It is submitted that it is the possession of the right, not the ability of the possessor to enforce it, that is the determining factor. Very substantial amounts of the debentures in question are payable at places outside of Ontario, the appellant Dingwall is resident outside the Province and it is submitted that the Province is without jurisdiction to take away the right to or prohibit Dingwall or any other non-resident holder of such debentures from suing in the courts of the place of payment of such debentures. Because certain of these debentures are specifically payable at places outside the Province, the right of the creditor to payment beyond the jurisdiction is thereby acknowledged, thus giving to them a quality that did not exist in the indebtedness sued on in The Royal Bank of Canada vs. The King, and another, (1913) A.C. 283, at pages 298 and 299.

p. 207, l. 2
p. 207, l. 8
p. 135, l. 42
p. 16, l. 18

p. 98, l. 30

57. On this point, Henderson, J.A., distinguishes his Judgment from the judgment of the same Court (differently constituted) in Ottawa Valley Power Company, et al, vs. The Hydro-Electric Power Commission of Ontario, et al, (1937) O.R. 265, and The Beauharnois Light, Heat and Power Company, Limited, et al, vs. The Hydro-Electric Power Commission of Ontario, et al, (1937) O.R. 796, but no such distinction can be deduced from the wording of the judgments in either cases; note particularly that of Masten, J.A., in the Ottawa Valley case, at pages 311, 313 and 322.

58. The decision under this heading rests upon Jones vs. Canada Central Ry. 46, U.C.R. 250, which held that a debenture issued under an Act passed prior to Confederation could be modified by the legislature of a Province after Confederation had taken place, though payable out of Ontario. It was the judgment of a Trial Judge based on the ground that if the Dominion can trench upon provincial matters where necessary to effectually legislate with respect to the subjects enumerated in section 91, the provincial legislatures can trench upon Dominion matters in order to legislate

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effectually on the subjects enumerated in section 92; this, of course, disregards the concluding words of section 92 and numerous decisions on their meaning such as Great West Saddlery vs. Rex (1921) 2 A.C. 91.

59. The essential point here, it is submitted, is that the provision in the debentures for payment in another jurisdiction ought not, without the clearest authority to be held valueless and a nullity, for certainly purchasers do acquire debentures containing such clauses at higher prices because they have the right to recover outside the jurisdiction.

D. Appellants' rights to a declaratory judgment.

60. The next point is that the prayer is purely in the nature of that of a quia timet action and Henderson, J.A., quotes in re

p. 98, l. 7

Lockyer, 1934, O.R. 22 as an authority for not interfering with the trial judge's discretion in dismissing the action, but it is hardly necessary to point out that that is a legal discretion and is appealable. In fact, the trial Judge did not exercise any discretion in

p. 87, l. 33

dismissing the action; he dismissed it on the ground that no substantive right of the plaintiffs had been affected, overlooking as already stated the defaults in payment, etc.; further In re Lockyer (a decision of the Court of Appeal for Ontario) holds that in the special circumstances of the motion then before the Court, no declaratory order ought to be made owing to its being a purely academic question. Mulock, C.J.O., at page 24 says: "The Court should not now entertain what may prove to be purely an academic question". Riddell, J.A., at page 26 says: "There is no doubt of the power of the Court to give a declaratory judgment but this power is to be carefully exercised, particularly in such a case as this, when the declaration can have no effect except in the future and on the happening of a stated contingency . . . On the present case I fail to see any useful purpose to be served by making a declaration". Middleton, J.A., dissenting holds that the remainder man has a vital interest and a real interest to have its rights now determined instead of having to await the death of the life tenant.

