

## SECT. 15.

Winding up  
in General.

How com-  
pany can be  
extinguished.

Different  
kinds of  
winding up.

Provisions  
generally  
applicable.

## SECT. 15.—Winding up in General.

645. There is no provision for extinguishing a registered company (*m*) by any formal application analogous to a *scire facias* to repeal the charter of a chartered company (*n*); it can only be extinguished by winding up on certain specified grounds (*o*), which differ according to the mode in which the winding up is to be brought about (*p*), or in certain cases by being struck off the register without any winding-up proceedings being taken (*q*).

646. The winding up of a company may be either (1) by the court (*r*); or (2) voluntary (*s*); or (3) subject to the supervision of the court (*t*).

The provisions of the Act of 1908 with respect to winding up apply, unless the contrary appears, to the winding up of a company in any of these three modes (*u*), different provisions, as a rule, relating to each particular mode.

647. The following provisions are of general application, namely, those relating to the liabilities as contributories of past and present members of the company (*a*); the meaning of the term "contributory" (*b*); the nature of a contributory's liability (*c*); the death, bankruptcy or marriage of a contributory (*d*); the proof of debts of all descriptions (*e*); the application of bankruptcy rules in the case of insolvent companies (*f*); the preferential payment of certain kinds of debts (*g*); fraudulent preference (*h*); the effect of floating

*Medicine Hat Land Co., Ltd.*, [1908] 2 Ch. 652, C. A. For the position where in a winding up the assets are sufficient to pay the principal of the debt, but not the interest, see *Re Whitaker, Whitaker v. Palmer*, [1904] 1 Ch. 299.

(*m*) As to unregistered companies, see p. 394, *post*.

(*n*) See title CORPORATIONS, Vol. VIII., p. 400.

(*o*) *Reuss (Princess) v. Bos* (1871), L. R. 5 H. L. 176, 193, 197, 202; *Salomon v. Salomon & Co.*, [1897] A. C. 22, 30.

(*p*) See pp. 391 *et seq.*, 569 *et seq.*, 594 *et seq.*, *post*.

(*q*) *Re Wallasey Brick and Land Co.* (1894), 63 L. J. (OH.) 415.

(*r*) See pp. 391 *et seq.*, *post*.

(*s*) See pp. 569 *et seq.*, *post*.

(*t*) See pp. 594 *et seq.*, *post*.

(*u*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 122 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 31 (2)]. The provisions of the Act of 1908, with respect to winding up do not apply to any company of which the winding up commenced before April 1st, 1909, but every such company must be wound up in the same manner and with the same incidents as if the Act had not passed, and, for the purposes of the winding up, the Act or Acts under which the winding up commenced remain in full force (*ibid.*, s. 287). The practice in winding up is, for the most part, regulated by the Companies (Winding-up) Rules, 1909, as to which see further pp. 552 *et seq.*, *post*.

(*a*) *Ibid.*, s. 123; see p. 487, *post*.

(*b*) *Ibid.*, s. 124; see p. 487, *post*.

(*c*) *Ibid.*, s. 125; see p. 492, *post*.

(*d*) *Ibid.*, ss. 126—128; see pp. 489, 490, *post*.

(*e*) *Ibid.*, s. 206; see p. 507, *post*.

(*f*) *Ibid.*, s. 207; see p. 512, *post*.

(*g*) *Ibid.*, s. 209; see p. 516, *post*.

(*h*) *Ibid.*, s. 210; see p. 544, *post*.

charges (*i*); paying classes of creditors in full and entering into compromises or arrangements (*k*); misfeasances by officers of the company (*l*); falsification of books (*m*); perjury (*n*); company's books being evidence (*o*); disposal of books and papers (*p*); setting aside the dissolution of the company (*q*); information as to pending liquidations (*r*); and the company's liquidation account (*s*).

A winding up under the supervision of the court is for many purposes deemed to be a winding up by the court (*t*); and in a voluntary winding up, on application duly made, the court may exercise any powers which are incident to its own jurisdiction to wind up (*u*).

SECT. 15.  
Winding up  
in General.

Supervision  
proceedings.

Courts  
which have  
winding-up  
jurisdiction.

