

1887
 *Feb. 15.
 *June 20.

JOHN. P. MOTT AND OTHERS }
 SHAREHOLDERS OF THE BANK } APPELLANTS ;
 OF LIVERPOOL..... }

AND

THE BANK OF NOVA SCOTIA.....RESPONDENT.

IN RE THE BANK OF LIVERPOOL. EX PARTE THE BANK OF NOVA SCOTIA.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Winding up act—45 V. c. 23—47 V. c. 39—Winding up of insolvent bank—Proceedings in case of.

Sections 2 and 3 of the winding-up act 47 Vic. ch. 39, providing for the winding-up of insolvent companies (1) do not apply to banks, but an insolvent bank whether in process of liquidation or not at the time it is sought to bring it under the winding up act, must be wound up with the preliminary proceedings provided for by secs. 99 to 102 of 45 V. c. 23, as amended by 47 V. c. 39 (2). Strong and Gwynne JJ. dissenting.

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

(1.) Sections 2 and 3 of 47 Vic. ch. 39, amending 45 Vic. ch. 23, read as follows :

2. When at the date of the passing of the said act, a company was in liquidation or in process of being wound up, any shareholder, creditor, assignee, receiver or liquidator of such company may 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 the winding up of such company shall thereafter be carried on under the said act, and the expression "winding up order," in the said act shall include the order in this section

mentioned.

3. The court, in making such an 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 the said act, or may appoint some other person to be liquidator of the company.

(2.) 45 Vic. ch. 23, sec. 99 to 102 as amended :

99. In case of a bank the application for a winding up order must be made by a creditor for a sum of not less than one thousand dollars, and the court must, before making the order, direct a meeting of the shareholders of the bank, and a meeting of the

APPEAL from a decision of the Supreme Court of Nova Scotia (1) sustaining the order of the Chief Justice for winding up the affairs of the Bank of Liverpool and appointing the Bank of Nova Scotia liquidator.

1887
 MOTT
 v.
 THE BANK
 OF NOVA
 SCOTIA.
 ———
 In re THE
 BANK OF
 LIVERPOOL.
 ———

The Bank of Liverpool had been placed in insolvency under the provisions of "The Insolvent Act of 1875" and amending acts" and the Bank of Nova Scotia was the assignee. In 1884 the Bank of Nova Scotia filed a petition under the winding up act of 1882, praying that the said Bank of Liverpool be wound up thereunder. After hearing arguments for and against the petition the Chief Justice made the following order under sections 2 and 3 of 45 Vic. ch. 23, the winding up act of 1882, as amended by 47 Vic. ch. 39, he having decided that said sections governed the proceedings in this case.

"It is ordered that the prayer of the said petition be granted and that the said Bank of Liverpool and the estate thereof be brought within and under the pro-

creditors of the bank to be summoned, held and conducted as the court directs, for the purpose of ascertaining their respective wishes as to the appointment of liquidators.

100. The court may appoint a person to act as chairman of the meeting of shareholders, and in default of such appointment, the president of the bank, or other person who usually presides at a meeting of the shareholders, shall preside. The court may also appoint a person to act as chairman of the meeting of creditors, and in default of such appointment the creditors shall appoint a chairman.

101. In taking a vote at such a meeting of shareholders, regard

is to be had to the number of votes conferred by law or by the regulations of the bank on each shareholder present or represented at such meeting, and in case of the creditors, regard is to be had to the amount of the debt due to each creditor.

102. The chairman of each meeting must report the result thereof to the court, and if a winding up order is made, the court shall appoint three liquidators, to be selected in its discretion, after such hearing of the parties as it may deem expedient from among the persons nominated by the majorities and minorities of the shareholders and creditors at such meetings respectively.

(1) 6 Russ. v. Geld. 53L.

