See 1968 V.R. 605
Refd to at p 92. 1968 85 A.L.R. 548



[HIGH COURT OF AUSTRALIA.]

INSURANCE COMMISSIONER . . . APPLICANT;

AND

ASSOCIATED DOMINIONS ASSURANCE SOCIETY PROPRIETARY LIMITED } RESPONDENT.

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ASSOCIATED DOMINIONS ASSURANCE SOCIETY PROPRIETARY LIMITED } APPLICANT;

AND

INSURANCE COMMISSIONER . . . RESPONDENT.

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SYDNEY, *Sept.* 7-11, 14, 16; MELBOURNE, *Oct.* 14; SYDNEY, *Dec.* 10, 16.

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*Constitutional Law (Cth.)—Life assurance—Company—Winding-up—Judicial management—Order—"Just and equitable"—Statute—Validity—Conditions—Power to make—Restrictions—Prohibition—Policy-holders—Representation—The Constitution* (63 & 64 *Vict. c.* 12), *s.* 51 (*xiv.*), (*xxxix.*)—*Life Insurance Act* 1945-1950 (*No.* 28 *of* 1945—*No.* 80 *of* 1950), *Pt. III., Div.* 8, *ss.* 40 (3), 49, 55, 59—*Acts Interpretation Act* 1901-1950, (*No.* 2 *of* 1901—*No.* 80 *of* 1950), *s.* 15A.

Although in certain particular respects the *Life Insurance Act* 1945-1950 may be invalid it is, regarded as a whole, a law with respect to "insurance", which is authorized by s. 51 (xiv.) of the Constitution.

The power to make laws with respect to insurance, together with the incidental power in s. 51 (xxxix.), includes power to prescribe conditions upon which any person, natural or artificial, may carry on an insurance business of any kind, and to provide for the winding up of a corporation carrying on any such business.

If a Commonwealth law is in truth a law with respect to any of the matters enumerated in s. 51 of the Constitution it cannot be any objection to it that it restricts, or even prohibits, the exercise of powers which belong to a corporation by virtue of its constitution under the law of a State.

The six specific grounds stated in s. 55 of the *Life Insurance Act* 1945-1950 indicate grounds which may justify the Court in making under s. 59 either a winding-up order or an order for judicial management. The making of either of those orders is a matter of discretion. In the exercise of that discretion the Court should make one or other if, but not unless, it is satisfied that to do so is "just and equitable", that is, if to do so appears likely to be in the best interests of all concerned having regard not only to the present liabilities of the company but also to its future and contingent liabilities.

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MOTIONS.

On 5th February 1953, a notice of motion by the Insurance Commissioner was filed in the High Court asking for an order that Associated Dominions Assurance Society Pty. Ltd. be wound up under Div. 8 of Pt. III. of the *Life Insurance Act* 1945-1950.

By motion, notice of which was filed on 27th May 1953, the company asked for an order that it be placed under judicial management under Div. 8 of Pt. III. of the Act.

The motions were heard together before *Fullagar* J. in whose judgment hereunder the facts and relevant statutory provisions sufficiently appear.

*B. P. Macfarlan* Q.C., *J. K. Manning* Q.C. and *E. J. Hooke*, for the commissioner.

*J. D. Holmes* Q.C., *R. Else-Mitchell* and *D. A. Staff*, for the company.

*Cur. adv. vult.*

Dec. 10.

The following written judgment was delivered :—

FULLAGAR J. I have before me two motions which I ordered to be heard together. The first is a motion by the Insurance Commissioner, notice of which was filed on 5th February 1953, asking that the Associated Dominions Assurance Society Pty. Ltd. (which I will call the company) be wound up under Div. 8 of Pt. III. of the *Life Insurance Act* 1945-1950 (Cth.). The second is a motion by the company, notice of which was filed on 27th May 1953, asking that the company be placed under judicial management under the same Division of the same Part of the Act. The Insurance Commissioner, who is named as a respondent to the second motion, is the commissioner appointed under s. 9 of the Act. This is only the second occasion on which the jurisdiction given by the Act to this Court to order the winding up of a life insurance company has been invoked. The first was a case of a company in a very small way of business, the application was not opposed, and a winding-up

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order was made by *Williams* J. on 20th February 1947. This is the first occasion on which an application has been made under the Act for an order for judicial management. The whole position created by the Act being thus practically unexplored, I think that I ought to state fairly fully my reasons for the decision which I have reached. I may say that I considered at an early stage whether I ought not to take steps to have policy holders of the company separately represented before me, but I decided against any such course, thinking that the interests involved were sufficiently represented by counsel for the commissioner and counsel for the company and that it was not desirable to add to the expense of already costly proceedings.

I propose (1) to set out the substance of the material provisions of the Commonwealth Act; (2) to consider two general questions of law which were raised thereon; (3) to state shortly the sequence of events leading up to the present applications; (4) to examine the financial position and prospects of the company; and (5) to explain, as well as I can, the conclusion which I have reached.

(1) The *Life Insurance Act* 1945, was assented to on 16th August 1945, and by virtue of a proclamation under s. 2 came into force on 20th June 1946. Section 4 contains a number of definitions, only one or two of which need be noticed. There is a rather curious definition of "approved securities", but the sole or main importance of this appears to be in connection with the deposits which the Act requires a life insurance company to lodge with the Treasurer of the Commonwealth. "Industrial insurance business" is defined as meaning life insurance business consisting of the issuing of or the undertaking of liability under industrial policies, and "industrial policy" is defined as meaning a policy upon which the premiums are by the terms of the policy made payable at intervals of less than two months and are contracted to be received or are usually received by means of collectors. "Ordinary life insurance business" is defined as meaning life insurance business consisting of the issuing of or the undertaking of liability under ordinary policies, and "ordinary policy" is defined as meaning a policy other than an industrial policy. Section 8 provides, subject to a qualification which is not material for present purposes, that the provisions of the Act shall apply to the exclusion of the application of a number of specified State Acts, which may probably be assumed to include all State legislation on the subject of life insurance. Section 9 provides for the appointment of an Insurance Commissioner. Section 15 provides that a company carrying on life insurance business in Australia immediately prior to the commencement of

the Act shall not, after the expiration of six months from the commencement of the Act, carry on any class of life insurance business in Australia unless it has been registered by the commissioner. Provisions relating to registration follow. Section 19 of the Act of 1945 has been amended by s. 2 of the *Life Insurance Act* 1950. Section 26 requires a company carrying on life insurance business in Australia to deposit with the Treasurer money or approved securities or both to the value of £50,000. Section 29 provides that money so deposited is to be invested by the Treasurer in such approved securities as the company selects or, in default of selection, as the Treasurer determines. All deposits are to be deemed to form part of the assets of the company, and interest accruing thereon is to be paid to the company.

Section 37 provides that every company *shall* establish and maintain a " statutory fund " under an approved name in respect of the life insurance business carried on by it, and that it *may* establish and maintain a separate statutory fund under an appropriate name in respect of any class or classes of life insurance business. Section 38 provides that all amounts received by a company in respect of any class of life insurance business shall be carried to and become assets of its statutory fund. It also provides that, subject to s. 50, the assets of a statutory fund shall not, so long as the company carries on the class or classes of life insurance business in respect of which the fund was established, be available to meet any liabilities or expenses of the company other than liabilities or expenses referable to that class or those classes of life insurance business and liabilities charged on those assets immediately prior to the commencement of the Act, and shall not otherwise be directly or indirectly applied for any purpose other than the purposes of that class or those classes of life insurance business. Section 39 provides that, subject to the Act, the assets of every statutory fund maintained by a company may be invested in such manner as the company thinks fit, but are not to be invested in any other life insurance undertaking. Sections 41 to 47 prescribe certain accounts and returns which are to be made by the company, which include revenue accounts in prescribed forms and a balance sheet in a prescribed form.

Section 48 provides that every company shall, as at the date of the expiration of the financial year expiring next after the commencement of the Act and thereafter at intervals of five years, cause an actuary to make an investigation into its financial condition, including a valuation of its liabilities in respect of its life insurance business, and to furnish it with a report of the results of

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the investigation. Section 49 provides for the basis of valuation which is to be adopted in the preparation of the valuation balance sheet. It is to be such as to place a proper value upon the liabilities, regard being had to mortality experience, to the average rate of interest from investments and to the expenses of management. The value placed on the aggregate liabilities of any statutory fund is not to be less than it would have been if it had been calculated on a basis set forth in the Fourth Schedule to the Act, which is referred to as the "Minimum Basis". Section 50 prescribes conditions on which a company may pay or apply any part of its statutory fund as dividends or otherwise as profits to shareholders or as bonuses to policy holders. Section 52 requires accounts, balance sheets, &c., prepared in pursuance of the requirements of the Act to be lodged with the commissioner.

Section 55 provides that if it appears to the commissioner that "(*a*) a company is, or is likely to become, unable to meet its obligations; (*b*) a valuation made in pursuance of Division 5 of this Part discloses that the amount of a statutory fund of a company is less than the amount of the liabilities of the company in respect of that statutory fund; (*c*) a company has failed to comply with any provisions of this Act; (*d*) a company has not, within a period of one month as from a date upon which the Commissioner demanded from it in writing any information which the Commissioner was entitled under this Act to demand from it, furnished that information fully and satisfactorily; (*e*) the rate of expense of procuring, maintaining and administering any life insurance business of a company in relation to the income derived from premiums is unduly high; (*f*) the method of apportionment of income or expenditure of a company among any classes of life insurance business or between life insurance business and any other business is inequitable; or (*g*) any information in the possession of the Commissioner calls for an investigation into the whole or any part of the life insurance business of the company", the commissioner may serve on the company a notice in writing requiring it to show cause within a specified period why he should not investigate the whole or any part of the business of the company. If the company fails within the period specified to show cause to the satisfaction of the commissioner, the commissioner may make the investigation. Section 56 provides that in making an investigation the commissioner may require the company to produce any securities, books, documents, &c., and allow him to make extracts from them and may examine on oath or affirmation any director or officer of the company.