## SECT. 16.—Winding up by the Court.

## SUB-SECT. 1.—Jurisdiction.

## (i.) In General.

648. The courts having jurisdiction to wind up companies registered in England (*w*) are the High Court of Justice, the Chancery Courts of the Counties Palatine of Lancaster and Durham, and certain county courts (*a*), and each court has for the purposes of that jurisdiction all the powers of the High Court (*b*), and every prescribed officer of the court must perform any duties which an officer of the High Court may discharge by order of the judge thereof or otherwise in relation to the winding up of a company (*c*). A county court cannot, however, issue a writ of *fiery facias* addressed to the sheriff of the county for the purposes of enforcing an order which directs payment of money to a liquidator (*d*); nor can it decide a question as to title to property which arose before the winding up (*e*).

(*a*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 212; see p. 348, *ante*.

(*k*) *Ibid.*, s. 214; see p. 602, *post*.

(*l*) *Ibid.*, s. 215.

(*m*) *Ibid.*, s. 216.

(*n*) *Ibid.*, s. 218.

(*o*) *Ibid.*, s. 220; see p. 505, *post*.

(*p*) *Ibid.*, s. 222; see p. 563, *post*.

(*q*) *Ibid.*, s. 223; see p. 567, *post*.

(*r*) *Ibid.*, s. 224; see p. 455, *post*.

(*s*) *Ibid.*, ss. 229, 230; see p. 451, *post*.

(*t*) *Ibid.*, s. 203.

(*u*) *Ibid.*, s. 193; see p. 582, *post*.

(*w*) As to unregistered companies, see pp. 394, 650, *post*.

(*a*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 131 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 1]. As to the jurisdiction to wind up building societies and industrial and provident societies, see p. 394, *post*.

(*b*) The High Court cannot issue a writ of prohibition to a county court wrongly exercising this jurisdiction; the remedy is by appeal (*Re New Par Consoles* (No. 2), [1898] 1 Q. B. 669, C. A.); compare *Skinner v. Northallerton County Court Judge*, [1899] A. C. 439.

(*c*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 131 (6) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 1 (6)].

(*d*) *Re Bassett's Plaster Co.*, [1894] 2 Q. B. 96.

(*e*) *Re Ilkley Hotel Co.*, [1893] 1 Q. B. 248.

## (ii.) Courts and Officers exercising Jurisdiction.

**649.** Where the amount of a company's share capital, paid up or credited as paid up, exceeds £10,000, the jurisdiction is in the High Court, or, in the case of a company whose registered office is situate within the jurisdiction of either of the Palatine courts, either in the High Court or in that Palatine court (*f*).

A guarantee company having no share capital, or an unlimited company without such capital, may be wound up by the High Court (*g*).

Subject to general rules and to orders of transfer made under the Judicature Acts, the winding-up jurisdiction of the High Court is, as the Lord Chancellor from time to time by general order directs, exercised, either generally or in specified classes of cases, either by such judge or judges of the Chancery Division as the Lord Chancellor assigns to exercise that jurisdiction, or by the judge who, for the time being, exercises the bankruptcy jurisdiction of the High Court (*h*).

**650.** Where the amount of the company's share capital, paid up or credited as paid up, does not exceed £10,000, the jurisdiction is (subject as stated below) in the county court in the district of which the registered office of the company is situated (*i*). The Lord Chancellor may, however, by order exclude a county court from having winding-up jurisdiction, and for the purposes of that jurisdiction may attach its district, or any part thereof, to the High Court or to any other county court, and may revoke or vary any such order. In exercising these powers the Lord Chancellor must provide that a county court shall not have jurisdiction unless it has for the time being jurisdiction in bankruptcy; but his order does not affect any jurisdiction or powers vested in any county court exercising the stannaries jurisdiction (*k*). Under existing rules and orders neither the City of London Court nor any county courts within the London bankruptcy jurisdiction have winding-up jurisdiction, even where the paid-up capital of the company does not exceed £10,000;

(*f*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 131 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 1 (2)]. As to unregistered companies, see p. 647, *post*.

(*g*) *Re Monmouthshire and South Wales Employers Mutual Indemnity Society* [1909] W. N. 6; *Re North of England Iron Steamship Insurance Association*, [1900] 1 Ch. 481.

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 132 [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 2]. The jurisdiction is at present exercised by SWINFEN EADY and NEVILLE, JJ.

(*i*) *Ibid.*, s. 131 (3) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 1 (3)]. The expression "registered office" means the place which has longest been the registered office of the company during the six months immediately preceding the presentation of the petition for winding up (*ibid.*, s. 131 (8) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 32 (3)]).