1887
 MOTT
 v.
 THE BANK
 OF NOVA
 SCOTIA.
 In re THE
 BANK OF
 LIVERPOOL.

visions of the said act, intituled, 'An act respecting insolvent banks, insurance companies, loan companies, building societies, and trading corporations,' passed by the Parliament of Canada, being forty-fifth Vic. ch. 23, and of the said act, passed by said Parliament of Canada, being 47 Vic. ch. 39, intituled, 'An act further to amend the act 45 Vic. ch. 23, entitled 'An act respecting insolvent banks, insurance companies, loan companies, building societies and trading corporations,' and that the liquidation and winding up of the said Bank of Liverpool be carried on and completed under the said last named acts, and that the said Bank of Liverpool and the estate thereon be wound up by this court under the provisions of the said last named acts.

"It is further ordered that the said bank of Nova Scotia be, and it is hereby appointed, the liquidator of the said Bank of Liverpool under the provisions of the said last named acts.

"It is further ordered that the said Bank of Nova Scotia shall give security under the provisions of said act 45 Vic. ch. 23, and amending act, and under sec. 28 thereof by bond in a penal sum of one hundred thousand dollars to the satisfaction of and to be approved by a judge of this Honourable Court conditioned for the due and faithful performance of the duties of the said Bank of Nova Scotia as such liquidator.

"It is further ordered that the said petitioner's costs of and relating to the said petition and application be allowed and paid out of the assets of the said Bank of Liverpool such costs to be taxed, and that the costs of the contestants abide the order of the appellate court to be made in the premises.

"Dated at Halifax this 16th day of January, A. D., 1885."

Application was made to the Supreme Court of Nova Scotia to have the order of the Chief Justice set aside, chiefly on the ground that the proceedings prescribed by sections 99 to 102 inclusive of the act of 1882 as amended by the act of 1884 should have been followed and the bank wound up as if the previous proceedings under the Insolvent Act had not taken place. The court divided equally on the application and the order was sustained. The dissatisfied shareholders then appealed to the Supreme Court of Canada.

1887
 MOTT
 v.
 THE BANK
 OF NOVA
 SCOTIA.
 In re THE
 BANK OF
 LIVERPOOL.

Henry Q.C. for the appellants.

Sedgewick Q.C. for the respondent.

Sir W. J. RITCHIE C.J.—This is an appeal from the judgment of the Supreme Court of Nova Scotia affirming the decision of the Chief Justice, ordering the Bank of Liverpool to be brought within the provisions of 45 Vic. cap. 23., “An Act respecting Insolvent Banks, Insurance Companies, Loan Companies, Building Societies and Trading Corporations.”

Section 147 of 38 Vic. cap. 16, (the Insolvent Act of 1875), and 39 Vic. cap. 31, contain the provisions for putting insolvent companies into insolvency.

Under these statutes the Bank of Liverpool was placed in insolvency in 1879.

17th October, 1879, the attachment under the Insolvent Act of 1875 was issued against the Bank of Liverpool. The official assignee took possession of the estate. At the first meeting of creditors the Bank of Nova Scotia was appointed assignee.

13th September, 1884, the Bank of Nova Scotia, assignee, filed a petition praying that the Bank of Liverpool and its estate should be brought under the provisions of 45 Vic. c. 23., and 47 Vic. ch. 39., and that liquidation and winding up be carried on under said acts, and that the Bank of Nova Scotia might be

1887

MOTT

v.
THE BANK
OF NOVA
SCOTIA.

In re THE
BANK OF
LIVERPOOL.

Ritchie C.J.

appointed liquidator.

13th September, 1884, the Chief Justice made an order directing a hearing on the 28th October, 1884, and in the meantime that notice should be given to creditors by publication in the Canada Gazette and other papers for thirty days, such publication to be sufficient notice.