61. The power of the Courts of Ontario to make declaratory judgments is contained in section 15 (b) of the Judicature Act, R.S.O., 1937, cap. 100, which reads as follows: "(b) No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is or could be claimed or not." This section is identical with Order XXV, rule v of the Rules of the Supreme Court of England and has been explained and its limits determined in three recent

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important cases: Guaranty Trust Company of New York vs. Hannay and Company, (1915) 2 K.B. 536, which was approved by the House of Lords in Russian Commercial and Industrial Bank vs. British Bank for Foreign Trade, Limited, (1921) 2 A.C. 438. These two cases were followed in Ruislip-Northwood Urban District Council vs. Lee and another, 145, L.T. 208. Lord Justice Scrutton in this latest case on the point says at page 213: In my view all the Court should look at is whether there is a real dispute between the parties on the point raised, and incidentally, is it a matter in which jurisdiction is not excluded by any Statutory provision? Greer, L.J., who had argued the Guaranty Trust case says at page 214: In my opinion it has now been decided beyond doubt that the words of rule 5 have got to be taken at their face value. Accordingly, in a case where it is important to have a decision between two parties, then the decision may be given in the form of a declaration even though there is no other cause of action than the right of relief in the form of a declaration.

62. It is submitted that Henderson, J.A., erred in following "In re Lockyer" (Supra) in dismissing the appeal. It is to be noted that Middleton, J.A., who wrote the dissenting judgment in the Lockyer case is the only judge in the Court that heard that appeal, to take any notice of the Russian Bank or Guaranty Trust Company cases. The remainder of the Court felt that in view of the special circumstances, a declaratory order ought not to be made.

E. Amalgamation is not the Pith and Substance of the Legislation.

63. The paragraph at the head of page 99 of the record seems to be an argument that the "pith and substance" of the legislation was amalgamation, but it is impossible to justify this argument for Part VI of the Ontario Municipal Board Act, as the first of the series, was passed several years before amalgamation was talked of, and it gave very wide powers over the contracts of insolvent Municipalities but contained no power to amalgamate and as already stated above, the bankruptcy sections in Part VI which were continued in Part III were entirely general and provided for cancellation or compromise of the debts by such a plan as that in question here, and amalgamation was an incident devised long after the enactments.

64. The judgment of Henderson, J.A., is really based upon the holding that municipal institutions are by their nature local, and that the legislation is not ultra vires because it deals with assets which are located entirely within the Province. But, insolvency Acts have two objects in view; one no doubt is the administration of the estate of the debtor so that the creditors may obtain what there is, and the debtor be not reduced to servitude for the rest of

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his life, but, as far as Canada is concerned, an equally important object arose from the fact that the creditors of a debtor were so often scattered throughout all the Provinces of Canada, and many were located outside Canada so that it was desirable to give such widely scattered creditors the rights and advantages which otherwise would accrue to the local creditors only: and purchasers of bonds or debentures pay an enhanced price for those privileges. It is submitted that as far as their contracts give rise to debts payable outside the Province, it is not a local aspect with which the Province can deal; and further, from the viewpoint of insolvency, municipal institutions are not local institutions any more than companies created solely by a Provincial Act are local institutions, nor are they a class of persons which are naturally not included in insolvency any more than farmers, who may be called a special class in some aspects and who were validly dealt with by the Dominion under the Farmers' Creditors Arrangement Act. The municipalities dealt with by the legislation in question herein are bodies corporate by virtue of R.S.O. 1927, cap. 233, section 7, which reads:

"The inhabitants of every county, city, town, village and Township shall be a body corporate for the purposes of this Act."

F. The Limits of powers under "Municipal Institutions".

65. The statement by Henderson, J.A., that there can be no doubt that the Legislature has the fullest and widest powers and jurisdiction to create municipal institutions, to merge or amalgamate or otherwise alter them, to endow them with administrative powers and powers in the nature of legislative powers avoids one of the main issues in this action, because such powers are limited where they fall under any of the heads of section 91 of the British North America Act. This point was dealt with and determined in Attorney-General for Ontario vs. Attorney-General for Canada and The Brewers and Distillers Association of Ontario, (1896) A.C., 348, where Lord Watson says at p. 363: "Their Lordships can find nothing to support that contention in the language of s. 92, No. 8 which according to its natural meaning simply gives provincial legislatures the right to create a legal body for the management of municipal affairs . . . the extent and nature of the functions which it can commit to a municipal body of its own creation must depend upon the legislative authority which it derives from the provisions of s. 92 other than No. 8."