Section 59 provides that if the commissioner, by reason of the conclusions arrived at by him as a result of an investigation so made, is of opinion that it is necessary or proper so to do, he may apply to the Court for (*a*) an order that the company or any part of the business of the company be placed under judicial management; or (*b*) an order that the company be wound up. The expression "the Court" is defined by s. 4 as meaning the High Court of Australia. Section 59 also provides that a company may, in respect of itself, after giving the commissioner one month's notice in writing, apply to the Court either for a winding-up order or for an order for judicial management. Both the company and the commissioner are entitled to be heard on any application made to the Court under this section. Section 59 also provides that a company or any part of the business of the company shall not be judicially managed or wound up except under the provisions of the Act. The word "company" is defined by s. 4 as meaning a body corporate which carries on life insurance business in Australia. Sections 60 to 66 inclusive are concerned with the conduct of the "judicial management" of a company in pursuance of an order made under s. 59 (1) (*a*). All that need be noted at this stage is that s. 62 requires the person appointed by the order as judicial manager to conduct the management with the greatest economy compatible with efficiency, and as soon as possible to file with the Court a report stating what course he thinks most advantageous to the general interests of policy holders. Under this section the judicial manager may recommend *inter alia* either that the company be permitted to carry on its business as before, or that the company be wound up. Sections 67 to 72 deal with the consequences of a winding-up order. All that need be noted at this stage is that the Court is to appoint a liquidator and to give him such directions as appear to be necessary. The liquidator is to be under the control of the Court and may apply to the Court from time to time for directions. Notice of any such application is to be given to the commissioner. Section 67 (7) provides that "Subject to this Act, and to any direction of the Court, the winding-up of a company incorporated within Australia shall be carried out in accordance with the law in force in the State or Territory in which the head office of the company is situated with respect to the winding-up of a company by a court and that law shall apply accordingly, with such modification and adaptations as are necessary".

The remaining provisions of the Act have no direct relevance to either of the present applications, but ss. 96 and 97 should, I think, be noted. Section 96 provides that a policy holder who

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desires to discontinue payment of premiums on a policy on which not less than three years' premiums have been paid shall on application be entitled to receive a paid-up policy for an amount not less than that determined in accordance with the provisions of Pt. I. of the Sixth Schedule. Section 97 provides that the owner of a policy which has been in force for at least six years shall on application be entitled to surrender the policy and to receive not less than its surrender value less the amount of any debt owing to the company. For the purposes of s. 97 the surrender value of a policy is to be the amount calculated in accordance with Pt. II. of the Sixth Schedule. It will be seen that these provisions, in cases to which they apply, give definite rights to a policy holder as against a company. Apart from such provisions, the position would depend entirely on the contract between the policy holder and the company, and, in the absence of any express provision on the subject, the policy holder would have no right at any time either to receive a paid-up policy or to surrender his policy and receive any sum by way of surrender value.

(2) Two general questions of law were argued before me, and these I must now consider.

In the first place Mr. *Holmes* challenged the validity of s. 59 of the Act, so far at least as it purported to authorize the making of a winding-up order. No general attack was made on the validity of the Act, regard being had doubtless to the recent decisions of this Court in *Associated Dominions Assurance Society Pty. Ltd.* v. *Balmford* (1), and *Hospital Provident Fund Ltd.* v. *State of Victoria* (2). It was said, however, that sub-s. (4) of s. 59 was invalid and inseverable from the rest of the section, so that the whole section fell to the ground. It was also said that the Commonwealth Parliament had no power under the Constitution to create or destroy legal personality, or to make laws affecting the status or capacity of corporations which owed their existence to, and derived their status and capacity from, State laws. The minor premise of the argument was not, I think, expressly stated, but it is presumably to be found in the proposition that a law providing for the winding up of companies incorporated under State laws is a law which directly affects the status and capacity, and ultimately the legal existence, of such companies. The very words "winding up" denote, it might be said, a process in the course of which the affairs of such a corporation are taken out of its hands and its property and rights disposed of, and at the end of which the corporation itself is annihilated. Mr. *Holmes* referred to *Huddart, Parker & Co. Pty.*

(1) (1951) 84 C.L.R. 249.

(2) (1953) 87 C.L.R. 1.

*Ltd.* v. *Moorehead* (1), and to a line of Canadian cases in the Privy Council of which *John Deere Plow Co. Ltd.* v. *Wharton* (2) is an important example. He referred also to *Re Alberta Debt Adjustment Act* (3). The latter case went on appeal to the Privy Council, and is reported *sub nom. Attorney-General for Alberta* v. *Attorney-General for Canada* (4), but their Lordships held the Alberta statute in question invalid on a broad ground which did not require them to consider that part of the majority judgment in the Supreme Court of Canada on which Mr. *Holmes* relied.

There are provisions in the *Life Insurance Act* 1945, which may be found difficult to sustain under the Constitution at all, and others which it may be found difficult to sustain without an application of s. 15A of the *Acts Interpretation Act* 1901-1950. In the first place, take sub-ss. (4) and (5) of s. 40, sub-ss. (4) and (5) of s. 47, sub-ss. (4) and (5) of s. 52, and sub-ss. (3) and (4) of s. 58. In each of these cases the Act purports to confer on this Court a "jurisdiction" to entertain an "appeal" from an administrative decision of the commissioner. In the last of the four cases it purports to confer a similar "jurisdiction" on the Supreme Court of a State. I should have thought it difficult to say that the power so conferred is judicial power, and equally difficult to say that powers other than judicial powers, and powers strictly incidental thereto, could lawfully be conferred under Chapter III of the Constitution on this Court or on any Federal court or on any State court as a court to exercise Federal jurisdiction: cf. *Queen Victoria Memorial Hospital* v. *Thornton* (5). Again, s. 8 of the Act, which purports to deprive a large number of State Acts of all effect, could conceivably be open to a challenge which would raise the whole question of what *Evatt* J. has called "manufactured inconsistency": see *West* v. *Commissioner of Taxation* (*N.S.W.*) (6). There are other provisions too which may be thought dubious. For example, though I express no opinion on the matter, I can readily imagine its being argued that the character of a "law with respect to insurance" does not attach to the provisions of ss. 92, 93 and 94 of the Act, which are concerned with the protection of the rights of insured persons under life policies against creditors and with the creation of beneficial interests in life policies. And, to come nearer home, the argument presented in this case that sub-s. (4) of s. 59 is invalid is, to say the least, an argument which may some day demand serious consideration, for its effect would

(1) (1909) 8 C.L.R. 330.
(2) (1915) A.C. 330.
(3) (1942) S.C.R. (Can.) 31, esp. at p. 42.
(4) (1943) A.C. 356.
(5) (1953) 87 C.L.R. 144.
(6) (1937) 56 C.L.R. 657.

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appear at first sight to be that no creditor or shareholder can present a petition for the winding up of any company which carries on a life insurance business, even though that business may constitute only a very small part of that company's activities.

However, I do not find it necessary to decide whether sub-s. (4) of s. 59 is a valid provision, because that sub-section has no direct application to the present case, and because I consider that I should be bound to hold it, if it were invalid, severable from those parts of s. 59 which are directly relevant. The position might have been different in the absence of s. 15A of the *Acts Interpretation Act* 1901-1950. But this appears to me to be just the very kind of case in which that section is decisive. The same considerations appear to me to apply with regard to those other provisions of the Act the validity of which is impugned on one ground or another. Even if the attack on them is soundly based, they are severable from those provisions which are material for present purposes. Even if the sub-sections, to which I have referred, of ss. 40, 47, 52 and 58 were invalid and inseverable, so that their invalidity brought down the whole of those respective sections (which is quite a possible view), I should still think that those sections were severable from the rest of the Act.

Nor do I think that I can accept Mr. *Holmes's* more general constitutional argument. It is quite true that the Parliament of the Commonwealth has no general power to make laws with respect to the creation of corporations, or the powers and capacities of corporations, or the liquidation and dissolution of corporations. The power given by s. 51 (xx.) of the Constitution with respect to "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth", whatever may be its true scope, does not amount to any such general power (*Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (1)). In *Bank of New South Wales* v. *The Commonwealth* (2), *Latham* C.J. said of s. 51 (xx.) that "the one thing that is clear about it is that" [it] "assumes the existence of corporations either under foreign law or under some law which is in force in the Commonwealth. If the corporation is already formed it derives its existence and its capacity from the law which provided for its formation" (3). If there is no general power to provide for the creation of corporations, it may be taken that there is no general power to wind up or dissolve corporations. But I should think it quite clear that a law made by the Parliament with respect to any of the subjects mentioned in s. 51 may be made

(1) (1909) 8 C.L.R., at pp. 349, 353, 371, 394, 412.

(2) (1948) 76 C.L.R. 1.

(3) (1948) 76 C.L.R., at p. 202.

applicable to corporations and control their conduct within the field of the power, and I am disposed to think further that such a law may, if the special character of corporations requires special provision in order to make the law effectively applicable to corporations, make any such special provision. Although there are matters of detail (such as those I have mentioned) in which its provisions may be open to constitutional attack, I can feel no doubt that the *Life Insurance Act* of the Commonwealth is, regarded as a whole, a law with respect to "insurance", which is authorized by s. 51 (xiv.) of the Constitution. Life insurance is, and was in 1900, a well recognized kind or class of "insurance". It may be that the power includes a power to make special provision for the constitution or incorporation of bodies to carry on insurance businesses of various kinds (cf. *M'Culloch* v. *Maryland* (1); *Jumbunna Coal Mine N.L.* v. *Victorian Coal Miners' Association* (2)), though it may be noted that s. 51 (xiii.), which confers legislative power with respect to banking, expressly refers to the incorporation of banks, and there is no corresponding reference in s. 51 (xiv.). But it is not necessary to consider this question, because the Act (apart from Pt. VI., with which I am not concerned) makes no attempt to do any such thing. It seems to me that the power to make laws with respect to insurance must include power to prescribe conditions upon which any person, natural or artificial, may carry on an insurance business of any kind. It must include power to require such persons to be registered and to provide security for the due performance of their obligations to insured persons, to maintain funds to answer those obligations, to keep appropriate accounts, to submit those accounts to a designated authority, to make and return to a designated authority periodical actuarial investigations disclosing their true financial condition, and so on. It must include power also to make such provisions practically effective, and s. 51 (xxxix.) is there to be called in aid, if need be. Further, the whole relation of insurer and insured is within the scope of the power, and the power must extend to providing for the enforcement of contractual obligations and for the creation and enforcement of further obligations. It must extend also, in my opinion, to dealing with a situation in which the interests of a body of insured persons are involved by reason of an actual or probable default on the part of their insurer. In such a situation it extends, in my opinion, to providing for the taking of such steps as may be thought necessary or desirable for the protection of such persons as a body and the

(1) (1819) 4 Wheat. 316 [4 Law. Ed. 579].