Notice was duly published and petition heard when counsel for the shareholders and contributories appeared. The Chief Justice allowed the prayer of the petition and granted an order as follows (1):—

45 Vic. ch. 23, provides for the winding up of incorporated banks and other companies. The principal sections bearing on the questions involved in the present appeal are as follows:

1. This act applies to incorporated banks (including savings banks), incorporated insurance companies, loan companies having borrowing powers, building societies, having a capital stock which are insolvent or in process of being wound up, either under a general or special act, and which, on petition as in this act set forth, by its shareholders or creditors, assignees or liquidators, ask to be brought within and under the provisions of this act.

(a) This act does not apply to railway or telegraph companies or to building societies that have not a capital stock.

2. The provisions of sections thirteen to ninety eight inclusive of this act are, in the case of a bank, (not including a saving's bank) subject to the provisions, changes and modifications contained in sections ninety nine to one hundred and five inclusive.

6. "Company" includes any corporation subject to the provisions of this act.

Ch. 39 of 47 Vic. amends the act 45 Vic. ch. 23, as follows:—

I. The first section of the act passed in the forty-fifth year of Her Majesty's reign, chaptered twenty three, and entitled, "an act respecting insolvent banks, insurance companies, loan companies, building societies and trading corporations is hereby repealed, and the following section is enacted in lieu thereof:

I. This act applies to incorporated banks (including savings banks) incorporated insurance companies, loan companies having borrowing powers, building societies having a capital stock, and incorporated

(1) See pp. 651-2.

trading companies, which are doing business in Canada, no matter where incorporated, and which are insolvent or in process of being wound up and on petition as in this act set forth by their shareholders or creditors, assignees or liquidators ask to be brought within and under the provisions of this act.

(a) this act does not apply to railway companies or to building societies that have not a capital stock.

2. When at the date of the passing of the said act, a company was in liquidation or in process of being wound up, any shareholder, creditor, assignee, receiver or liquidator of such company, may 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 the winding up of such company shall thereafter be carried on under the said act, and the expression "winding up order," in the said act, shall include the order in this section mentioned.

3. The court in making such an 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 the said act, or may appoint some other person to be liquidator of the company.

4. The 24th section of the said act is amended by inserting before the words "the winding up order" in the first line, the words, "the court in making."

7. Sections 99, 100, 101 and 102 of the said act are hereby repealed, and the following sections are enacted in lieu thereof:—

99. In the case of a bank the application for a winding up order must be made by a creditor for the sum of not less than \$1,000 and the court must before making the order, direct a meeting of the shareholders of the bank, and a meeting of the creditors of the bank to be summoned, held and conducted as the court directs, for the purpose of ascertaining their respective wishes as to the appointment of liquidators.

100. The court may appoint a person to act as chairman of the meeting of shareholders, and in default of such appointment the president of the bank, or other person who usually presides at a meeting of the shareholders, shall preside. The court may also appoint a person to act as chairman of the meeting of creditors, and in default of such appointment the creditors shall appoint a chairman.

101. In taking a vote at such a meeting of shareholders, regard is to be had to the number of votes conferred by law or by the regulations of the bank of each shareholder present or represented at such meeting; and in the case of creditors, regard is to be had to the amount of the debt due to each creditor.

1887
 MOTT
 v.
 THE BANK
 OF NOVA
 SCOTIA.
 —
 In re THE
 BANK OF
 LIVERPOOL.
 —
 Ritchie C.J.

1887

MOTT
v.THE BANK
OF NOVA
SCOTIA.*In re* THE
BANK OF
LIVERPOOL.
Ritchie C.J.

102. The chairman of each meeting must report the result thereof to the court, and if a winding up order is made the court shall appoint three liquidators, to be selected in its discretion, after such hearing of the parties as it may deem expedient from among the persons nominated by the majorities and minorities of the shareholders and creditors at such meetings respectively.

