1886
*Nov. 23.
1887
*March 14.

WILLIAM SHOOLBRED.....APPELLANT;

AND

THE UNION FIRE INSURANCE CO. *et al*.....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Company—Winding up order - Notice to creditors, &c.—45 *V. c.* 23 *s.* 24.

It is a substantial objection to a winding up order appointing a liquidator to the estate of an insolvent company under 45 Vic. ch. 23, that such order has been made without notice to the creditors, contributories, shareholders or members of the company as required by sec. 24 of said act (1), and an order so made was set aside, and the petition therefor referred back to the judge to be dealt with anew.

Per Gwynne J. dissenting, that such an objection is purely technical and unsubstantial, and should not be allowed to form the subject of an appeal to this court.

APPEAL from a decision of the Court of Appeal for Ontario (2) affirming the judgment of the Chancery Division (3), whereby the petition of William Shoolbred was dismissed.

In 1881 proceedings were instituted for the purpose of winding-up under the provisions of 45 Vic. ch. 23 as amended by 47 Vic., ch. 39 (the winding-up acts) the Union Fire Insurance Company which was already insolvent, and in the hands of a receiver under ch. 160 R. S. O., and in January, 1885, a winding-up order was granted by Mr. Justice Proudfoot which contained the following among other provisions:—

"1. This court doth declare that the said the Union

*PRESENT—Sir W. J. Ritchie C.J. and Strong, Fournier, Henry, Taschereau and Gwynne JJ.

(1) Sec. 24 is as follows: The court in making the winding-up order must appoint a liquidator * * * but no such liquidator shall be appointed unless previous notice be given to the creditors, contributories, shareholders and members in the manner and form prescribed by the Court.

(2) 13 Ont. App. R. 268.

(3) 10 O. R. 489.

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Fire Insurance Company is an insurance company within the meaning of the said act and is insolvent under the provisions thereof, and doth order and adjudge that the business of the said company shall be wound up by this court under the provisions of the said act and the amendments thereto.

"2. And this court further order and adjudge that William Badenach, of the City of Toronto, Esquire, accountant, the receiver heretofore appointed in the said case of *Clarke* v. *The Union Fire Insurance Company*, be and he is hereby appointed interim liquidator of the estate and effects of the said company.

"3. And this court doth further order that it be referred to the master in ordinary of the Supreme Court of Judicature to appoint a liquidator of the estate and effects of the said company, and to fix and allow the security to be given by the said liquidator and the remuneration payable to him and the said interim liquidator.

"4. And this court doth further order that it be referred to the said master to settle the list of contributories, take all necessary accounts and make all necessary enquiries and reports for the winding up of the affairs of the said company under the provisions of the said act and amending acts."

Shoolbred, a shareholder and creditor of the said company, filed a petition in the Chancery Division, praying to have the said winding up order set aside, principally on the grounds that the court must appoint the liquidator and cannot delegate the authority of appointment to the master, and that a notice of the petition for such order was not given to the creditors, contributories and shareholders of the company as required by 45 Vic. ch. 23, sec. 24.

The petition was heard before Mr. Justice Proudfoot who ordered it to be dismissed, and on appeal to the

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Court of Appeal the judgment of Proudfoot J. was affirmed, the court being equally divided. The petitioner then appealed to the Supreme Court of Canada, having applied to Mr. Justice Strong in chambers for leave to appeal, which was granted.

W. Cassels Q C. and *Walker* for the appellant, cited Thring on Joint Stock Companies (1); *In re Agriculturist Cattle Ins. Co.* (2).

Bain Q C. for the respondents referred to *In re General Financial Bank* (3); Buckley on Joint Stock Companies (4).

SIR W. J. RITCHIE C. J.—I cannot see my way clear to ignore what appears to me to be the plain meaning of section 24 of this statute which declares that:

The court in making the winding up order must appoint a liquidator, or more than one liquidator, of the estate and effects of the company, but no such liquidator shall be appointed unless previous notice be given to the creditors, contributories, shareholders and members in the manner and form prescribed by the court.

I agree with Mr. Justice Osler that we should attribute to these words their natural and ordinary meaning, and that which can be given to them without doing violence to any other section of the act.

In agreeing generally with what Mr. Justice Osler says on this point, I must except his observations as to the purely technical and unmeritorious character of the objection. It appears to me that the want of notice contemplated by sec. 24 is a very substantial matter.