(2) (1908) 6 C.L.R. 309.

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equitable adjustment of their interests *inter se*. It cannot, as I think, be held to stop short of authorizing the taking of such steps as are authorized by s. 59. It seems to me that such provisions possess on their face the character of laws with respect to life insurance. It may be that the power does stop short of authorizing a direct provision for the actual dissolution of a corporation. But I regard this as a point of small importance in this case. Neither an order for judicial management nor an order for winding up affects the existence of a corporation.

I do not think that the position, as I have stated it, is affected by the Canadian authorities on which Mr. *Holmes* relied. The argument sought, of course, to apply *e converso* the case of *John Deere Plow Co. Ltd.* v. *Wharton* (1), in which it was held that Provincial legislation restricting the operations of a company incorporated under a statute of the Dominion was unconstitutional. The decision in that case has been explained and applied notably in *Great West Saddlery Co.* v. *The King* (2), and *Attorney-General for Manitoba* v. *Attorney-General for Canada* (3). If those decisions could be so applied here, it might well lead to the conclusion that the whole of Div. 8 of Pt. III. of the *Life Insurance Act* of the Commonwealth was invalid, so that I should have to dismiss both the motion for winding up and the motion for judicial management. (The dismissal of its own motion, if the commissioner's motion were also dismissed, would probably cause no great sorrow to the company.) But the decisions in the Canadian cases cannot, in my opinion, be so applied. It appears to me that the position under our own Constitution is radically different in material respects.

As is well known, ss. 91 and 92 of the *British North America Act* 1867 (Imp.) (30 & 31 Vict., c. 3) confer exclusive legislative powers over specified subjects upon the legislatures of the Dominion and of the Provinces respectively, and there is a provision at the end of s. 91 which may be stated sufficiently for present purposes by saying that (as it has been interpreted) a matter which falls within s. 91 is not to be deemed to be a matter falling within s. 92. Among the matters assigned to the Dominion by s. 91 is "(2) The Regulation of Trade and Commerce", and among the matters assigned to the Provinces by s. 92 is "(11) The Incorporation of Companies with Provincial Objects". In order to preclude what was regarded as a potential "hiatus" with respect to the incorporation of companies, it was held by the Privy Council at an early stage that the power to regulate trade and commerce included a

(1) (1915) A.C. 330.
(2) (1921) 2 A.C. 91.
(3) (1929) A.C. 260.

power in the Dominion Parliament to provide for the constitution and incorporation of companies having "Dominion objects", i.e., objects not confined to the boundaries of any particular Province: *Colonial Building & Investment Association* v. *Attorney-General for Quebec* (1). So to hold was, of course, equivalent to holding that an express and exclusive power with respect to the constitution and incorporation of companies with "Dominion objects", as distinct from companies with "Provincial objects", resided in the Dominion legislature. Nor could it be easy to confine such a power within narrow limits, although the doctrine actually developed has been criticized: see, e.g., the observation of *Meredith* C.J. quoted in *Great West Saddlery Co.* v. *The King* (2). For a power to create, although exclusive, might be thought to be empty and nugatory unless it comprised a power to endow the thing created with powers and capacities to govern within a wide field its potentially Dominion-wide corporate activities, and to provide ultimately for its liquidation and dissolution. The result has been the rule exemplified in *John Deere Plow Co. Ltd.* v. *Wharton* (3). It does not mean that Dominion companies are immune from Provincial legislation of a general character, but it does appear to mean that neither the existence of such a company nor the pursuit of its corporate objects can be controlled or affected by any law enacted in a Province.

The position in Canada has no direct analogy under the Constitution of the Commonwealth. On the one hand, the enumerated powers of the Commonwealth Parliament do not include any general power to provide for the creation or destruction of corporate personality. On the other hand, corporations created under State laws enjoy no immunity from Commonwealth laws enacted under any of the powers given by the Constitution. If a Commonwealth law is in truth a law with respect to any of the matters enumerated in s. 51, it can—at any rate, since the *Engineer's Case* (4)—be no objection to it that it restricts, or even prohibits, the exercise of powers which belong to a corporation by virtue of its constitution under the law of a State. It may well be that a Canadian Province could not make applicable to a Dominion-created corporation such provisions as those of s. 15 (2) and s. 59 (1) of the *Life Insurance Act* of the Commonwealth. But there is no reason why in Australia the Commonwealth should not make such provisions applicable to a State-created corporation. I have already explained that, in

(1) (1883) 9 App. Cas. 157.
(2) (1921) 2 A.C., at p. 115.
(3) (1915) A.C. 330.
(4) (1920) 28 C.L.R. 129.

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my opinion, those provisions possess the character of laws with respect to insurance.

The other question of law which was debated before me relates to the grounds on which this Court may or should exercise the power to make a winding-up order under s. 59. That section confers the power as a discretionary power, which is not controlled by any express condition, although the Court could not, of course, entertain an application by the commissioner unless it were satisfied that he had made an investigation under s. 55 and was genuinely of opinion, as a result thereof, that it was necessary or proper to make the application. Of those matters I am entirely satisfied. For the rest, s. 59, so far as its express terms go, leaves the discretion of the Court entirely at large. In this respect it presents a contrast to such familiar provisions as those of s. 208 of the *Companies Act* 1936-1940 (N.S.W.) and s. 166 of the *Companies Act* 1938 (Vict.), both of which are in the same terms as s. 168 of the *Companies Act* 1929 (Imp.) (19 & 20 Geo. 5 c. 23). It may be noted that s. 547 of the Victorian Act (which is now deprived of operation according to the tenor of s. 8 and s. 59 (4) of the Commonwealth Act) provides that the Court may order the winding up of a life assurance company on the petition of five or more policy holders or shareholders upon its being proved that the company is insolvent. This provision is taken from s. 21 of *The Life Assurance Companies Acts* 1870-1872 (Imp.) (33 & 34 Vict. c. 61—35 & 36 Vict. c. 41). So far as the general provisions of the Companies Acts are concerned, the most important grounds on which the Court is authorized to make a winding-up order are (*e*) that the company is unable to pay its debts and (*f*) that the Court is of opinion that it is just and equitable that the company should be wound up. With regard to the latter ground, the reports contain many and various examples of facts and circumstances which have been regarded as making it "just and equitable" that a company should be wound up.

I cannot say that I have felt any serious difficulty as to the general principles which should guide the Court in exercising its discretion under s. 59. With regard to the ultimate discretion, I think the general conception to be applied is that which is inherent in the words "just and equitable" in the Companies Acts. Those words are wide and vague, but they have become very familiar, and they have been judicially considered on many occasions. The Act, however, contemplates that certain matters are to be established before a question of discretion arises. When the application under s. 59 is made by the commissioner, it can only be after he

has made an investigation under s. 55, and if he is of opinion that the results of the investigation warrant the making of the application. The grounds which justify the making of an investigation are stated in s. 55, and I have set them out above. They are seven in number. Six of them are specific, and the seventh is of a general nature. What might be included within the seventh need not now be considered. The six which are specific indicate, in my opinion, grounds which may justify the Court in making either a winding-up order or an order for judicial management. It does not follow from the establishment of any one or more of the grounds mentioned that either order should be made. The Court has still to exercise a discretion, and it should, in my opinion, make one or other order if, but not unless, it is satisfied that to do so is "just and equitable". It will be just and equitable if to do so appears likely to be in the best interests of all concerned. In saying this, I have it in mind that the prime intention of the Act is to protect policy holders —they, as Mr. *Macfarlan* said, borrowing from legislation on another subject, should be the "first and paramount consideration"— but I do not regard this as meaning that the interests of shareholders or others are always to be ignored. The grounds which may, under s. 55, support an investigation by the commissioner and an application under s. 59 are intrinsically of varying degrees of seriousness, and the facts of any particular case which falls within any one of them may be of varying degrees of seriousness. If any one of those grounds is established, the making of either of the orders authorized by s. 59 is still a matter of discretion. No rule should, or can, be laid down. The case must depend on all the circumstances. But, so far as grounds (*a*) and (*b*) in s. 55 are concerned—and these are the most important for the purposes of the present case—it may be said that, generally speaking, if there appears to be no reasonable prospect of the position being remedied and the company's business being placed in the near future on a sound basis, a winding-up order should be made If it appears likely to be a case of mere temporary embarrassment, no order should be made. If the position is in doubt, and the Court thinks that, although a serious position is disclosed, further investigation and experiment would be desirable—perhaps that the company ought to be given a chance to see what it can do—then an order for judicial management of the company may well be thought appropriate.