I cannot conceive that sec. 3 of the amending act was intended to apply to banks with reference to which the sections 99, 100, 101 and 102 of the original act and the sections of the amending act in lieu thereof have made very special provisions. I think the amending act must be read as if it formed part of the original act, and such a reasonable construction put on it as will give effect to all its provisions. In other words I am at a loss to conceive how section three can be construed to exclude this case from the provisions of sections 99 to 102 when the legislature by express words have declared in the case of a bank they shall apply; certainly it should not be so read as to give to section three the effect of repealing all those special provisions in reference to banks enacted in the same act. To whatever companies section three may apply, it appears to me beyond all reasonable doubt that it does not apply to banks. So far from there being any indication of an intent on the part of the legislature to dispense with all or any of the preliminaries of the original act the legislature seems to me, emphatically, in unmistakable language, by the sections enacted in lieu of sections 99, 100, 101 and 102, to have re-affirmed the necessity of such preliminaries being observed.

As regards the complaint as to the discretion exercised by the learned Chief Justice: Had such discretion as applicable to this case been conferred on him by the statute 47 Vic. ch. 39 sec. 2, (a judicial discretion it is true over which this court no doubt has complete jurisdiction but a discretion the exercise of which is not lightly to be interfered

with) if no case of miscarriage had been shown, and if the learned Chief Justice had not been shown to have gone wrong in his law, no mistake of fact being shown nor that he ordered anything so utterly unreasonable that the court would be obliged to say that there had not been a reasonable exercise of his discretion, I should not have thought it the duty of this court to interfere.

1887
 MOTT
 v.
 THE BANK
 OF NOVA
 SCOTIA.
 —
 In re THE
 BANK OF
 LIVERPOOL.
 —
 Ritchie C.J.
 —

STRONG J.—I am of opinion that the judgment in this case should be affirmed for the reasons given by the Chief Justice of Nova Scotia in his judgment in the court below.

FOURNIER J.—I am in favor of allowing the appeal. It is very clear that the 103rd section of the act was not complied with. It requires that three liquidators should be appointed and here there was only one.

HENRY J.—The respondent bank became in 1879 the assignee in insolvency of the Bank of Liverpool, and on the 12th of September, 1884, made application by petition to a judge of the Supreme Court of Nova Scotia for an order to bring the insolvent estate within and under the provisions of the acts of Canada of 1882, chap. 23, and of 1884, chap. 39, and asking to be appointed liquidator of the estate.

The matter came before His Lordship the Chief Justice of that court who, after hearing the parties, made an order granting the prayer of the respondent's petition.

The appellants appealed to the whole court. At the hearing the court was composed of four members, one joining the Chief Justice in sustaining his order and the others deciding against the validity of the order. One of the latter, however, subsequently changed his judgment formally so that an appeal to

1887

MOTT

v.

THE BANK
OF NOVA
SCOTIA.*In re* THE
BANK OF
LIVERPOOL.

Henry J.

this court might be had.

Previously to the act of 1882, chap. 23, incorporated banks could not be brought into liquidation.

By the first section of that act it was provided, amongst other things, that incorporated banks which were insolvent or in process of being wound up might be brought within its provisions.

By section two the provisions of sections thirteen to ninety eight inclusive of that act were, in the case of a bank, (not including a savings bank)—

Made subject to the provisions, changes and modifications contained in sections ninety nine to one hundred and five inclusive.

Sec. 24 provides that:—

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 or members in the manner prescribed by the court.

That section clearly prohibits the passing of a winding up order unless notice be given in the manner prescribed by the court. In this case the court did not make, nor was it asked to make, any order prescribing how the notice was to be given. The only notice given was one in the newspapers as provided by sec. 105, but the provision in that section does not apply to such a notice, but only is sufficient as to the holders of bank notes in circulation. The reason why that provision was made is that it would be impossible to serve such a notice personally as the holders could not be discovered. No such reason existed in this case and therefore the petitioners were required to obtain the direction of the court. Without such notice being given the court had no power to appoint a liquidator in any case, and for that reason alone the appointment was void for the want of jurisdiction.