(*k*) *Ibid.*, s. 131 (5) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 1 (5)]; see *Re New Terras Tin Mining Co.*, [1894] 2 Ch. 344.

and outside that area only some county courts have jurisdiction in such cases (*l*).

**651.** Where a company is formed for working mines within the stannaries and is not shown to be actually working mines beyond the limits of the stannaries, or to be engaged in any other undertaking beyond those limits, or to have entered into a contract for such working or undertaking, the jurisdiction to wind up is in the court exercising the stannaries jurisdiction, whatever may be the amount of the capital of the company, and wherever its registered office is situate (*m*).

**652.** Nothing in the provisions above stated invalidates a proceeding by reason of its being taken in a wrong court (*n*).

The winding up or any proceedings therein may at any time and at any stage be transferred from one court to another, or may be retained in the court in which the proceedings were commenced, although it may not be the court in which they ought to have been commenced (*o*).

**653.** The officers of the court are the registrars (*p*), the official receivers (*q*), and, for most purposes, the liquidators (*r*).

## (iii.) Companies which may be wound up by the Court.

**654.** The Act of 1908 provides for the winding up of the following companies (*s*), namely, (1) companies formed and registered under the Act of 1908; or (2) existing companies (*a*); or (3) companies registered but not formed under the Joint Stock Companies Acts (*b*) or the Companies Act, 1862 (*c*); or (4) companies registered but not formed under the Act of 1908 (*d*), although the registration has taken place with a view to the winding up (*e*); or (5) unregistered companies (*f*).

(*l*) *Re Court Bureau* (No. 2), [1891] W. N. 15; *Re Real Estates Co.*, [1893] 1 Ch. 398.

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 131 (4) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 1 (4)]; see p. 659, *post*.

(*n*) *Ibid.*, s. 131 (7) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 1 (7)].

(*o*) *Ibid.*, s. 133 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 3 (1)]; see p. 541, *post*.

(*p*) See note (*t*), p. 541, *post*.

(*q*) See p. 423, *post*.

(*r*) See p. 428, *post*.

(*s*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 122; see p. 36, *ante*.

(*a*) For the definition, see p. 36, *ante*.

(*b*) See p. 36, *ante*.

(*c*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 246.

(*d*) *Ibid.*, ss. 245, 263 (ii).

(*e*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 249 (1); *Southall v. British Mutual Life Assurance Society* (1871), 6 Ch. App. 614. A railway company incorporated under a special Act, which has voluntarily registered under Part VII. of the Act of 1908 (see p. 61, *ante*), may be wound up by the court (*Re Ennis and West Clare Rail. Co.* (1879), 3 L. R. Ir. 94); see *Re London Indiarubber Co.* (1866), 1 Ch. App. 329; *Bowes v. Hope Life Assurance Society* (1865), 11 H. L. Cas. 389; *Re Bank of London and National Provincial Insurance Association* (1871), 6 Ch. App. 421.

(*f*) See p. 647, *post*.

SECT. 16.

Winding up  
by the  
Court.Stannaries  
cases.Commencing  
proceedings  
in wrong  
court.Officers of  
the court.Winding up  
under the  
Act of 1908.

SECT. 16.  
Winding up  
by the  
Court.

Companies  
barred  
under the  
Act of 1908.

There are also certain companies and societies which, by statutes other than the Act of 1908, may be wound up under that Act, namely, unregistered assurance companies (*g*), registered building societies (*h*), registered industrial and provident societies (*i*).

**655.** There is no power under the Act of 1908 to wind up such non-trading bodies as literary or scientific institutions (*k*), or ordinary or non-proprietary clubs (*l*); or illegal companies (*m*); or foreign companies with no assets in England (*n*); or trade unions (*o*); or companies registered in Scotland or Ireland, even though they have branch offices in England (*p*).

A company which has been dissolved cannot be wound up unless it is an unregistered company (*q*) or the dissolution has been declared to have been void (*r*). Nor can it be wound up if it has been dissolved by being struck off the register as defunct, except, perhaps, where the dissolution has been obtained by fraud (*s*).

An abortive company which has not, in fact, been formed cannot be wound up as an unregistered company (*t*).

