

Div. Ct.]

PHOENIX MUTUAL INSURANCE CO. V. DEANS.

[Div. Ct.]

company desiring to wind up its affairs and withdraw from business.

2. That the company, even if within the Act, or if treated as levying this assessment under their statutory powers, was not *sui juris* at the date of the assessment in question, 21st April, 1882, as it did not possess a *de jure* Board of Directors, and that the assessment so levied is therefore simply nugatory and void.

3. If the assessment is properly and legally levied—under the company's statutory powers, or otherwise—the assessment is itself invalid, because it is not an assessment upon the premium notes and undertakings "in proportion to the amount of the said notes or undertakings" (R. S. O. cap. 161, sec. 50); that the resolution directing the same is irregular and informal, and does not comply with the statute in that behalf; that prior assessments of the company—notably those of the 11th November and 16th December, 1881—were also irregular and invalid, and the premium notes and undertakings assessed under such former invalid assessments are not included in the assessment in question—in other words, they are not re-assessed, and therefore, the present assessment is hopelessly and incurably defective, even if a general assessment of all balances unpaid upon all premium notes and undertakings could under all the circumstances of the case be sustained.

As to the first point, that the provisions of the Winding up Act do not apply, I do not think I need dwell long upon this objection. That is an objection which I think should be taken in the original proceedings, instituted for the purpose of winding up the company. The Winding up Act, by sect. 27, gives the right of appeal from any order of the County Judge to the Court of Appeal or one of its judges, which right would of course extend to the initial winding up order equally with any other. It has already been held by the Court of Appeal that insurance companies, incorporated under Provincial statutes, fall within the classes of joint stock companies affected or intended to be affected by the Winding up Act, and that too, notwithstanding other statutory provisions, may give special powers to the Court of Chancery to deal with the Government deposit of insurance companies: *Re Union Fire Insurance Co.* 7 App. R. 783. It appears also from the winding up order obtained in the case of the present company, that the company as

such was represented by counsel upon the application of the petitioners, for the order in question, before the County Judge, and as the defendant is a member of the company I think he cannot be heard to attack the validity of the order in this collateral proceeding, he being deemed in law to be a party to the obtaining of it. Any question of lack of power in the judge to grant the order, or of the peculiar condition of the company's affairs, taking the case out of the operation of the Act, would be questions to be settled by appeal to the proper tribunal. Sitting as a judge of first instance, and with this order unreversed and unappealed against, I must assume that the proceedings leading to its issue were regular, and am only concerned in the regularity and validity of the subsequent steps alleged to have been taken under the Winding up Act, whereby it is claimed that this defendant has become liable to pay the amount of his undertaking: *Upton v. Hansborough*, 3 Bissel N.Y. 426.

The second objection is more formidable, and will require closer consideration.

The Winding up Act, by sect. 8, sub-sect. 1, points out the consequences of proceedings to wind up: "The company shall, from the date of the commencement of such winding up, cease to carry on its business except in so far as may be required for the beneficial winding up thereof . . . the corporate state and the corporate powers of the company shall, notwithstanding it may be otherwise provided by the Act, charter, or instrument of incorporation, continue until the affairs of the company are wound up."

Sub-sect. 6 enacts, "Upon the appointment of liquidators all the powers of the directors shall cease except in so far as the company, in general meeting, or the liquidators may sanction the continuance of such powers."

In this case the company, at a general meeting of its members, subsequent to the winding up order, expressly sanctioned the continuance of certain powers to the directors, amongst others the power to levy assessments under sec. 47 of R. S. O. cap. 161; and the assessment sued for in this action is an assessment levied by the directors pursuant to these express powers so conferred upon them. But it is contended that on the 21st April, 1882, (the date of the assessment), or even at the date of the general