WILLIAM SHOOLBRED.... .....APPELLANT, 1890

AND *Jan. 21, 22, 23.

ALEXANDER STUART CLARKE.....RESPONDENT. June 12.

In re UNION FIRE INSURANCE COMPANY.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Winding-up Act—R.S.C. s. 129—Application of to provincial company—Winding up proceedings—Reference to master.

A company incorporated by the Legislature of Ontario may be put into compulsory liquidation and wound up under the Dominion Winding-up Act, R.S.C. c. 129.

In assigning to provincial courts or judges certain functions under the Winding-up Act Parliament intended that the same should be performed by means of the ordinary machinery of the court and by its ordinary procedure. It is, therefore, no ground of objection to a winding-up order that the security to be given by the liquidator appointed thereby is not fixed by the order, but is left to be settled by a master.

APPEAL from a decision of the Court of Appeal for Ontario (1) dismissing an appeal from the judgment of Boyd C. (2) who made an order for winding up the Union Fire Insurance Company, under the Dominion Winding-up Act.

On a former appeal to this court (3) a winding-up order made by Mr. Justice Proudfoot in this matter was held defective and remitted to the court below for the petition to wind up the Union Fire Insurance Co., to be dealt with anew. The matter was then brought before the Chancellor, who made an order containing, among others, the following provisions :

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*PRESENT : Sir W. J. Ritchie C.J. and Fournier, Taschereau, Gwynne and Patterson JJ.

(1) 16 Ont. App. R. 161. (2) 14 O. R. 618.

(3) 14 Can. S.C.R. 624.

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"1. This court doth declare that the said the Union Fire Insurance Company is an insurance company within the provisions of the said act, and is insolvent under the provisions thereof, and doth order 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 doth further order that William Badenach, of the city of Toronto, accountant, the receiver heretofore appointed in the said case of Clarke *v.* Union Fire Insurance Company, be and he is appointed permanent liquidator to the estate and effects of the said company upon his furnishing security to the satisfaction of the master in ordinary of the Supreme Court of judicature for Ontario before he shall intermeddle with the said estate."

"3. And this court doth further order that it be referred to the said master in ordinary to fix the remuneration payable to the said liquidator, to settle the list of contributories, take the accounts of the assets, debts and liabilities and all other necessary accounts, and to make all necessary inquiries and reports and do all necessary acts and give all necessary sanctions to the said liquidator for the winding up of the affairs of the said company under the provisions of the said act and amendments thereto."

Shoolbred, a shareholder of the insolvent company, objected to this order on the grounds, mainly, that the Dominion Winding-up Act was not applicable to a company incorporated by the Ontario Legislature, and, therefore, no order could be made under it in this case; also that if the order could be made it was defective in leaving the security of the liquidator to be settled by the master, as the court could not so delegate the authority conferred on it by the act. Both these objections were overruled by the Court of Appeal and

the order was confirmed. Shoolbred then appealed to the Supreme Court of Canada.

S. *H. Blake* Q.C. and *McLean* for the appellant referred to *Merchant's Bank of Halifax* v. *Gillespie* (1).

Bain Q.C. for the respondents cited *Re Eldorado Union Store Company* (2) and the cases relied on in the courts below.

Sir W. J. RITCHIE C.J.—In this case the majority of the court are of opinion that the appeal should be dismissed. I should have liked more time to consider the matter, but my opinion could not affect the decision and I am not prepared to dissent from the judgment of the court.

FOURNIER J.—I agree that the appeal should be dismissed.

TASCHEREAU J.—I am of opinion that the appeal should be dismissed with costs.

GWYNNE J.—I entertain no doubt that the Winding-Up Act of the Dominion Parliament, 45 Vic. ch 23, and the acts in amendment thereof, do apply to the Union Fire Insurance Company, and that so applying those acts are *intra vires* of the Dominion Parliament, and I confess that I cannot understand how it can be doubted that this court was of that opinion when it made the order which was made upon the former appeal between the same parties. It cannot be conceived that after hearing an argument upon this very ground of appeal upon the former occasion, this court would have remitted the case to be dealt with by the court below, under the provisions of the statute, in accordance with the opinion of the majority of the court as to the construc-

(1) 10 Can. S. C. R. 312. (2) 6 Russ. & Geld. 514.