p. 99, l. 1

66. The extent of the legislative authority of the provincial legislatures has been considered in a number of cases. Lord Herschell in the well known reference as to Fisheries, The Attorney-General for Canada vs. The Attorney-General for Ontario, et al, (1898) A.C. 700, says at page 714: "The earlier part of this section (91)

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read in connection with the words beginning "and for greater certainty" appear to amount to a legislative declaration that any legislation falling strictly within any of the classes specially enumerated in s. 91 is not within the legislative competence of the Provincial Legislatures under s. 92. In any view the enactment is express that laws in relation to matters falling within any of the classes enumerated in s. 91 are within the "exclusive" legislative authority of the Dominion Parliament. Whenever, therefore, a matter is within one of these specified classes, legislation in relation to it by a Provincial Legislature is in their Lordships' opinion incompetent. It has been suggested, and this view has been adopted by some of the judges of the Supreme Court, that although any Dominion legislation dealing with the subject would override provincial legislation, the latter is nevertheless valid, unless and until the Dominion Parliament so legislates. Their Lordships think that such a view does not give their due effect to the terms of s. 91 and in particular to the word "exclusively". It would authorize, for example, the enactment of a bankruptcy law or a copyright law in any of the provinces unless and until the Dominion Parliament passed enactments dealing with those subjects. Their Lordships do not think this is consistent with the language and manifest intention of the British North America Act."

67. A further development was expressed in Union Colliery Company of British Columbia vs. Bryden, et al. (1899) A.C. 580, where Lord Watson says at page 588: "The abstinence of the Dominion Parliament from legislating to the full limit of its powers could not have the effect of transferring to any provincial legislature the legislative power which had been assigned to the Dominion by s. 91 of the Act of 1867."

G. *Toronto vs. York Township.*

p. 96, l. 40

68. Henderson, J.A., states that "It is, however, conceded that the existing Dominion legislation does not apply to Municipal institutions". This statement goes further than counsel in the Court of Appeal was willing or desirous; the actual admission (and the difference did not seem to be apprehended) is that the Dominion Bank-

p. 208, l. 1

ruptcy Act is not a suitable or satisfactory means of administering the affairs of an insolvent municipality; the appellants do not admit that a municipality cannot be brought under the Bankruptcy Act. In fact a petition by one of the appellants under that Act is pending against the respondent, the Walkerville-East Windsor Water Commission.

69. The majority of the Court of Appeal felt bound by the decision in The City of Toronto vs. The Township of York (1938)

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A.C. 415, firstly on the ground that the "pith and substance" of both the Municipal Board Act, and the Department of Municipal Affairs Act was not bankruptcy but mere administration. This has already been discussed in paragraphs 66 and 67. And, secondly, on the ground that the actual wording of the judgment in that case is a decision that Part VI of the Municipal Board Act, 1932, and Part III of the Department of Municipal Affairs Act, 1935, are intra vires of the Province. It is submitted that no such conclusion can be drawn. The words ars "a study of the provisions of the Municipal Board Act leads their Lordships to the conclusion that the Board is primarily in pith and substance an administrative body. Parts IV, V, VI and VII are almost entirely administrative": but it is admitted that the question of bankruptcy did not arise in that case at all. As stated by Lord Atkin at page 427, it was decided solely upon the question whether the Ontario Municipal Board was a Superior Court or an administrative body, and the question whether Part III of the Act was valid was not in issue and was not decided though the judgment did hold that certain sections thereof entrusted the Board with the jurisdiction of a Superior Court and were accordingly ineffective. It is submitted that the inclusion of Part VI in a general and passing reference to legislation having a certain character is not to be taken as a decision on a point that was not raised and therefore not present to their Lordships' minds especially when there is no doubt that all bankruptcy legislation is administrative in character.