By section 7 of the act of 1884, secs. 99, 100, 101 and 102 of the act of 1882, were repealed and other provisions substituted as I shall hereafter show.

The 1st sec. of the act of 1884 applies its provisions to incorporated banks, savings banks, incorporated insurance companies, loan companies having borrowing powers, building societies having a capital stock and incorporated trading companies.

Sec. 2 provides that :

When at the date of the passing of this act (19th April, 1884) a company was in liquidation or in process of being wound up, any shareholder, creditor, assignee, receiver or liquidator of such company may apply by petition to the court, asking that the company be brought within the provisions of the said act, and the court may make such order, &c.

3. 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 the said act or may appoint some other person to be liquidator of the said company.

It will be seen that neither incorporated banks nor savings banks are mentioned in the section just recited, although mentioned specifically in sec. 1. Are we to conclude that the word "company" in sec. 2 was intended to include and has included incorporated banks and savings banks? Incorporated banks may be called companies; but a distinction between banking and other companies is clearly shown to have been drawn in sec. 1, and if it was intended that incorporated banks should be affected by the provisions of sec. 2 it is not unreasonable to expect to find "incorporated banks" or "an incorporated bank" inserted in sec. 2, and when we consider how essentially banks differ from insurance companies I would feel forced to the conclusion that the provisions of sec. 2 were not intended to apply to incorporated banks.

If section two, for the reasons I have given or shall hereafter give, does not apply to banks then the provisions of section three are equally inapplicable, but why is it at all necessary to speculate as to section two, which as I have before said does not mention banks, when we find ample and full provision as to them in

1887
 MOTT
 v.
 THE BANK
 OF NOVA
 SCOTIA.

In re THE
 BANK OF
 LIVERPOOL.

Henry J.

1887

MOTT

v.
THE BANK
OF NOVA
SCOTIA.

In re THE
BANK OF
LIVERPOOL.

Henry J.

section seven taken with some modifications from the act of 1882.

The first one of the imported sections is in section seven of the act of 1884 and is as follows :

In the case of a bank the application for a winding up order must be made by a creditor for a sum not less than a thousand dollars, and the court must before making the order direct a meeting of the shareholders of the bank and a meeting of the creditors of the bank to be summoned, held and conducted as the court directs, for the purpose of ascertaining their respective wishes as to the appointment of liquidators.

The next in order of the imported sections provides that the court may appoint chairmen of the meetings, &c.

The next provides for the mode of taking the votes at the meetings and the last provides that

The chairman of each meeting must report the result thereof to the court, and if a winding up order is made the court shall appoint three liquidators to be selected in its discretion after such hearing of the parties as it may deem expedient from among the persons nominated by the majorities and the minorities of the shareholders and creditors at such meeting respectively.

It will thus be seen how carefully the rights and interests of all parties connected with banks were provided to be guarded. Between section two and the first of the imported sections there is this important difference. Under the former the application for a winding up order may be made by any shareholder, creditor, assignee, receiver or liquidator of a company but under the latter (in the case of banks) the application

Must be made by a creditor for a sum not less than one thousand dollars.

A shareholder, creditor for less than a thousand dollars, receiver or liquidator could not apply for a winding up order under that provision.

Under sec. 2 there is no provision for any preliminary meeting of shareholders or creditors, but under the first of the imported sections the court has no power

to appoint liquidators until meetings are held and the result of them reported to the court. Under secs. 2 and 3 one liquidator may be appointed, but under the provisions of the first and last of the imported sections liquidators must be appointed, and under the latter section the member is fixed at three.

The act plainly says that in the case of a company other than a banking company sec. 2 shall apply, but it as plainly says that as to a bank the four imported sections shall apply. If not, why should there be any such special provisions in the case of a bank? Did the legislature make them to become ineffectual for the objects evidently intended by them, to be over-riden by the provisions of sections 2 and 3? The first section provides that the petition for a winding up order must be "as in this act set forth." Section two provides for an application for an order to wind up an insolvent company, but when we would ascertain how such an application should be made in the case of a bank "as in this act set forth" we must refer to the first of the imported sections and be guided by it and the three following sections. In the case of a company one mode is provided and in the other an essentially different course is required to be taken. Section 103 of the act of 1882 provides for the appointment in the case of a bank of three liquidators.