I will only add at this stage that it seems clear to me, and I did not understand it to be disputed, that, for the purposes of s. 55 and s. 59 alike, it is necessary to have regard not only to present

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liabilities of a company but to future and contingent liabilities. Even in 1875 and under 33 & 34 Vict. c. 61, s. 21, I should have thought that the position was correctly stated by Mr. *Kay* Q.C. (as he then was) in argument in *In re London & Manchester Industrial Association* (1), and that the observations of *Bacon* V.C. in that case (2) were quite mistaken. A different view was, I think, taken by *James* V.C. in *Re European Life Assurance Society* (3). Sir *William James* in that case said:—"In my view of the law, it would be just and equitable to wind up a company like this assurance company if it were made out to my satisfaction that it is, not in any technical sense but plainly and commercially, insolvent—that is to say, that its assets are such, and its existing liabilities are such, as to make it reasonably certain—as to make the Court feel satisfied—that the existing and probable assets would be insufficient to meet the existing liabilities" (4). His Lordship speaks of "*existing* liabilities". But he was dealing with a case in which the liabilities side of the company's balance sheet showed an item of some £300,000 as "Liabilities under assurances or balance of value of sums assured over present value of annual premiums", and the judgment shows very clearly that his Lordship regarded this actuarially calculated future liability as an "existing liability". When this is borne in mind, I think that the passage which I have quoted is not without value as a guide in the present case.

(3) I turn now to the facts leading up to the present applications. The company has been in existence for some twenty-five years, having been incorporated in New South Wales on 27th March 1928 as a company limited by shares. On 14th April 1937 it became a proprietary company under its present name. Its nominal capital is £250,000 divided into 250,000 ordinary shares of £1, of which 46,687 have been issued. Of these shares 20,007 were issued to one W. T. Page, now deceased, who was for many years managing director of the company. These were issued for a consideration other than cash. There was no evidence as to the nature of the consideration. The remaining 26,680 shares were issued for a cash consideration, and these are paid up to 3s. per share. The company thus has some £23,000 of uncalled capital. It was stated at the Bar that it was unlikely that a call would produce any substantial sum, but there is no evidence as to this. I regard the fact that there is uncalled capital as relevant, but, having regard to the figures to which I shall refer, as of small importance.

(1) (1875) 1 Ch. D. 466, at p. 470.
(2) (1875) 1 Ch. D., at p. 472.
(3) (1869) L.R. 9 Eq. 122.
(4) (1869) L.R. 9 Eq., at p. 128.

I have no evidence as to the activities of the company before the commencement of the *Life Insurance Act* 1945. The business carried on has comprised ordinary life insurance, industrial insurance and accident insurance. Shortly after the Act was proclaimed, the company applied for registration, and it was registered by the commissioner under s. 19 on 9th September 1946. The material, however, which, in pursuance of s. 17, accompanied the application for registration, disclosed certain features which the commissioner not unnaturally considered unsatisfactory. This material included a valuation report, with a valuation balance sheet, as at 30th June 1941, the latest date as at which the company had caused an actuarial investigation to be made. The valuation balance sheet showed "net liability under assurance and annuity transactions" at a figure of £331,564, and "assurance funds as per balance sheet" at a figure of £179,915. A deficiency of £151,649 was thus disclosed. The material also included accounts of the company as at 30th June 1945. The balance sheet as at that date showed, on the liabilities side, an item "Assurance Account—£307,262". It also showed other liabilities (apart from shareholders' capital and a reserve) amounting to some £12,000. The assets side showed "tangible" assets amounting to about £240,779 and "Establishment and Purchase Account—Cost of establishment of business and purchase price of other business acquired—£111,429". The company's next actuarial investigation was made as at 30th June 1946, and the documents in connection therewith, including a valuation balance sheet, were received by the commissioner in Canberra on 7th July 1947. It is necessary at this stage to say only that this valuation balance sheet showed net liabilities under policies at a figure of £549,783, and the life assurance statutory fund at £332,239. The deficiency thus disclosed was £217,544. It should be mentioned here also that the ordinary balance sheet as at 30th June 1946 showed, on the assets side, an increase in the figure for "Establishment Account" of some £8,000, that figure now standing at £119,911. Accounts for succeeding years, up to and including the year ended 30th June 1952 were transmitted by the company to the commissioner. Under s. 48 of the Act the company's next actuarial investigation should have been made as at 30th June 1951, the last having been made as at 30th June 1946. On 1st April 1952 the commissioner received a letter from the company, saying that a valuation as at 30th June 1950 had been made by Mr. A. T. Traversi, a Fellow of the Institute of Actuaries, and suggesting that, in order to save expense to the policy holders, this should be accepted in lieu of the valuation which was due as at

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30th June 1951. Mr. Traversi's valuation balance sheet showed net liabilities under policies at a sum of £660,325, and the life insurance statutory fund at a sum of £475,173. The deficiency thus disclosed was £185,152. The commissioner raised various objections to accepting the material thus put before him, pointing out, among other things, that, if the material was intended to comply with the Act, it ought, in accordance with s. 52, to have been lodged with him twelve months earlier. In the meantime, however, several things had been happening.

The commissioner appears from the outset to have taken a serious view of the company's position. He began by requiring the company, under s. 40 (3) to rectify its accounts in various respects, which included a writing down of the value of certain shares held by the company in other companies. These requirements appear to have been carried out. However, after receiving the valuation balance sheet as at 30th June 1946, and the company's ordinary accounts for the year ended 30th June 1947, and after some correspondence with the company and an interview with its auditor, he wrote to the company on 2nd April 1948, informing it that he had instructed Mr. S. W. Caffin of his office to conduct an investigation into the affairs of the company. The company protested, and on 28th April 1948 issued a writ in an action in this Court claiming, *inter alia*, an injunction to restrain the commissioner from investigating its affairs. No further step was ever taken in this action. It was obvious that the commissioner had not complied with s. 55 of the Act, and (having doubtless been so advised) he issued on 30th April 1948 a formal notice to the company requiring it to show cause why its affairs should not be investigated. The company's immediate response was to commence another action, the writ in which was issued on 12th May 1948. For some reason more than two years elapsed before this action was practically determined in favour of the company when the Full Court, on 9th August 1950, on appeal from *McTiernan* J., held that the notice of 30th April 1948 did not comply with the requirements as to time of s. 55, and granted an injunction restraining the commissioner from acting on the notice: see *Associated Dominions Assurance Society Pty. Ltd.* v. *Balmford* (1). On 8th February 1951 the commissioner issued a fresh notice to show cause under s. 55, but, because the company claimed that it had not a fair opportunity of showing cause, he decided not to proceed further under that notice, and on 28th March 1951 he issued a third notice.

(1) (1950) 81 C.L.R. 161.

On 13th April 1951 the company delivered to the commissioner at Canberra a document in which it purported to show cause why an investigation under s. 55 should not be made. I will not attempt to summarize this document, which is Exhibit W.C.B. 21 to Mr. Balmford's main affidavit. Suffice it to say that, while it contained certain arguments which were put before me and which I shall have carefully to consider, a substantial part of it was taken up with complaints of unfair treatment by the commissioner in several respects including a failure to state any " particulars " of his reasons (if any) for thinking that the company was likely to become unable to meet its obligations. This professed desire for " particulars " bears all the *indicia* of insincerity. The company also objected strongly to the proposed appointment of Mr. Caffin as investigator, referring to an action for malicious conspiracy to injure it, which it had commenced on 14th December 1949 in the Supreme Court of New South Wales against the commissioner himself (Mr. Balmford), Mr. Caffin and others. It suggested that the nature of some of the acts of which the company complained would be found referred to in *Associated Dominions Assurance Society* v. *Andrew* (1). In the proceedings there reported, which were against employees of the company, the company had failed, and special leave to appeal to this Court was refused : see (2) .

Five days later—on 18th April 1951—the company commenced yet another action in this Court, action No. 8 of 1951. In this action it claimed, *inter alia*, a declaration that the *Life Insurance Act*, and in particular Div. 7 of Pt. III., was invalid, and an injunction to restrain the commissioner from acting on his notice. The statement of claim made allegations of malice and want of good faith against the commissioner. On 27th April 1951 the commissioner informed the company by letter that he had determined that it had not shown cause to his satisfaction, and that he had appointed Mr. Caffin to make an investigation of its affairs. On 26th April 1951 *McTiernan* J. refused an application by the company in action No. 8 of 1951 for an interlocutory injunction, and an appeal against this decision to the Full Court was dismissed on 1st June 1951 : see *Associated Dominions Assurance Society Pty. Ltd.* v. *Balmford* (3). On 4th October 1951, *McTiernan* J. made an order striking out the statement of claim in the action, and on 14th December 1951 an appeal against this decision to the Full Court was dismissed, leave being reserved to deliver an amended statement of claim.

(1) (1949) 49 S.R. (N.S.W.) 351 ; 66 W.N. 176.

(2) (1949) 79 C.L.R., at p. 651.

(3) (1951) 84 C.L.R. 249.

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In the meantime Mr. Caffin had proceeded to enter upon the investigation entrusted to him by the commissioner. For the purposes of the task in hand he required the production of the securities of the company and certain books of account and desired to interview some of the senior officers of the company. The securities and books which he required were not produced to him, and he was able to interview none of the officers of the company. It was open to the commissioner to act under s. 56 of the Act, but —quite possibly because he did not regard that section as providing anything in the nature of a satisfactory sanction—he did not do so. Instead Mr. Caffin informed the company that he would conduct his investigations without the documents and information which he had required. Again the company commenced legal proceedings, but a motion for an injunction to restrain Mr. Caffin from adopting this course was dismissed by *Roper* C.J. in Eq., on 26th July 1951. Mr. Caffin then commenced and completed a detailed examination and analysis of the material contained in the documents, accounts and returns, furnished from time to time to the commissioner in pursuance of the Act. He presented his report to the commissioner on 10th September 1951, and on 6th February 1952 the commissioner notified to the company "a summary of the conclusions arrived at" by him as a result of Mr. Caffin's report. His notice of motion for a winding-up order was, as I have said, filed on 5th February 1953, and the company's notice of motion for an order for judicial management about four months later. The motions were heard by me on 7th September 1953 and succeeding days.