H. Exercise of Judicial Functions.

70. It is submitted that the Board in deciding that the several municipalities were insolvent and unable to pay their debts in full, and that therefore, no actions should be brought against them nor executions allowed and vesting the administration in another body was a judicial decision and also that in adopting the plan and making an order that it come into force they thereby decided the time and place for the payment of the debts, and the amount that should be paid whether principal or interest, and was exercising judicial powers and interfering with the validity of contracts and the rights of the parties in actions which might otherwise be brought and is ultra vires of the Board.

Toronto vs. Township of York (1938) A.C. 415.

p. 98, l. 38

71. The Judge was under a misapprehension as to the position of the appellants with respect to the relief claimed which is shown by the Statement of Claim to be a declaratory judgment as to their rights and the appointment of a receiver and an accounting based upon that declaratory Judgment to be obtained from the Lower Court.

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72. The appellants stated at the trial that they were not asking for personal judgment against the defendants G. Bennett, Farrow, Mero and McGregor, who were joined solely by virtue of their office as members of the Windsor Finance Commission, and against whom only a declaration was asked. They were removed from office by the Amalgamation Amendment Act of 1936, which substituted the Department of Municipal Affairs, prior to the trial and no claim for any relief against them has since been made either by the Notice of Appeal or on the hearing of the appeal and none is now claimed.

The said defendants were at the time of the issue of the Writ necessary parties to the action by reason of the duty cast upon them to prepare and submit a plan of refunding and also because the plan prepared by them was contrary to the Department of Municipal Affairs Act, 1935, sec. 31, and sec. 7(c) of the Amalgamation Act. The appellants submit that by reason of the Legislature removing them from the office in which they are sued prior to the trial, they are liable for costs and no costs should be allowed them.

Re Hendrick and The Milk Control Board (1935) O.R. 308.
Reg. vs. Local Government Board (1882) 10 Q.B.D. 309.
Security Export Co. vs. Hetherington (1923) S.C.R. 539.

73. The appellants submit that the judgments of the Court of Appeal for Ontario and the Trial Judge are wrong and should be reversed for the following amongst other reasons:

1. The legislation authorizing and the refunding plan dealing with rates of interest are ultra vires the Legislature of Ontario.

2. The Legislation in question in this appeal is insolvency legislation, and together with the plan based thereon, are ultra vires the Provincial Legislature.

3. The said acts and the plan thereon cancel and otherwise deal with debentures payable outside the Province and are ultra vires the Provincial Legislature.

4. The appellants had suffered substantial wrong and the plan proposed was actually carried out and the action is not premature and the appellants are therefor entitled to a declaration.

5. The powers of the Dominion Parliament over the subject "Bankruptcy and Insolvency" prevail over the powers of the Provincial Legislature on the subject matter "Municipal Institutions in the Province" and the legislation and the plan are therefor ultra vires the Provincial Legislature.

6. The Legislation empowers the Ontario Municipal Board to exercise and the said Board did exercise Judicial functions in dealing with the financial affairs of the municipalities.

CHAS. SALE

No. 103 of 1938.

In the Privy Council.

ON APPEAL

FROM THE COURT OF APPEAL FOR ONTARIO.

BETWEEN

EDGAR F. LADORE, BURLEY W. BENNETT, HORACE W. CUNNINGHAM and HARRIE R. DINGWALL *suing on* behalf of themselves and all other Ratepayers of the Corporation of the Town of Walkerville and suing on behalf of themselves and all other holders of Debentures of the Town of Walkerville and other Corporations

(Plaintiffs) *Appellants*

— AND —

GEORGE BENNETT, HARRY J. MERO, W. DONALD McGREGOR, RUSSELL A. FARROW, THE CORPORATION OF THE TOWN OF WALKERVILLE and other Corporations, THE CORPORATION OF THE CITY OF WINDSOR, THE WINDSOR UTILITIES COMMISSION and THE ATTORNEY GENERAL OF THE PROVINCE OF ONTARIO

(Defendants) *Respondents.*

CASE FOR THE APPELLANTS.

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