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tion of the statute, if they were of opinion that the act did not apply to the Union Fire Insurance Company.

I still am of opinion that proceedings instituted by certain creditors of that company for the purpose of having the proceedings taken by the respondent Clarke to have the assets of the company applied in liquidation of the claims of its creditors brought under the operation of the Dominion statute, 45 Vic. ch. 23, as amended by 47 Vic. ch. 39, were well instituted under the provisions of the 2nd and 3rd sections of the latter act, and I entertain no doubt that the order of the learned Chancellor for Ontario, which is the subject of this appeal, was a good and valid order under these acts as the same are amended by and consolidated in ch. 129 of the Revised Statutes of Canada.

The intention of Parliament in submitting all proceedings instituted for the winding up of insolvent companies under these acts to the jurisdiction of the ordinary courts in the respective Provinces of the Dominion was to leave those proceedings or cases to be dealt with in those courts by the machinery and course of procedure ordinarily in use in those courts *in consimili casu*, and in my opinion this intention was made sufficiently apparent by sec. 77 of ch. 129 of the Revised Statutes of Canada, and the repeal of the sub-section of that section and the substitution therefor of another sub-section by 52 Vic. ch. 32 sec. 20, does not, in my judgment, create any doubt whatever as to such having been the true construction of the said sec. 77 of ch. 129.

The objections taken to the form of the learned Chancellor's order appear to me to be of a purely technical character, affecting only matter of procedure, matters which are not, in my opinion, proper subjects of appeal to this court. To speak of a reference to a master of a matter which, according to the ordinary procedure

of the court, comes within his ordinary duty as a delegation by a judge to a master to do what it was the duty of the judge himself to do, involves, in my judgment, a misuse of the term, a misconception of the intention of Parliament, and a misconstruction of the terms of the act in which that intention is expressed. I concur in the dismissal of the appeal with costs.

PATTERSON J.—The Union Fire Insurance Company was incorporated in 1876 by an act of the Legislature of Ontario, 39 Vic. ch. 93.

In November, 1881, the company was insolvent, and its license from the Ontario Government, under R.S.O. (1877,) chap. 160, was suspended.

In the same month of November, 1881, Clarke, one of the present respondents, instituted an action in the High Court of Justice in Ontario, asking on behalf of himself as a creditor of the company and on behalf of the other creditors to have the assets of the company realised and distributed. His position will more fully appear from the following extract from his statement of claim :—

10. By the said act of incorporation a capital stock was provided for, of which a large amount was subscribed for, taken and is now held by a large number of persons, and a portion thereof has been paid up, and the holders of the said stock are too numerous to be made parties defendants, and it would be almost impossible for the plaintiff to proceed with this cause and the expense attending the same would be very great were he compelled to make all the shareholders parties in this action, and in order to realize the amount due to the plaintiff and other creditors from the various stockholders of the said company, it would be necessary to bring a great number of actions, whereas the amount due to the plaintiff and other creditors can be realized herein with less expense and in less time.

11. The plaintiff claims that under the circumstances it would be greatly to the advantage of the creditors of the defendants generally to have the company wound up, and the assets administered under the direction of this court, and that he and the creditors of the defendants

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generally cannot be sufficiently protected in their rights without the benefit and assistance of this court.

12. The defendants have, pursuant to the statute in that behalf, deposited with the treasurer of the Province of Ontario the sum of $26,300, which deposit the plaintiff claims should be made available by order of administration on unearned premiums and on claims by the policy holders in the said company in accordance with the terms of the said statute, and notice of the failure of the said company to pay said claims after the lapse of sixty days from time it became due has been given by the plaintiff to the said Provincial Treasurer.

13. The plaintiff claims to have it declared that the defendants are liable to have their deposit in the hands of the Provincial Treasurer administered in manner provided for in the 21st and 22nd sections of said chapter 160.

14. The plaintiff claims to have it declared that the plaintiff and the other creditors of the company are entitled to have the assets of the company realized to pay its creditors.

15. The plaintiff claims that an account may be taken of what is due to the plaintiff and the other creditors of the said company, and that the assets may be applied in payment of the claims of the said creditors in due course of administration, and that all the unpaid stock and other assets may be called in.