I have thought it desirable to set out the events which led up to the making of these applications to the Court. It is not that I think that anything that emerges from them should carry decisive weight with me in determining what course I should adopt. But they present some remarkable features, which ought not to be overlooked. Statements made in one of the letters from the company to the commissioner suggest that at one stage the company's managing director was willing to interview the commissioner and make certain books and records available. But it remains true to say that for a period of five years the company did everything in its power to delay the taking of decisive action by the commissioner, to prevent an examination of its books and records, and to withhold all information other than the returns which the Act required it to make. It did not even comply fully with the Act, for it did not make the actuarial investigation required as at 30th June 1951. Ultimately, indeed, it succeeded in its endeavours

in all the directions mentioned. In the course of its endeavours it made most serious allegations against the commissioner and Mr. Caffin, which were—very properly, no doubt—not raised before me, but which have never been withdrawn. I think I ought to say that, so far as any material before me goes, these allegations are without any foundation. Then, when the commissioner finally moves for a winding-up order, the company, having done all the things which I have mentioned, agrees in effect that the intervention of the Court is necessary, but asks the Court to make an order which, while taking its affairs out of its own control, will not actually put it into liquidation. It may be that the death of Mr. W. T. Page in 1952 was a material event in the story, but the acts of the company are the acts of the company whoever is responsible for its management. Mr. *Macfarlan*, for the commissioner, did not strongly press these matters upon me, and the company's actual financial position and prospects must clearly be regarded as the main factors in the case. I think, however, that such matters as I have mentioned might legitimately be weighed in the balance in a doubtful case. And, in so far as there are any gaps in the relevant material, it is to be borne in mind that these exist because the company has not chosen to disclose books and records to the commissioner.

(4) I approach now an examination of the financial position and prospects of the company. Such a task is more difficult than in the case of an ordinary commercial concern, because of the peculiar features of a life insurance business. The general position, as I see it, may be set out substantially in Mr. Balmford's words with some modifications. There are passages in his second affidavit which appear to me to have the effect of qualifying (though they do not expressly do so) the exposition in his first affidavit. What follows, of course, does not pretend to be more than a summary of bare essentials.

An ordinary commercial institution measures its financial solvency by means of a balance sheet setting forth the actual liabilities and assets in hand. Regard may, of course, also be had to contingent assets or liabilities, if any. In the case of a life insurance company which has been doing a substantial business, while the immediate liabilities may be quite small, those which are payable in the future upon death, or in the case of endowment assurances upon survival, are likely to be very substantial. The consideration to the company for the undertaking of these future liabilities is the payment of premiums, and future premiums payable must be taken into account in order to arrive at an estimation of the company's true future

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liabilities. To arrive at the true position of a company's life insurance business, it is, therefore, necessary to begin by estimating the cost of future claims and future receipts from premiums. This involves, in the first place, an estimate of the number of present policy holders of each age—(a) who will die or attain the maturity age of their policies in each future year, from which numbers can be obtained the cost of the claims arising in each future year; and (b) who will not have died or will not have attained the maturity age of their policies in each future year, from which numbers can be obtained the premiums to be received in each future year. Having obtained an estimate of the claims and premium receipts in each future year the actuary has then to discount these amounts at an appropriate rate of interest in order to obtain their value at the present time. The difference between these two discounted values represents the "net liabilities under policies", which are referred to in Form J in the Second Schedule to the Act. A major consideration in the valuation is the determination of the rate of interest to be used in discounting future claims and premium receipts. The valuation rate of interest should be related to the rate of interest which it is anticipated that the company will earn on its investments, though it is to be noted that maximum rates of interest to be used in the calculation of future liabilities are now fixed by the Fourth Schedule to the Commonwealth Act. The effect of assuming in the valuation a higher rate of interest than that which can be actually earned is to under-estimate, or at least to run a grave risk of under-estimating, the value of the company's liabilities. The higher the rate of interest adopted, the lower will be the apparent net liability. The accepted method of arriving at the financial position of a life office is by comparing the net liabilities, actuarially calculated in the manner described above, with the assets available to meet those liabilities.

I have already mentioned that s. 49 of the *Life Insurance Act* 1945-1950 and the Fourth Schedule prescribe a "minimum basis" for the calculation of the liabilities of a life office. While the importance of this for present purposes must not be exaggerated, it does mean, I think, that the Court is not left entirely at large with regard to a standard of solvency. One of the matters which justify an investigation by the commissioner, and which may justify a winding-up order, is that a valuation discloses that the amount of the statutory fund is less than the liabilities in respect of that fund. The amount of the statutory fund is, to all intents and purposes, a matter of ascertainable fact, whereas the amount of the liabilities is a matter of actuarial estimation and probability, and the pro-

priety of a particular " valuation " might be matter of difference of opinion. When, however, we find the Act itself prescribing a " minimum basis " of valuation, the possible field of controversy while not, of course, eliminated, is at least reduced. No basis of calculation more favourable to the company than that prescribed by the Fourth Schedule is permitted for the purposes of the Act. All this, of course, in no way affects the significance to be attached to a deficiency in a particular case. Still less does it compel the exercise of discretion in any particular way.

It will clear the ground somewhat if I put one matter aside at the outset. There were several references during the hearing to the " expense rate " of the company. What is called the " expense rate " or " expense ratio " of a life office is the ratio of the expenses of conducting the life business to the premium income thereof. What can be regarded as a reasonable expense rate depends on a variety of circumstances. The commissioner, I think, regards the expense rate of the company in the present as having been, in all the circumstances, unduly high. This may or may not be so, but the figures are not startling, and I have attached no importance to the expense rate as such in this case.

The matters on which the commissioner mainly relied are matters of much greater moment. They were analyzed and discussed before me with care and in detail, but I think it will suffice if I set out the substance of what I regard as important.

(a) We have, to begin with, from the company itself actuarial statements of the company's position as at three dates—30th June 1941, 1946 and 1950. The last, it will be remembered, was made by Mr. Traversi: the quinquennial investigation which the Act required to be made as at 30th June 1951, appears not to have been made. It does not seem to me to be important at this stage to distinguish between the ordinary branch and the industrial branch of the company's business. The relevant figures disclosed as at the three respective dates are as follows :—

| | 1941 | 1946 | 1950 |
|---|---|---|---|
| Net value of liabilities .. | £331,564 | £549,783 | £660,325 |
| Statutory or Insurance Fund | 179,915 | 332,239 | 475,173 |
| Deficiency .. .. .. | £151,649 | £217,544 | £185,152 |

The amount of the deficiency disclosed by these figures in each year is very substantial. If we regard them comparatively, they show an increase in the amount of the deficiency as between 1941 and 1946 of some £66,000, and a decrease in the amount of the

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deficiency as between 1946 and 1950 of some £32,000. It would appear, however, that, for purposes of comparison, the figures for 1941 and 1950 require adjustment. In the first place it seems that the valuation of 1946, being made after the Act of 1945 came into force, was on a "more stringent" basis than that of 1941. This means, as I understand it, that, if the same basis were taken for 1941 as for 1946, the *amount* of the 1941 deficiency would be greater than the above figure, with the result that the *difference* between the figures for the two years would be reduced. Mr. Traversi says, and Mr. Balmford accepts this position, that an adjustment for this change in the valuation basis would reduce the apparent increase in amount of deficiency between these two years to approximately £30,000. In the second place, in the year ended 30th June 1950 the company sold a property which it had acquired and thereby realized a capital profit of some £37,000. Since this is a non-recurring profit, it would seem right to exclude it in comparing the positions as at 30th June 1946 and as at 30th June 1950, though it could not, of course, be excluded in considering the company's actual position as at 30th June 1950. If this be excluded, the company's deficiency increased between 1946 and 1950 to the extent of some £5,000. So far as amount of deficiency is concerned, it may perhaps be said that no very startling change took place over the nine years. On the other hand, if the above figures are taken at their face value, it may be said that there has been a substantial improvement in the company's position, since they would appear to indicate that the percentage of statutory fund to net liabilities increased between 1946 and 1950 from about sixty per cent to about seventy-two per cent, about half of this increase being accounted for by the non-recurring profit on the sale of the land. If the 1941 liabilities are calculated on the 1946 basis, a somewhat similar percentage improvement is indicated as between 1946 and 1941.

(b) In spite of the apparently improving ratio, the above figures show a serious deficiency existing as at 30th June 1950. But the above figures are far from disclosing the full seriousness of the position. The figure taken above as representing the statutory fund at each date is taken from the company's ordinary balance sheets, in which it appears, of course, on the liabilities side. We have not a copy of the balance sheet as at 30th June 1941, though the relevant figures can be obtained from material before the Court. It will suffice to look at the balance sheets for the years ended 30th June 1946 and 1950. In 1946 the item "Statutory Fund—£332,239" appears on the liabilities side. There are also certain current

liabilities, though these are, comparatively speaking, not of large amount. They do, of course, affect the actual position, but for present purposes I am prepared to ignore them. When we turn to the assets side of the balance sheet, in order to ascertain what there is to answer the " statutory fund ", we find the total assets of the company stated at a figure of £371,737, of which, however, no less a sum than £119,911 is the value attributed to an " intangible " asset described as " establishment account ". Of this sum of £119,911 (which, by the way, has increased by about £8,500 since 1941) a sum of £95,902 is attributed to the life insurance business, the balance of £24,009 (which is the amount of shareholders' paid-up capital) being attributed to " Other classes of business ". The position disclosed by the ordinary balance sheet as at 30th June 1950 is substantially the same in the respect under consideration. The statutory fund is shown on the liabilities side at the figure of £475,173. Total assets of the life insurance business are shown at a figure of £480,005, but the " establishment account " still stands at £119,911, though the amount of this which is attributed to life insurance business is reduced to £91,111. There is an additional item on the assets side—" Sundry Debtors (Including Insurance Act Suspense Account)—£10,284 ". I am not clear as to what this item is supposed to represent, but I did not understand it to be suggested that it should be regarded otherwise than as an " intangible ". We thus get a total figure for intangibles of £101,395. In the absence of any evidence as to these intangibles, or as to the existence of anything in the nature of a " hidden reserve ", I would be disposed to express the result of this examination of the balance sheets at 30th June 1946 and 1950 by saying that, at least to the extent of the intangibles, the statutory fund mentioned in those balance sheets was not represented by assets. It is, I think, only saying the same thing in another way if we say, as the commissioner says, that we should add to the amount of the deficiency shown in the table at the beginning of par. (a) above the amount of the value attributable to intangibles. If we do that, we get the following result :—

| | 1946 | 1950 |
|---|---|---|
| Deficiency shown above .. .. | £217,544 | £185,152 |
| Intangibles .. .. .. .. | 95,902 | 101,395 |
| Real deficiency .. .. .. | £313,446 | £286,547 |

My figures for 1946 differ slightly from those of the commissioner, and it may well be that the commissioner is more likely than I to

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be right, but in any case I would, having regard to the figures involved, regard the difference between us as negligible. The figures given immediately above do still show some improvement in the company's position as between 1946 and 1950. They show a decrease in the amount of the deficiency. They also show for 1946 what I would regard as the true statutory fund as amounting to about forty-three per cent of the actuarial liability, and for 1950 as amounting to about fifty-seven per cent of the actuarial liability. Those figures give to the company, so to speak, the benefit of the casual profit on the sale of land. If that profit were excluded, the amount of the deficiency would show a slight increase, and the difference in percentages would work out, I think, as an increase from about forty-three per cent to about fifty-one per cent. This accords substantially with Exhibit R2, which was prepared by Mr. Traversi, and which shows the ratio as being 5s. 10d. in the £ in 1941, 8s. 11d. in the £ in 1946, and 11s. 5d. in the £ in 1950.