If, however, the court does make an order to wind up a company without having jurisdiction, the order cannot be treated as a nullity, and, unless and until it is discharged on appeal, it is binding

(*g*) *Re Great Britain Mutual Life Assurance Society* (1880), 16 Ch. D. 246, C. A.; and see Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 15; pp. 624, 633, *post*.

(*h*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 8; see title BUILDING SOCIETIES, Vol. III., pp. 394—397.

(*i*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 58; see *Re Ilfracombe Permanent Mutual Benefit Building Society*, [1901] 1 Ch. 102.

(*k*) *Re Bristol Athenæum* (1889), 43 Ch. D. 236.

(*l*) *Re St. James's Club* (1852), 2 De G. M. & G. 333. If a club is inadvertently wound up, a member's name will be taken off the list of contributories (*Re Newcombe (A. Martin)* (1908), *Times*, October 21, 1908); and see title CLUBS, Vol. IV., p. 437.

(*m*) *Re Padstow Total Loss and Collision Assurance Association* (1882), 20 Ch. D. 137, C. A.; compare *Re South Wales Atlantic Steamship Co.* (1876), 2 Ch. D. 763, C. A.; and see *Re Arthur Average Association for British, Foreign and Colonial Ships, Ex parte Hargrove & Co.* (1875), 10 Ch. App. 542; *Hume v. Record Reign Jubilee Syndicate* (1899), 80 L. T. 404. But it is no ground of objection that the company is carrying on an illegal business (*Re Brinsmead (Thomas Edward) & Sons*, [1897] 1 Ch. 406, C. A.; *Re International Securities Corporation*, 25 T. L. R. 31, C. A.); and see p. 398, *post*.

(*n*) *Re Lloyd Generale Italiano* (1885), 29 Ch. D. 219.

(*o*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 5; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 68), s. 294.

(*p*) *Re Scottish Joint Stock Trust*, [1900] W. N. 114.

(*q*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 268 (iii.) (a); see p. 650, *post*.

(*r*) *Ibid.*, s. 223 (1).

(*s*) *Ibid.*, s. 242; *Re Pinto Silver Mining Co.* (1878), 8 Ch. D. 273, C. A.; *Re London and Caledonian Marine Insurance Co.* (1879), 11 Ch. D. 140, C. A.; and see p. 567, *post*.

(*t*) *Re Imperial Anglo-German Bank* (1872), 26 L. T. 229, C. A. As to the jurisdiction of the High Court, independently of any statute, to wind up the affairs of a company, see *Jones v. Charlemont (Lord)* (1848), 16 Sim. 271; *Clements v. Bowes* (1852), 17 Sim. 167, 171; *Ward v. Sittingbourne and Sheerness Rail. Co.* (1874), 9 Ch. App. 488.

SECT. 16.  
Winding up  
by the  
Court.

Grounds for  
winding up  
by court.

Non-  
commence-  
ment of  
business.

on the creditors and contributories of the company (*u*), but not on strangers (*w*).

SUB-SECT. 2.—*Grounds for Winding up.*

**656.** A company (not being an unregistered company) (*x*) may be wound up by the court—

(1) If the company has by special resolution (*y*) resolved that the company be wound up by the court;

(2) If default is made in filing the statutory report or in holding the statutory meeting (*a*);

(3) If the company does not commence its business within a year from its incorporation (*b*), or suspends its business for a whole year;

(4) If the number of members is reduced, in the case of a private company (*c*), below two, or, in the case of any other company, below seven (*d*);

(5) If the company is unable to pay its debts;

(6) If the court is of opinion that it is just and equitable that the company should be wound up (*e*);

(7) If the court is satisfied that an existing voluntary winding up, or a winding up subject to supervision, cannot be continued with due regard to the interests of creditors or contributories (*f*).

(8) If the company, being an assurance company, makes default in compliance with any of the requirements of the Assurance Companies Act, 1909, for three months after notice of default by the Board of Trade (*g*).

**657.** Non-commencement, within a year, of business refers to actually setting to work, not merely allotting shares (*h*). An

(*u*) *Re Padstow Total Loss and Collision Assurance Association* (1882), 20 Ch. D. 137, C. A.; *Re London Marine Insurance Association, Andrews' and Alexander's Case, Chatts' Case, Cook's Case, Crew's Case* (1869), L. R. 8 Eq. 176, 189, 193; *Re Arthur Average Association* (1876), 3 Ch. D. 522.