I think the winding up order must be set aside and the petition referred back to the learned judge to be dealt with as he may think right.

STRONG J.—I agree with the judgments delivered by Burton and Osler JJ. in the Court of Appeal,

(1) 4 Ed. p. 227, sec. 92 and pp. 273, 384.
(2) 3 DeG. F. & J. 194.
(3) 20 Ch. D. 276.
(4) P. 520.

though I am unable to agree that the objection is of a mere technical character; on the contrary I think it a very substantial one.

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FOURNIER J.—I concur in the judgment of the learned Chief Justice.

HENRY J.—I have arrived at the same conclusion. I entirely agree with the learned Chief Justice and my brother Strong that the judgment of Burton and Osler JJ. ought to be the judgment of this court with the exception of that part which refers to the objection as being one of an unsubstantial and technical character. I consider that the statute has some meaning and was intended to have some effect and, without going into the reasons why the parties were to be benefitted by it, I think it is enough for us to find that the statute was to confer a benefit and, I think, we are bound to presume that it was so intended.

Under the circumstances I think the judgment of Mr. Justice Osler, with the exception I have mentioned, should be adopted by this court.

TASCHEREAU J.—I would allow this appeal. The objections assigned by the appellant against the order of the 27th of January, 1885, are far from being technical and unmeritorious. If the respondent's contentions were maintained proceedings of the most important nature might be taken without notice to the shareholders or creditors of a company, who would thus be deprived of the most important safeguards that the legislature has enacted for their protection.

The order complained of cannot be supported either under the act of 1882 or that of 1884. It could not be made without appointing a liquidator, and as no liquidator could be appointed without notice to the creditors, contributories, shareholders, and members of

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the company, the order itself could not be made without such notice.

I am of opinion that the prayer of the petition of Shoolbred should be granted and that the order in question should be vacated and discharged. The appeal should be allowed with costs in all the courts against the respondents, including those in the court of appeal.

GWYNNE J.—The main ground of appeal taken by the appellant is one relating to procedure only, and is so purely technical that I doubt the propriety of an appeal in respect of it being entertained at all. The point is one which raises merely the question—What is the proper time for serving notice upon the creditors, contributories and shareholders of an insolvent trading company of an application for the appointment of a liquidator of the company in liquidation under the Dom. Stat. 45 Vic. ch. 23, as amended by 47 Vic. ch. 39? And what is the proper manner of making the appointment? Must the notice for the appointment of a liquidator be given before the company is put into liquidation and must the appointment be made in the order for winding up the company? or may the notice be given upon the order which puts the company into liquidation being made, and may the liquidator be appointed by a separate order according to the ordinary procedure of the Chancery Division of the High Court of Justice in Ontario in a similar case as in the appointment of a receiver, &c.? The appeal if it should be allowed will decide nothing but a point of practice and the costs of the appeal, for immediately upon the appeal being allowed notice may be given and the appointment may be made in the manner this court should direct, and the same end will be attained as that which has already been attained, in

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the manner adopted by the Chancery Division of the High Court of Justice, in Ontario. The entertaining an appeal in a question of this nature seems to me to tend rather to the obstruction, than to the advancement, of justice; and there is, in my opinion, no foundation for the contention that the point appealed comes within the provisions of the 78th section of the act of 1882, which prescribes the only cases in which an appeal is by the statute allowed. However if the point were appealable and had to be entertained I concur in the construction put upon the 24th section of 45 Vic. ch. 23, as amended by 47 Vic. ch. 39, by Mr. Justice Proudfoot in the Divisional Court, and by Mr. Justice Patterson in the Court of Appeal. But apart wholly from that section the winding up order is, in my opinion, a perfectly good order within the 2nd and 3rd sections of 47 Vic. ch. 39, which sections and not the 13th, 14th and 24th sections of the act of 1882, as amended by the act of 1884 are the only sections applicable to the present case. The 13th, 14th and 24th sections apply to the case of an insolvent company about to be put into liquidation originally, under the act of 1882, while the 2nd and 3rd sections of the act of 1884 apply to the case of a company already in liquidation or in process of being wound up at the time of the passing of the act of 1882, which the company here was, being brought within and under the provisions of that act.