16. The plaintiff further claims that a proper person may be continued as receiver of the property, business and moneys of the said company, with power to collect and get in all the assets of the said company, and to manage and wind up its affairs, and that proper direction may be given to the said receiver.

17. The plaintiff further claims that the said company, its officers, servants and agents, may be restrained by the order of this court from intermeddling in the management of the property of the said company and from receiving any of the moneys or profits thereof.

Judgment was, by consent, entered in that action for the plaintiff on the seventh of January, 1882, giving the full relief asked, and referring it to the master to take an account of the debts and liabilities of the company, to fix the priorities of the creditors, and to take an account of the assets and estate of the company. After a report by the master there was another judgment on further directions which referred it again to the master to continue the accounts and to ascertain and settle who were the stockholders of the company, and order-

ed the company to make calls for enough to pay the debts.

The master entered upon the inquiries, and contests on various matters took place before him, but he made no report.

The reason for this was that proceedings were initiated under the Dominion Winding-up Acts.

Those proceedings have led to the present appeal, which is from the judgment of the Court of Appeal affirming a winding-up order made by the Chancellor of Ontario on the 9th May, 1888.

That order was made six years and a-half after the institution of Clark's action, and it was upwards of eight years from the commencement of the action when this appeal was argued.

There had been a former winding-up order made in January, 1885, from which the present appellant appealed to the Court of Appeal of Ontario (1), where the court being equally divided in opinion the appeal was dismissed, but upon a further appeal to this court the order was vacated and the matter remitted to the High Court (2).

I shall presently notice the ground of that decision. In the meantime I may quote an observation made with equal force and truth by one of the learned judges while expressing his opinion that upon one ground, which he designated as a purely technical and unmeritorious objection, the order ought to be reversed.

"The only practical result of the objection," remarked Mr. Justice Osler, "seems to be that the winding up of this insolvent company has been delayed for more than a year. The delay and expense which have been already incurred are a reproach to the administration of justice, the litigation having been pending for

(1) *Re* Union Fire Ins. Co. 13 Ont. App. R. 268.

(2) *Shoolbred* v. *Union Fire Ins. Co.* 14 Can. S. C. R. 624.

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nearly five years, with the result, as we understand, that between $5,000 and $6,000 of the company's assets have been expended in costs."

The reproach to the administration of justice is now more glaring, for four years more have elapsed and, save as advanced by the recent hearing of this appeal, the litigation is at precisely the same stage, the former order having been replaced by that of the Chancellor, but with an inevitably large addition to the costs.

The Chancellor's order was made under the Winding-up Act, R. S. C., ch. 129, which came into force on the first of March, 1887. The first order was under 45 Vic. ch. 23, as amended by 47 Vic. ch. 39. In the revised statute, section 20 represents the former section 24, but with the important substitution of the word "may" for "must," thus removing the ground on which it was contended that the liquidator must be appointed by the winding-up order, which was the main question on which the judges of appeal differed in opinion. This question, whether the order to wind up the business of the company and the appointment of the liquidator must be written on one paper, or might be written on two, was justly characterised by the learned judges who felt compelled to hold that the section imperatively required the two things to be embraced in the one order, as a purely technical point.

That first winding-up order did not appoint a liquidator, but referred it to the master to appoint one, merely continuing, as liquidator *ad interim*, the same gentleman who was already acting as receiver. No one supposed or contended that a permanent liquidator could be appointed under section 24, either by the winding-up order or by a subsequent order, without the prescribed statutory notice being given to creditors, &c. The objection taken to the order was because it failed to appoint a liquidator, yet, singularly enough,

the case seems to have been presented on the appeal to this court, as would appear from the head note of the report and from some of the judgments delivered, as if the liquidator had been appointed by the order and (as would have been so in that case) without due notice of the intention to appoint him The objection to the absence of the notice, upon the case thus apprehended, was a substantial objection, and was not the technical and unmeritorious one which arose and was dealt with upon the facts as they really existed, and it was upon that apprehension of the case by the majority of the judges that the order was vacated.

The decision cannot give much assistance in settling the disputed construction of the section. The questions now raised are not quite the same as those made under the former order, and some questions raised upon the enactment, under section 24, are excluded by the change made in section 20 of the revised statute.