(*w*) *Re Bowling and Welby's Contract*, [1895] 1 Ch. 663, C. A.; *Re Newcombe (A. Martin)* (1908), *Times*, October 21, 1908.

(*x*) As to the meaning of unregistered company, see note (*l*) p. 647, *post*; as to the grounds of winding up an unregistered company, see p. 650, *post*.

(*y*) As to a special resolution, see p. 259, *ante*.

(*a*) As to the statutory report and meeting, see p. 248, *ante*. The petition in this case cannot be presented before the expiration of fourteen days after the last day on which the meeting ought to have been held, and then only by a shareholder (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 137 (1) (b)).

(*b*) The date of incorporation is stated in the certificate of incorporation (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 16 (2)).

(*c*) As to private companies, see p. 73, *ante*.

(*d*) "Members" means actual members, and does not include past members, or representatives of deceased members, or trustees of bankrupt members (*Re Bowling and Welby's Contract*, [1895] 1 Ch. 663, C. A.).

(*e*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 129 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 79; Companies Act, 1900 (63 & 64 Vict. c. 48), s. 12 (8); Companies Act, 1907 (7 Edw. 7, c. 50), s. 37 (4)].

(*f*) *Ibid.*, s. 137 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 14]. S. 14 of the Act of 1890 only expressly gave the official receiver the right to petition in this case. An order ought not to be made at his instance except in a strong case, as where a public examination is absolutely necessary (*Re Jubilee Sites Syndicate*, [1899] 2 Ch. 204).

(*g*) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 23; see p. 642, *post*.

(*h*) *Re South Luipards Vlei Gold Mines* (1897), 13 T. L. R. 504, C. A.; *Re Caementum (Parent) Co. Ltd* [1908] W. N. 657

SECT. 16.  
Winding up  
by the  
Court.

order on this ground may be made although the majority of the shareholders oppose (i). An order will not be made, however, where the company has commenced business abroad within the year and a *bonâ fide* intention is shown to commence business in this country (j). Nor will an order be made on the ground that the company has suspended its business for a year if a shareholder petitioning is opposed by a large majority of the shareholders and there is a *bonâ fide* intention to proceed with the business (k). A company does not cease to carry on business because it has given up part of its business (l). An order may be made, although nothing has been paid on the shares and there are no debts (m).

Inability to  
pay debts.

**658.** A company (not being an unregistered company) is deemed to be unable to pay its debts—

(1) If a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding £50 then due, has served on the company, by leaving the same at its registered office (n), a demand under his hand requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or

(2) If execution or other process, issued on a judgment decree or order of any court in favour of a creditor of the company, is returned unsatisfied in whole or in part; or

(3) If it is proved to the satisfaction of the court that the company is unable to pay its debts; in determining whether a company is unable to pay its debts, the court is to take into account the contingent and prospective liabilities of the company (o).

In the case of failure to satisfy the statutory demand the petition must not be presented before the three weeks have expired (p). Omission by a company *bonâ fide* disputing the debt is not neglecting to comply with the statutory demand (q). Default in

(i) *Re Tumacacori Mining Co.* (1874), L. R. 17 Eq. 534.

(j) *Re Capital Fire Insurance Association* (1882), 21 Ch. D. 209; and see *Re Petersburg and Viborg Gas Co.*, [1874] W. N. 196; *Reuss (Princess) v. Bos* (1871), L. R. 5 H. L. 176.

(k) *Re Middlesborough Assembly Rooms Co.* (1880), 14 Ch. D. 104, C. A.; *Re Metropolitan Railway Warehousing Co.* (1867), 36 L. J. (CH.) 827, C. A.; *Re Tomlin Patent Horse Shoe Co.* (1886), 55 L. T. 314.

(l) *Norwegian Titanic Iron Co., Ltd.* (1865), 35 Beav. 223; *Re New Gas Co.* (1877), 5 Ch. D. 703, C. A.

(m) *Re Tumacacori Mining Co.*, *supra*; *Re Caementium (Parent) Co., Ltd.*, [1908] W. N. 257; compare *Re New Gas Co. supra*, where the order was refused.

(n) As to the case where there is no registered office, see *Re British and Foreign Gas Generating Apparatus Co.* (1865), 13 W. R. 649.