The salient fact which seems to me to emerge from all this is that at 30th June 1950, the latest date as at which we have what I would regard as reliable information as to the company's actuarially calculated liability on its policies, the statutory fund amounted, on the most favourable view possible to the company, to only about fifty-seven per cent of the amount of those liabilities, the actual amount of the deficiency being in the vicinity of £300,000. This salient fact, viewed in the light of the company's history over the preceding nine years, appears to me to provide the crux of the commissioner's case. There are, however, certain other matters to be mentioned, which have a bearing on the position and prospects of the company. Having regard to the apparent improvement in 1950, it becomes important, I think, to attempt to assess its prospects.

(c) Although certain figures for 1950-1951 suggest considerable activity on the part of the company, I can find nothing in the evidence to establish that any material improvement in its position took place between 30th June 1950 and 30th June 1952, which is the latest date as at which we have any figures. Indeed, I think the contrary is suggested. The balance sheet at the latter date shows an increase in the statutory fund to £511,588. It also shows an increase in the figures for the main tangible assets, loans on mortgages and on policies, and government securities, to £420,644, but the establishment account stands at the same figure as in 1950, the proportion attributed to the life insurance business being £91,111, and there is a further "intangible" asset—"Litigation Suspense Account—£22,256", while on the liabilities side there

is a substantial bank overdraft (secured) of £25,817. One other feature should be mentioned. The proportion of loans on mortgage to government securities has very greatly increased, the former now standing at £236,935, and the latter at £157,600. This suggests a change in investment policy, made perhaps with the object of obtaining a slightly higher rate of interest. It would appear from the evidence that a realization of all these assets would be likely to involve a loss. The commissioner has expressed the opinion that the point as at which the apparent ratio of real assets to net liabilities was about 11s. 5d. in the £ has represented the peak of the company's fortunes, and I am disposed to agree with him.

(d) Rates of interest are a matter to which the commissioner has attached some importance. Theoretically the rate of interest used in the actuarial calculation of net liabilities should be the rate which is being earned or may be expected to be earned on the company's funds. In the present case the figures given above for the company's net liabilities have been calculated by taking an interest rate of four per cent, whereas the actual rate earned, calculated over the whole of the assets, including intangibles, has in only three years since 1937 exceeded three per cent, and in many years has been considerably under three per cent. The adoption of a lower rate of interest than four per cent would, of course, have disclosed an apparent deficiency greater than that shown above. The rates earned in 1950-1951 and 1951-1952 respectively were £3 11s. 2d. per cent and £3 8s. 10d. per cent. One might guess that the increase in these last two years was due to the increase in the ratio of mortgages to government securities held. The importance of the interest figures I take to be mainly as showing that net liabilities in 1946 and 1950 were calculated on a basis favourable to the company.

(e) The position disclosed by the revenue accounts of the company is, I think, of considerable importance. The commissioner has extracted from these accounts the figures showing the excess of gross income over outgoings, i.e., over expenses of all kinds and surrender, death and maturity claims. The excess for the six years ended 30th June 1947 to 30th June 1952 inclusive is disclosed as being respectively £37,289, £35,047, £19,191, £15,605, £25,927 and £10,488. The substantial rise in 1950-1951 is attributed by the commissioner (and I did not understand his view to be challenged) to (i) a considerable increase in the amount of new business written in the ordinary branch (a large proportion of which was written off as " forfeitures " in the following year), and (ii) an abnormally low figure for claims in the industrial branch. Apart from 1951 the figures show a very marked decline. The decline is in fact

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very much more marked in the industrial branch than in the ordinary branch, and actually the figure for 1952 is arrived at by subtracting a deficiency of £3,333 in the industrial branch from a credit balance of £13,821 in the ordinary branch.

(f) It seems to me to be an extremely important fact that the company is now entering on a period in which heavy increases in maturity claims can be anticipated. The commissioner has examined the maturity dates of a large number of endowment assurance policies in force in the ordinary branch and in the industrial branch respectively as at 30th June 1946 and 30th June 1950. I will refer only to policies in force at the later date. The total sums insured in the ordinary branch at that date amounted to £885,556. The commissioner excluded from his calculations whole life policies for a total amount of £267,172, and he had to exclude from his calculations endowment assurances for a total amount of £311,925, the years of maturity of which were not disclosed by the company's returns. Taking the four quinquennial periods, 1951-1955, 1956-1960, 1961-1965, and 1966-1970, they show maturities under the policies taken into account at the respective figures of £19,077, £33,829, £53,688 and £109,067. The corresponding figures for the industrial branch are much more striking. The total sums insured in this branch at 30th June 1950 amounted to £942,014. Here again a large number of policies were excluded from the commissioner's calculations. The whole life policies in this branch were, as one would expect, for the comparatively small total amount of £21,404. The endowment assurances, the maturity dates of which were not disclosed by the returns, amounted to £307,808. Taking the endowment assurances of which he knew the maturity year and taking the five quinquennial periods, 1946-1950, 1951-1955, 1956-1960, 1961-1965, and 1965-1970, the commissioner found the maturities respectively as amounting to £8,409, £151,154, £240,638, £137,327, and £15,395. These figures for the industrial branch have to be viewed alongside Exhibit R4, which purports to take the whole of the endowment assurances in this branch, and which suggests that (through surrenders and lapses and perhaps other causes) the actual figures for the maturities are likely to be considerably lower than the commissioner anticipates. I am not able, however, to regard Exhibit R4 as substantially qualifying the general picture which the commissioner's calculations present.

(g) I think that, in order to complete the picture, the figures for new sums insured, and for annual premiums on new sums insured, should be referred to. It will suffice to state these for three years. In respect of the ordinary branch they are as follows :—

| Year | New Sums Insured | Annual Premiums on New Sums Insured |
|---|---|---|
| 1946-1947 .. | £205,126 | £9,920 |
| 1950-1951 .. | £265,762 | £7,100 |
| 1951-1952 .. | £70,414 | £2,572 |

Between 1946-1947 and 1950-1951, the amount of new sums insured fluctuated, but there was a very marked drop in the amount of annual premiums on new sums insured. The rise in 1950-1951 has already been referred to. In respect of the industrial branch the figures for the same years are as follows :—

| Year | New Sums Insured | Annual Premiums on New Sums Insured |
|---|---|---|
| 1946-1947 .. | £101,092 | £7,339 |
| 1950-1951 .. | £44,000 | £2,698 |
| 1951-1952 .. | £41,181 | £2,546 |

In the case of the industrial branch, the decline from year to year, both in new sums insured and in annual premiums on new sums insured, has been continuous. The company would appear to have endeavoured in very recent years to develop ordinary business in preference to the comparatively more expensive industrial business.

(h) Only one other substantive matter need, I think, be mentioned, and that is the " forfeiture rate " of the company. I am not sure that the term " forfeiture rate " is a technical term with a strictly defined meaning, but it seems clear enough that it has reference to the ratio of business lost through non-payment of premiums to business gained. It may be taken, I think, that the great bulk of forfeitures occur in the year in which the relevant policy is written or in the following year. From one point of view, a forfeiture, while it represents clear loss to the policy holder, who has simply paid something for nothing, may represent in a sense a gain to a profit-seeking company, because, although the amount received will have cost a good deal to obtain, all future liability of the company is cancelled. But, in the long run and from any ultimate point of view, it would seem clear enough that a high forfeiture rate is an unhealthy sign. I am not prepared to disagree with the commissioner, when he says that a satisfactory method of calculating a forfeiture rate is to express the sums insured which are forfeited in a year as a proportion of the average of the new sums insured for that year and the preceding year. The

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forfeiture rates of the company, calculated on this basis have been as follows :—

| *Year* | *Ordinary Branch* | *Industrial Branch* |
|---|---|---|
| 1946-1947 .. .. | 23.4 per cent | 71.3 per cent |
| 1947-1948 .. .. | 47.7 per cent | 67.9 per cent |
| 1948-1949 .. .. | 80.4 per cent | 75.3 per cent |
| 1949-1950 .. .. | 55.1 per cent | 126.2 per cent |
| 1950-1951 .. .. | 27.5 per cent | 66.3 per cent |
| 1951-1952 .. .. | 44.2 per cent | 121.5 per cent |

These figures are curious in some respects. For example, while it is, of course, to be expected that the forfeiture rate in the industrial branch will be higher than in the ordinary branch, we find one year in which it is lower. Again we find a very definite improvement in 1950-1951. But the overall picture seems clearly to reveal a forfeiture rate which is abnormally high. This by itself would, of course, be of little importance on a motion to wind up, and I mention it only as one other factor in the general situation.