If no one has been so nominated (at the preliminary meeting) the three liquidators must be chosen by the court—if less than three have been nominated the requisite additional liquidator or liquidators must be chosen by the court.

That section was in force when the act of 1884 was passed and was left untouched and unrepealed by the latter act. If it was intended to apply the provisions of section two to the case of a bank such a counter provision would have been repealed. Sections 99, 100, 101 and 102 are re-enacted by the act of 1884 and section 103 completes the provisions for the appoint-

1887

MOTT

v.
THE BANK
OF NOVA
SCOTIA.In re THE
BANK OF
LIVERPOOL.

Henry J.

1887
 MOTT
 v.
 THE BANK
 OF NOVA
 SCOTIA.
 In re THE
 BANK OF
 LIVERPOOL.
 Henry J.

ment of three liquidators; and its having been left untouched by the subsequent act is conclusive evidence of the intention of the legislature to place banks, in regard to a winding up order, in a totally different position from that of companies. The petition in this case was made by the respondent bank as assignee of the insolvent bank, and although it alleges that the petitioners were creditors of the insolvent bank for an amount more than a thousand dollars a question might be raised as to the validity of the application as they did not petition as a creditor; but in the view I hold of the law it is unnecessary to refer to that objection.

No meeting was held by direction of the court as prescribed by the statutes and therefore, in my opinion, the court had no power to appoint liquidators and in any event, the appointment of one only was void.

I am, for the reasons given, of opinion the appeal should be allowed and the appointment of the respondent as liquidator annulled with costs.

GWYNNE J.—In my opinion the 2nd and 3rd sections of 47 Vic. ch. 39 applies to banks as well as to all other companies mentioned in the first section, and the object of the sections, as it appears to me, is to make provision in respect of companies which already at the time of the passing of the act were in process of liquidation in insolvency, different from the provision made in the case of companies which although in a state of insolvency had not yet been brought into liquidation by process of law, or which after the passing of the act should become insolvent. In the case of companies already in process of liquidation, and having an assignee or liquidator already appointed, the proceedings directed by the act to be taken for the ap-

pointment of an assignee or liquidator of a company about to be but not yet brought into liquidation might reasonably be dispensed with, and therefore in the case of a petition under the 2nd sec. of 47 Vic. ch. 39, the court is authorized to appoint the assignee or liquidator already appointed to be the assignee or liquidator to continue the proceedings in a winding up to be thereafter taken under the statute, 45 Vic. ch. 23, while section 99 and the subsequent sections apply only to the case of a bank in insolvent circumstances, but not yet brought into liquidation in insolvency. In the latter case a creditor of the bank sought to be brought into liquidation by process of law is the only person authorized to make the application, while in the case of an application under sec. 2 of 47 Vic. ch. 39 to have proceedings already commenced to wind up an insolvent company brought under the operation of 45 Vic. ch. 23, a shareholder, creditor, assignee, receiver, or liquidator may be the applicant, shewing that the legislature was making provision for a case different from the case of a bank which although in insolvent circumstances had not yet been brought under process of liquidation. I am of opinion, therefore, that the appeal should be dismissed with costs and that the order of the Chief Justice of the Supreme Court of Nova Scotia should stand.

1887
 MOTT
 v.
 THE BANK
 OF NOVA
 SCOTIA.
 In re THE
 BANK OF
 LIVERPOOL.
 Gwynne J.

Appeal allowed with costs.

Solicitor for appellants: *Otto. S. Weeks.*

Solicitors for respondents: *Graham, Tupper, Borden & Parker.*