Now upon this point the act of 1884 enacts that when, at the date of the passing of the said act of 1882, a company was in liquidation or in process of being wound up any shareholder, creditor, assignee, receiver or liquidator of such company might apply by petition to the court, asking that the company be brought within and under the provisions of the said act, and the court may make such order, and that in making

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such order the court may direct that the assignee, receiver or liquidator of such company, if one has been appointed, shall become the liquidator of the company under the said act, or may appoint some other person to be liquidator of the company. This was the proceeding taken in the present case. Two creditors of the company presented a petition to the court, setting forth an action brought, and pending in the Chancery Division of the High Court of Justice at the suit of one Clarke a creditor on behalf of himself and all other creditors of the Union Fire Insurance Company plaintiffs, against the Union Fire Insurance Company defendants, and that a judgment was rendered in the said suit on the 7th January, 1882, ordering the winding up of the affairs of the said company, and that one William Badenach had been appointed receiver of the estate and affairs of the said company under the said judgment. Upon that petition the order now under consideration was made whereby among other things the court did:—

Order and adjudge that William Badenach of the city of Toronto, Esquire, accountant, the receiver heretofore appointed in the said case of *Clarke* v. *The Union Fire Insurance Company* be and he is hereby appointed interim liquidator of the estate and effects of the said company.

And the court did further:

Order that it be referred to the Master in Ordinary of the Supreme Court of Judicature to appoint a liquidator of the estate and effects of the said company, and to fix and allow the security to be given by the said liquidator and the remuneration payable to him and to the said interim liquidator.

And the court did further:

Order that the accounts and enquiries heretofore made under the judgments and references to the said Master in the said suit of *Clarke* v. *The Union Fire Insurance Company* including the proceedings to ascertain who are the shareholders in the said company, and the evidence taken in connection with the said proceedings do stand and be incorporated with and used in the said winding up proceedings under this order in so far as the same can properly be made appliable by the said Master in the proceedings before him in the mat-

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ters of the winding up of the affairs of said company, and that the parties who have contested their liability to be settled on the list of stockholders by the said Master shall be at liberty to apply to the court after the settlement of the list of contributories in this matter for payment of such costs in the said suit of *Clarke* v. *Union Fire Insurance Company* as they may deem themselves entitled to.

Now this order not having been made under the 13th and 14th sections of the act of 1882 but under the 2nd and 3rd sections of the act of 1884 all question, in so far as the order is concerned, as to the proper time for giving the notice referred to in the 24th section of the act of 1882, as amended by the act of 1884, is removed from the case and the objection to the order assumes a new shape. It is admitted that the order as made would be good under the 2nd and 3rd sections of the act of 1884 if the word "interim" had not been inserted in it, and it is contended that the insertion of this word in the order avoids it, that is to say, that if the order had made Badenach "liquidator" instead of "interim liquidator" it would have been free from objection. This objection appears to me to be even more purely technical than the other, and to be utterly insufficient to warrant us to pronounce the order void. An interim liquidator is a liquidator and he must continue as such until removed or another should be appointed in his place in due course of law. The clause of the order, therefore, which appoints the person already filling the office of receiver in *Clarke* v. *Union Fire Insurance Company* to be "interim" liquidator under the order is equivalent to making him liquidator until he should be removed or until another should be appointed in his place in due course of law.

The appellant's contention, moreover, is that the reference to the master to appoint a liquidator is a proceeding not authorized by the statute and is therefore void; well if it be, nothing effectual can be done under it and therefore Badenach cannot be removed

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from his office as liquidator by anything to be done under it, and if the reference to the master to appoint a liquidator be authorized by the statute, Badenach may be the person so appointed, or if not the person so appointed will still be legally appointed, so that in the interim Badenach is to all intents liquidator, clothed with all the powers attached to such office until he shall be removed in due course of law; and as he can be removed only by a proceeding taken in due course of law there is no one who can have cause of complaint and his appointment as made in the order is warranted by the statute. Anything more technical and more devoid of merit than this objection to the order is, it would, in my opinion, be difficult to conceive. The appeal should, in my opinion, be dismissed with costs.

Appeal allowed with costs.

Solicitors for appellant: *Walker & McLean.*

Solicitors for respondents Scott & Walmsley: *Bain, Laidlaw & Co.*

Solicitors for respondents the creditors: *Foster, Clarke & Bowes.*

Solicitor for company: *G. F. Shepley.*