I do not think it necessary to refer to the figures of the accident insurance business of the company. That business is a comparatively small business, and it seems sufficient to say that any profits and assets attributable to it cannot be used to alter materially the general picture presented by the company's life business. No attempt to do this was made on behalf of the company.

It could hardly, I think, be denied that the material summarized above makes a prima-facie case for an order for a winding up under the Act. The commissioner's evidence is open, I think, to the comment (which was made) that he has set out to make the best case he could for a winding up, and there may be instances in which he has been tempted to exaggerate the position. In this particular case, however, I do not think that anything can be made of any such general comments. Even if we should discount it or qualify it here and there for this or that reason, I can feel no doubt that the position is reliably disclosed by the commissioner's evidence and is a very serious position indeed. I take this indeed to be more or less conceded by the company, which seeks judicial management as an alternative which it says is preferable to a winding up. The company's case rested fundamentally on the evidence and opinions of Mr. A. T. Traversi, an actuary of wide experience, to which I have given careful attention. In the following paragraphs I refer to the main points which I understand to be made.

(a) Mr. Traversi began by saying that, in considering the solvency of a company which it was proposed should be wound up, it was

altogether wrong to apply the stringent "minimum basis" prescribed by the Fourth Schedule for the valuation of liabilities. He said that the Fourth Schedule was concerned only with the distribution of bonuses and dividends. So far as this view depends on the construction of the Act, I do not agree with it. I do not think that the Fourth Schedule is concerned only with the distribution of bonuses and dividends. Such a view appears to me to be decisively negatived by s. 55 (1) (*b*), which states one of the grounds justifying an "investigation" by the commissioner, and which expressly refers to a valuation which has to be made subject to s. 49 and the Fourth Schedule. I do, however, agree—at any rate, up to a point—with what I understand to be the broad general contention underlying what Mr. Traversi said. While I think that the Act has prescribed its own standard of solvency, I do not think for a moment that a company ought to be wound up merely because a Fourth Schedule valuation discloses that net liabilities exceed the statutory fund even to a considerable degree. I agree that it is a very serious matter indeed to order a life insurance company to be wound up. All sorts of circumstances may have to be taken into consideration. The most obvious is the degree of the deficiency revealed. Not less obvious are the period during which the deficiency has existed and the prospect for the future. Another—perhaps less obvious—is the age of the company. I would fully accept the statement in the Report of the Hood Commission, which was cited to me, that "the business of life insurance at the present day is so complex and the changes taking place during its development are so considerable that the application of a 'hard and fast' standard of solvency to all companies irrespective of their age or the nature of their business would undoubtedly result in serious injury to the company and through it to its policy-holders". I see no reason to suppose that this is less true in 1953 than it was in 1910.

(b) Of the two main points—or what I regard as the two main points—made by Mr. Traversi, the first is a development of his view that a "net premium or modified net premium valuation", such as is prescribed by the Fourth Schedule, "is not a proper measure of solvency". He says:—"The proper measure of solvency is a gross premium valuation, that is, a valuation which, instead of taking credit for the value of the 'net' or 'modified net' premiums, takes credit for the value of the actual (or gross) premiums payable in future under the policy contracts, throwing off a reasonable proportion of the premium for renewal expenses and eliminating negative values". Mr. Traversi has not, I think, attempted to

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translate this view into figures, but in Exhibit C1 the commissioner has worked out the position on a four per cent basis assuming an expense rate of ten per cent in the ordinary branch and twenty-six per cent in the industrial branch. This shows smaller, but still very substantial, deficiencies in 1946 and 1950. In par. 10 of his affidavit Mr. Traversi takes what are substantially the same figures as those which are taken by the commissioner in his original calculations —these figures are taken from the returns in Form I in the Second Schedule and from the ordinary balance sheets—and works out the deficiency as at 30th June 1941, 1946 and 1950, so as to show a different result. I will only set out, by way of example, his figures for 1946. They are as follows :—

| | | | |
|---|---|---|---|
| Present value of sums assured .. | £1,200,995 | Tangible assets .. | £251,827 |
| Other liabilities .. | 15,489 | Present value of future premiums .. | 651,212 |
| | | Deficiency .. .. | 313,445 |
| | £1,216,484 | | £1,216,484 |

This calculation gives very nearly the same figure for the *amount* of the deficiency as the commissioner's calculations for the same year. The same is true of Mr. Traversi's calculations for the years ending 30th June 1941 and 30th June 1950. But, because Mr. Traversi treats the value of future premiums as an asset instead of a factor in the calculation of future policy liabilities, a ratio of assets to liabilities is shown which is very different, and which has the appearance of being considerably more favourable to the company. Mr. Traversi's method shows this ratio for 1946 to be a little under seventy-five per cent and for 1950 to be a little over seventy-five per cent, whereas the commissioner's method, as I have said, shows the ratio for 1946 to be about forty-three per cent and for 1950 to be about fifty-seven per cent. In a subject matter of such complexity I hesitate to express an opinion on a point on which two well qualified experts differ, but I feel bound to say that I am disposed to think that the commissioner is really right. I have difficulty in thinking that it is right, for present purposes, to regard as an actual asset sums which nobody is under any obligation to pay. Moreover, I have a strong impression that the commissioner's view is more in accord with sound theory as to the relation between a life policy and its premiums. I have felt that Mr. Traversi is really inviting me to ignore s. 49 and the Fourth Schedule, and I have

felt also that the commissioner's calculations really represent the realities of the situation.

(c) It is quite clear that Mr. Traversi does not regard the position of the company as satisfactory, whatever may be the proper method of analysing its financial position, but he says that in February 1953 he " advised the company that a rough approximate valuation at six per cent with a reduction of expenses to twenty per cent of the premium income encouraged the idea that a valuation at eight per cent might suffice to put the company on a satisfactory basis ". He also advised the company " that there was a lucrative field of investment in instalment and hire purchase finance ". His statement as to the existence of this " lucrative field " is supported by certain other affidavits, to which I do not think it necessary to refer specifically. Then, from statistical data supplied by the company and exhibited to his affidavit, Mr. Traversi has prepared, and sets out in par. 28 of his affidavit, an approximate valuation balance sheet as at 30th June 1952 on an eight per cent basis. This valuation balance sheet is as follows :—

| | | | |
|---|---|---|---|
| Value of liabilities (sums assured and bonuses) | £825,753 | Value future premiums .. .. | £403,114 |
| Other liabilities .. | 53,654 | Tangible assets .. | 447,084 |
| Loss on sale of bonds | 15,000 | Deficiency .. .. | 44,209 |
| | £894,407 | | £894,407 |

Is it to be noted that the method followed is the same as that followed in par. 10 of Mr. Traversi's affidavit, as to which I need not repeat what I have said. The sum of £15,000 represents the probable difference between sale price and balance sheet value of government securities held. The mortgage securities, which in 1952 largely exceeded government securities in amount, are apparently treated as of full face value, although, as Mr. Balmford pointed out, it would be quite impossible to convert them immediately into eight per cent securities of anything like the same value. Three comments which (apart from the general method adopted) seem to me to be justly made on par. 28 of Mr. Traversi's affidavit are these. It is open to very serious question whether " instalment and hire purchase finance " is a satisfactory investment for a very precariously situated life insurance company. Both Mr. Balmford and Mr. Innes (a former actuary of the Australian Mutual Provident Society) were strongly of opinion that it was not. (The case of a strong company with large reserves is, of course, quite different.)

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In any case there is not the slightest hope of obtaining eight per cent in the immediate future on the present face value of the company's tangible assets. And finally even the extremely optimistic valuation balance sheet put forward still shows a deficiency.

(d) There is one other matter to be mentioned. During the pendency of this matter two letters were written to the commissioner by the managing director of another company carrying on a business of life insurance in New South Wales, suggesting the outlines of two alternative schemes by which that company would "take over the control" of the Associated Dominions company. The commissioner declined to discuss either proposition: it is far from clear to me that he had any power to take any action in the matter. At a much later stage—after I had concluded the hearing of the motions and reserved judgment—Mr. *Holmes* sought to put before me an agreement (expressed to be subject to the approval of this Court) between the same life insurance company, the Associated Dominions company, and another company carrying on a business of financing hire-purchase agreements. It seemed to me to be a somewhat remarkable document. I understood it to be put that such an agreement could be carried into effect in the course of judicial management, and that the possibility of some such agreement being carried into effect afforded an argument in favour of ordering judicial management in preference to a winding up. I expressed the opinion, which I still hold, that such proposals as those of this other life insurance company ought not to carry any weight with me in deciding whether there ought or ought not to be a winding-up order in this case. I will refer briefly further to these proposals a little later.

(5) I have now, I think, summarized all the factual considerations which can be regarded as having any importance in this case. The making of a decision is a matter which must inevitably be attended with some anxiety. The primary question of solvency is not such a clear-cut question as it normally is in the case of an ordinary commercial undertaking. The standard accepted by actuaries is in some degree artificial, and in some degree elastic. I cannot overlook the necessity for caution, which Mr. *Holmes* so strongly pressed upon me, and which was illustrated by the examples of one or two companies which have appeared to be in a more or less hopeless position, and which have made spectacular recoveries. But, looking at the facts and adjudging the probabilities as best I can, I am of opinion that this company ought to be wound up.

The central and outstanding fact in the whole case appears to me to be that the company is insolvent. I regard this as quite

clearly established. The company is insolvent not merely in a technical sense but in a practical and commercial sense, not merely in slight degree but in very serious and substantial degree. This does not mean that it is unable at the moment to pay its debts as they fall due. It could, so far as the evidence goes, discharge its current liabilities tomorrow, and it will for some time to come be able to pay its policy holders in full as and when their claims mature. But it is highly probable—practically certain, I think, as matters stand—that it will in the not very distant future be unable to discharge in full claims under maturing policies. When that event will occur cannot in the nature of things, be precisely stated. I did not understand it to be suggested that it was likely to occur before 1960.