There are two branches to the present appeal.

First, it is contended that the Dominion Winding-up Act does not apply to the Union Fire Insurance Company because that company was incorporated by Provincial and not Dominion legislation ; and then, assuming the act to apply to the company, it is objected that its provisions do not authorise the order made by the Chancellor.

The interpretation clause of the act, R.S.C. ch. 129, defines the expression " insurance company " as used in the act, as meaning a company carrying on, either as a mutual or a stock company, the business of insurance whether life, fire, marine, ocean or inland marine, accident, guarantee or otherwise ; and defines the expression " winding-up order " as meaning an order granted by the court under that act to wind up the business of the company, including any order granted by the court to bring within the provisions of the act

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any company in liquidation or in process of being wound up.

Section 3 declares that the act applies to certain incorporated companies, including incorporated insurance companies, wheresoever incorporated, and

(*a*) Which are insolvent; or

(*b*) Which are in liquidation or in process of being wound up, and on petition by any of their shareholders or creditors, assignees or liquidators ask to be brought under the provisions of the act.

No language could be more general and comprehensive or less calculated to suggest the exclusion of any class of incorporated companies, nor has any good reason been given for thinking such exclusion can have been intended.

The Provincial Legislatures have under section 92 of the B. N. A. Act exclusive power to make laws in relation to the incorporation of companies with provincial objects; but the body politic created by any such act of incorporation becomes, like a natural body, subject to the laws of the land. There are a number of the subjects over which exclusive legislative jurisdiction is given to the Parliament of Canada, as well as others in relation to which the Parliament may make laws for the peace, order and good government of Canada, the legislation on which must govern all corporate bodies as well as natural bodies; for example—interest, legal tender, currency, taxation, the criminal law, and bankruptcy and insolvency.

In its compulsory operation upon incorporated companies the Winding-up Act is an insolvency law. Companies that are not insolvent, as well as those that are, may be brought under its operation by the effect of the second part of section 3 when they are already in liquidation or in process of being wound up. This may be on petition of creditors or assignees as well as of shareholders or liquidators; but original proceedings

under the Winding-up Act can be instituted only by creditors and only when the company is insolvent.

A wider power now exists under the Winding-up Amendment Act 1889, 52 Vic. ch. 32 (D). That act authorises voluntary winding-up proceedings at the instance of the company or a shareholder, following in this respect the 129th section of the English Companies Act, 1862, which is also followed by the Ontario Winding-up Act, R.S.O. (1887) ch. 183. But that provision for voluntary winding-up is not extended, like the winding-up act, to all corporations. It is confined by section 2 to companies incorporated "by or under the authority of an act of the Parliament of Canada, or by or under the authority of any act of the late Province of Canada, or of the Provinces of Nova Scotia, New Brunswick, Prince Edward Island or British Columbia, and whose incorporation and the affairs whereof are subject to the legislative authority of the Parliament of Canada."

This obviously is intended to exclude companies incorporated by provincial legislation since confederation under the exclusive legislative jurisdiction given to the Provinces. Ontario, Quebec and Manitoba, are not named, and misapprehention as to the four provinces which have retained their anti-confederation names is shut out by the reference to the legislative authority of the Parliament of Canada. Thus, the provision for voluntary winding-up is expressly confined to a class of corporations in which the Union Fire Insurance Company is not included, and the unlimited application of the Winding-up Act to the compulsory liquidation of the affairs of all insolvent corporations is made more clear.

It was argued that the third section of the act of 1889, which I have just quoted, went to show, by the omission of the name of the Province of Ontario, that

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the Winding-up Act did not apply to this Ontario company. This court may be said to have in effect decided that it did so apply when it remitted the matter to the High Court after the former appeal; and the leave to bring forward the present appeal was granted partly, if not principally, to give an opportunity to discuss the effect of the amendment act as a legislative explanation of the Winding-up Act.

It is clear that the act of 1889 bears on the question in no other way than to make the unlimited extent of the principal act more manifest.

It is, it is true, to be read with and construed as forming part of the Winding-up Act; but that is by the introduction into the statute of a set of provisions for the voluntary winding up of a limited class of corporations, to which provisions the expressions in section 3 "this act applies," &c, must be referred. The section does not qualify or supersede section 3 of the principal act. The term "this act," means and will continue to mean the amendment act, and not the whole Winding-up Act.