That being the position of the company, there is, in my opinion, a high degree of probability that, if it is not placed in liquidation, policy holders whose claims mature in the near future will be paid in full at the expense of those whose claims mature in the more distant future. Many, of course, will already have been paid in full, and nothing can be done about that. But such a state of affairs ought not, in my opinion, to be allowed to continue. In a winding up all policy holders will stand on an equal footing, whether their claims are due to mature soon or late. It seems to me to be prima facie just and equitable—just and equitable from the point of view of the policy holders generally—that a company which finds itself in the position of this company should be wound up.

I would, of course, agree that an assessment of future prospects is a vital element in the case which the commissioner makes. To a motion based merely on present insolvency—even a substantial degree of insolvency—it might be possible for a company to make a number of answers. For example, it might be said that it was a young company which had not had time to recover from heavy initial expenditure and which, though at the moment insolvent, was rapidly building up reserves. No such answer, however, could be made in this case, because this company has been carrying on business for twenty-five years. Again, some satisfactory explanation of a company's present insolvency might be forthcoming: it might be shown to be due to misfortunes which were not likely to recur, or to errors in management or policy which had been remedied. Again, however, no such answer is really put forward in this case. There is a vague suggestion that the blame should be laid at the door of Mr. Page, and Mr. Page is dead. But such vague suggestions carry us nowhere. It is suggested too that the company has suffered from "adverse publicity", and I would think that

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there is some foundation for this suggestion. But such publicity was very largely the inevitable result of the company's own actions, and such effect as it has had on the company's fortunes is probably irremediable.

The essence of any such answer that might be made to a motion for winding up on the ground of insolvency is, of course, that it establishes some prospect of recovery. On the evidence in this case I am unable to see anything in the nature of a reasonable prospect of recovery. Theoretically it might be possible for the company to carry on business vigorously and, by writing a large amount of new business at a low expense rate, build up its funds. But, even if this were a practical possibility—and I do not think it is—to embark on such a course would be, in effect, to invite new policy holders to come to the rescue at considerable risk to themselves. A realization of the impracticability and undesirability of such an attempt in existing circumstances has probably provided one reason for the course which the company has taken in asking that, in lieu of a winding-up order, an order for judicial management should be made. I do not imagine that it is the only reason. It is not contemplated that the company shall, at any rate in the immediate future, seek or write new business under judicial management, nor could it, by reason of s. 60 (4) of the Act, do so except with the leave of the Court. It is contemplated that, for the present at any rate, a judicial manager shall administer a "closed fund".

I have already, in an earlier part of this judgment, expressed very generally my view as to considerations which may properly guide the Court when it is faced, as I am faced here, with the choice between winding up and judicial management. It all comes back again, in my opinion, to an assessment of future prospects. This is not a case in which the Court is left in any real doubt as to the true financial condition of the company. Nor is it, to my mind, in the least degree likely that further investigation of the company's affairs by a judicial manager would reveal that the prospects of the company are more favourable than on the material before me they appear to be. In such circumstances I do not think that judicial management should be preferred to an immediate liquidation unless there is seen to be some prospect of a real benefit to policy holders generally as a result of judicial management. I am not able to see any such prospect.

From one point of view it may perhaps be said that there is little practical difference in ultimate effect between the two orders which may be made. On the one hand, a judicial manager may

after a period, if he is satisfied that nothing is to be gained by a continuance of judicial management, recommend to the Court under s. 62 that the company be wound up. On the other hand, if a liquidator, appointed under a winding-up order, were to find the outlook materially brighter than had been thought, I have no doubt that the Court would have power to stay the winding up. From another point of view, it might even be said that something *may* be gained, and nothing *can* be lost, by a period of judicial management. But any such approach overlooks, in my opinion, the point of fundamental importance to which I have already referred. A period of judicial management preceding a liquidation will, apart from the additional expense involved, have had the inequitable effect of prolonging, probably for a substantial time, the period during which maturing claims are paid in full at the expense of claims maturing later. It is primarily for this reason that I am of opinion that, in such a case as the present, judicial management ought not to be preferred to immediate liquidation unless there is seen to be some definite prospect of recovery under judicial management. One hesitates to make general statements which experience may prove to be too wide, but I am disposed to think that cases are likely to be rare in which judicial management will be appropriate where a company which has been carrying on business for many years is clearly and seriously insolvent.

The only avenue by which I understood it to be suggested that the company might advance to a recovery was the conversion of all or most of its tangible assets and a transfer of the proceeds to the " lucrative field " of the financing of hire purchase and instalment payments. I have already indicated my view of this proposal. I do not wish to be thought to be saying that such a proposal is inherently of such a nature that it ought not to be taken seriously. It is a fact that certain trading companies are engaged in the " field " in question and are finding it " lucrative ", and Mr. Traversi cited the case of a life insurance company which had by resorting to it succeeded in redressing a dangerous position. To say that a policy of investment is " unorthodox " is not necessarily a final condemnation of it. But I regard the proposal as quite impracticable in the present case. I agree broadly with the comments made on it in Mr. Balmford's second affidavit. The loans on mortgage could not be immediately realized without loss. Loans on policies could not be called in. At least £50,000 must remain as a deposit with the Treasurer of the Commonwealth, who is very unlikely to approve the proposed new form of investment (see s. 29). And on 30th June

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1952 the company's bank had a charge over assets presumably sufficient to secure with an adequate margin an overdraft of some £26,000. But the whole idea seems to me to be open to the objection which I have noted above. It might very well be wrong to describe the suggested investment as speculative, but the whole plan would be in the nature of an experiment, and again I do not think that experiments should be undertaken which may very well benefit policies which will mature early at the expense of those which will mature later.

It remains only to say a word as to the latest proposal put forward by the other insurance company to which I have referred. I do not wish to say very much about it. I think that Mr. *Manning* was entirely right when he said that what was proposed was, to all intents and purposes, a liquidation with the other insurance company as liquidator. It involves handing over to that other company control of the business and funds of the Associated Dominions Co. Whether it was actually contemplated that that other company, or some person representing it, should be appointed judicial manager, I do not know. I am quite sure that I should not have made any such appointment. The fact that such an agreement might be put before a judicial manager affords, to my mind, no reason whatever for preferring judicial management to immediate liquidation. If any scheme which appears to him to be safe and practicable and likely to benefit the whole body of policy holders is put before the liquidator, whom I propose to appoint, whether by this other life insurance company or by any other person or corporation, I have no doubt that he will bring it before the Court on notice to the commissioner.

I will make a winding-up order. I will hear counsel as to its form and content.

*On commissioner's motion order that Associated Dominions Assurance Society Pty. Ltd. be wound up by this Court under the provisions of the Life Insurance Act* 1945-1950 *of the Commonwealth and of the Companies Act* 1936 *of the State of New South Wales and that Basil Oswald Smith of* 115 *Pitt Street, Sydney, and Charles Herbert Rutherford Jackson of* 115 *Pitt Street, Sydney, be appointed liquidators of the affairs of the said company. Order that company's motion be dismissed. Order that the costs of the commissioner and of the said company of both motions be taxed and paid out of the assets of the said company.*

FULLAGAR J. made the following further order :—

*Order that the powers and duties of the liquidators appointed by Order of 10th December* 1953 *include the following :—*

(*a*) *To take into their custody or under their control all the real and personal property and things in action to which the said company is or appears to be entitled ;*

(*b*) *To carry on the business of the said company so far as is necessary for the beneficial winding up thereof ;*

(*c*) *To bring in the name and on behalf of the said company actions to recover book debts of the said company ;*

(*d*) *Where the amount involved does not exceed one hundred pounds, without the sanction of this Court*

(*i*) *to make any compromise or arrangement with creditors or persons claiming to be creditors, or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the said company or whereby the said company may be rendered liable ; and*

(*ii*) *to compromise all calls and liabilities to calls debts and liabilities capable of resulting in debts, and all claims, present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the said company and a contributory or alleged contributory or other debtor or person apprehending liability to the said company, and all questions in any way relating to or affecting the assets or the winding up of the said company, on such terms as are agreed, and take any security for the discharge of any such call debt liability or claim and give a complete discharge in respect thereof ;*

(*e*) *To sell the real and personal property and things in action of the said company by public auction tender or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels ;*

(*f*) *To do all acts and to execute in the name and on behalf of the said company, all deeds receipts and other documents and for that purpose to use when necessary, the seal of the said company ;*

(*g*) *To prove, rank and claim in the bankruptcy of any contributory, for any balance against his estate, and to receive dividends in bankruptcy in respect of that balance*

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*as a separate debt due from the bankrupt and ratably with the other separate creditors;*

(*h*) *To draw accept make and indorse any bill of exchange or promissory note in the name and on behalf of the said company with the same effect with respect to the liability of the said company as if the bill or note had been drawn accepted made or indorsed by or on behalf of the said company in the course of its business;*

(*i*) *To take out letters of administration to any deceased contributory and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the said company and in all such cases the money due shall for the purpose of enabling the liquidator to take out the letters of administration or recover the money, be deemed to be due to the liquidator himself;*

(*j*) *To appoint agents to do any business which the liquidator is unable to do himself;*

(*k*) *To open an account or accounts in the name of the said company in any branch of the Commonwealth Bank of Australia for the purposes of the winding up and forthwith to pay all moneys received by him as such liquidator into such bank account or accounts;*

(*l*) *To appoint a solicitor to assist him in the performance of his duties; and*

(*m*) *To do all such other things as are necessary for winding up the affairs of the said company.*

*Order that the date of commencement of the winding-up for the purposes of the Companies Act* 1936 *of the State of New South Wales be 5th February* 1953.

*Order that the costs of the commissioner and of the company of the commissioner's motion and of the company's motion, including the costs of the proceedings of this day be taxed and paid out of the assets of the company.*

Solicitor for the Insurance Commissioner, *D. D. Bell*, Crown Solicitor for the Commonwealth.

Solicitors for the company, *Hickson, Lakeman & Holcombe.*

J. B.