There are, in this act of 1889, specific amendments of several sections of the Winding-up Act. Those sections as amended must continue to apply to the same companies as before, although the amendments are made by an act which is declared to apply to a more limited class of companies. There is, doubtless, a want of precision in this particular, but the act can be read according to its evident intent without violence even to the literal wording. There are no restrictive words in section 3, such as "shall only apply," and yet the newly introduced powers touching voluntary liquidation will be confined to the class of companies specified in section 3 because, being newly created, they have only the extent expressly assigned to them.

There is, in my opinion, no reasonable doubt that the Union Fire Insurance Company is subject to the provisions of the Winding-up Act.

Then, is the Chancellor's order authorised by the act?

The order declares that the company is an insurance company within the provisions of the act, and is insolvent, and then proceeds to order:

(1.) That the business of the company be wound up.

(2.) That Wm. Badenach, the receiver appointed in the case of *Clarke* v. *The Company*, be permanent liquidator of the estate and effects of the company *upon his furnishing security to the satisfaction of the master in ordinary* before he shall intermeddle with the estate.

(3.) That it be referred to the master to fix the renumeration payable to the liquidator, to settle the list of contributories, etc., etc.

(4.) That costs of petition, &c., be paid by the liquidator out of the assets of the estate.

(5.) That costs ordered to be paid to plaintiff and defendants in Clarke's case, but not paid, be paid out of the assets.

(6.) That accounts, &c., in Clarke's case stand and be incorporated with and used in the winding-up proceedings, so far as applicable.

(7.) That parties who contested their liability in Clarke's case to be settled on list of shareholders shall be at liberty to apply to the court after the settlement of the list of contributories for the payment of such costs in Clarke's case as they may deem themselves entitled to.

We may simplify the consideration of the objections taken to this order by satisfying ourselves of the nature of the jurisdiction conferred on the court by the Winding-up Act.

The starting proposition, to the overlooking of which I attribute much if not all of the difficulty that to some judges has seemed to attend the working of the act, is that by the B.N.A. Act the constitution and organization of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts, is a function of the Provincial Legislature.

There is no *a priori* presumption that the Parliament of Canada in passing an act upon a subject within its exclusive jurisdiction intends to encroach upon the exclusive jurisdiction of the Province.

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If an act is ambiguous in this particular, I take it that the construction to be preferred is that which accords with the declaration of our constitutional charter.

Among the subjects exclusively assigned by section 91 to the Parliament of Canada are interest, bills of exchange and promissory notes, and bankruptcy and insolvency. We should be surprised to find that Parliament assuming to enact that an action on a bill of exchange should always be tried by a judge without a jury, or tried at bar before the full court, or that interest on a promissory note must always be computed by the judge personally and not by a master or referee.

We should be equally unprepared to find it enacted that when a provincial court was administering an insolvency or bankruptcy act the functions and powers of its officers were to be different from those exercised in an administration action or other action within its ordinary jurisdiction.

Such an enactment would amount to the constitution and organization of the court by the Dominion Parliament and not by the Local Legislature.

Yet this is what I understand to be contended is the intention and effect of the Winding-up Act.

In my opinion the act was never so intended, but, on the contrary, the effort of the Parliament has been to leave the court to perform its functions by means of its ordinary machinery and by its ordinary procedure.

I may refer, without repeating what I said, to the opinions on this topic which I expressed at some length in the Court of Appeal when the appeal from the first winding-up order in this matter was heard.(1)

I then alluded to amendments of the statute which seemed to me to be dictated by the desire to make it perfectly clear that the ordinary procedure of the court

(1) 13 Ont. App. R. 283-5.

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and the ordinary functions of its officers under the regular constitution and organization of the court, were not intended to be interfered with.

Section 77 of the Revised Statute seemed and still seems to me sufficiently plain on this point. But questions still arose. A reference to the master was considered to be an unauthorised delegation of duties which the statute assigned to the court, and not, as in ordinary cases, the discharge of its functions by the court by its accustomed methods. That opinion found expression in the present litigation, and has, as I venture to think, contributed towards the protracting of the litigation. The term "delegation" is, to my apprehension, inaccurately used in this position. It has, however, been accepted by the legislature which has again interposed to disclaim the intention imputed to it. The Winding-up Amendment Act, 1889, repeals the second sub-section of section 77 and substitutes the following:—

2. After a winding-up order is made the court may, from time to time, by order of reference, refer and delegate, according to the practice and procedure of such court, to any officer of the court any of the powers conferred upon the court by this act or any act amending the same as to such court may seem meet, subject to an appeal according to the practice of the court in like cases.

The repealed sub-section was, as I understand it, quite as explicit as this, but it was confined to Ontario while this is general.

But the amendment act does not stop here. It goes on to declare in terms that :—(1).

The proceedings under a winding-up order shall be carried on as nearly as may be in the same manner as an ordinary suit, action or proceeding within the jurisdiction of the court.

One objection to the order is that the approval of the security to be given by the liquidator and the fixing of his remuneration are referred to the master.

(1) Sec. 21.

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Section 24 enacts that "the court may also determine what security shall be given by the liquidator on his appointment;" and section 28 that "the liquidator shall be paid such salary or remuneration, by way of percentage or otherwise, as the court directs, upon such notice to the creditors, contributories, shareholders or members as the court orders."

The objection is without foundation. The reference is an accordance with the ordinary procedure of the court, and the action of the master, which is always subject to appeal and revision, is the action of the court. This topic has been dealt with in the court below by Mr. Justice Osler to whose remarks it is not necessary to add anything.

The incorporation of the proceedings in Clarke's action was fully discussed in the Court of Appeal under the first winding-up order. I refer to my remarks as reported on that occasion (1).

The position described in section 3 (*b*) is that of this company. It was in liquidation or in process of being wound up in the action of Clarke. That action and the proceedings taken in it are set out in the petition on which both the winding-up orders were made. That petition, by two creditors of the company, asked in substance that the company should be brought under the provisions of the Winding-up Act. Clarke's action, it will be remembered, was commenced in November, 1881, and judgment was entered in it in January, 1882. The company was, therefore, in liquidation or in process of being wound up on the 17th of May, 1882, which was the date of the passing of the Winding-up Act, 45 Vic. ch. 23.

Section 14 of the revised statute declares that:

Any shareholder, creditor, assignee, receiver or liquidator of any company which was in liquidation or in process of being wound up

(1) 13 Ont. App. R. 285-7.

on the 16 of May, 1882, may apply by petition to the court asking that the company may be brought within and under the provisions of this act, and the court may make such order; and the winding-up of such company shall thereafter be carried on under this act:

(2.) The court in making such order may direct that the assignee, receiver or liquidator of such company, if one has been appointed, shall become the liquidator of the company under this act, or may appoint some other person to be liquidator of the company.

This must mean that in the cases, of which the present is one, to which the section applies the proceedings are to be taken up in the stage at which they are at the date of the order, and continued from that point under the Winding-up Act.

It was perhaps unnecessary to insert the directions in the order. They would have been supplied by the statute. They serve, however, to show that the order was made in view of this provision, and not merely because the company was insolvent.

Section 20 forbids the appointment of a liquidator unless a previous notice is given to the creditors, contributories, shareholders or members in the manner and form prescribed by the court.

It is objected that this order of the 9th of May, 1885, was made without such notice.

Now, setting aside the question whether the notice is required when a receiver appointed under pending proceedings is continued as liquidator under section 14, the short answer to the objection is that it is not supported by any proof of the asserted fact.

Notice was duly given, as appears from the materials before us, for the appointment of a liquidator on the 20th of September, 1887, in pursuance of an order made on the 6th of that month. On the 20th an order was made that the matter of the petition and of the appointment should stand over till the 27th of the same month. How it came to stand further until the 9th of May is not explained. The Chancellor was doubtless

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satisfied that the proceeding had been properly continued or that due notice had been given. There is no reason to assume, nor is it suggested as a fact, that it was not so.

In my opinion the appeal fails on every ground, and should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellant: *Walker & McLean.*

Solicitors for respondents, petitioners: *Bain, Laidlaw & Co.*

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

Solicitor for Union Fire Insurance Co.: *G. F. Shepley.*