(o) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 130 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 80; Companies Act, 1907 (7 Edw. 7, c. 50), s. 28]. As to the law before 1907 relating to contingent and prospective liabilities, see *Re Melbourne Brewery and Distillery*, [1901] 1 Ch. 453; *Re European Life Assurance Society* (1869), L. R. 9 Eq. 122, 127. As to when an unregistered company is deemed to be unable to pay its debts, see p. 651, *post*.

(p) *Re Catholic Publishing and Bookselling Co.* (1864), 2 De G. J. & Sm. 116 C. A.

(q) *Re London and Paris Banking Corporation* (1874), L. R. 19 Eq. 444. As

SECT. 16.  
Winding up  
by the  
Court.

complying with the statutory demand of a creditor gives not only him, but other creditors and contributories the right to petition for a winding up (r).

Inability to pay debts may be shown in other ways than by proof of non-compliance with the statutory demand, as, for instance, where a bill or note has been dishonoured at maturity (s), or a judgment creditor has not issued execution because the company's solicitor has told him that there are no assets, or no unmortgaged assets, on which he can levy (t).

A company, not being a life assurance company (a), may also be wound up on the ground of inability to pay debts when it is commercially insolvent, namely, unable to pay its debts as they become due, although its assets when realised, including uncalled capital, exceed its liabilities (b).

**659.** The words as to its being "just and equitable" to wind up are not to be read as being *ejusdem generis* with the preceding words of the enactment (c).

It is just and equitable to wind up a company where its substratum is gone, as where its main object is to acquire and work a mine, or patent, or concession which cannot be obtained, or the mine is worthless or the patent is invalid, or the concession has lapsed (d); or where the company is a bubble company (e); or where its only business is *ultra vires* of the company (f); or where it is a bank,

Meaning of  
"just and  
equitable."

to default in paying a demand in excess of what is due, see *Cardiff Preserved Coal and Coke Co. v. Norton* (1867), 2 Ch. App. 405.

(r) *Re Anglesea Coal and Coke Co., Ex parte Owen* (1861), 4 L. T. 684.

(s) *Re Globe New Patent Iron and Steel Co.* (1875), L. R. 20 Eq. 337; *Re Great Northern Copper Mining Co. of South Australia* (1869), 20 L. T. 264.

(t) *Re Flagstaff Silver Mining Co. of Utah* (1875), L. R. 20 Eq. 268; *Re Yate Collieries and Limeworks Co.*, [1883] W. N. 171.

(a) As to life and other assurance companies, see pp. 616 *et seq.*, *post*.

(b) *Re National Funds Assurance Co.* (1876), 24 W. R. 1066; *Re European Life Assurance Society* (1869), L. R. 9 Eq. 122.

(c) *Re Amalgamated Syndicate*, [1897] 2 Ch. 600; *Re Brinsmead (Thomas Edward) & Sons*, [1897] 1 Ch. 406, C. A.; *Re Sailing Ship "Kentmere" Co.*, [1897] W. N. 58. Compare *Re Suburban Hotel Co.* (1867), 2 Ch. App. 737; *Re Langham Skating Rink Co.*, (1877) 5 Ch. D. 669, C. A.

(d) *Re Haven Gold Mining Co.* (1882), 20 Ch. D. 151, C. A.; *Re German Date Coffee Co.* (1882), 20 Ch. D. 169, C. A.; *Re Red Rock Gold Mining Co.* (1889), 1 Meg. 436; *Re International Cable Co.* (1890), 2 Meg. 183; compare *Re New Gas Co.* (1877), 37 L. T. 111, C. A.; *Norwegian Titanic Iron Co., Ltd.* (1865), 35 Beav. 223. As to the construction of the memorandum, see *Stephens v. Mysore Reefs (Kangundy) Mining Co., Ltd.*, [1902] 1 Ch. 745; *Pedlar v. Road Block Gold Mines of India, Ltd.*, [1905] 2 Ch. 427; *Campbell v. Australian Mutual Provident Society* (1908), 77 L. J. (P. C.) 117. And see generally *Pirie v. Stewart* (1904), 6 F. (Ct. of Sess.) 847 (loss of company's only vessel); *Re Palace Restaurants, Ltd.*, [1909] 127 L. T. Jo. 430 (restaurant company unable to acquire a site); *Symington v. Symington's Quarries, Ltd.* (1906), 8 F. (Ct. of Sess.) 121, where there was a deadlock and the order was made; *Re Furrier's Alliance, Ltd.* (1906), 51 Sol. Jo. 172, where there was a temporary deadlock and the order was refused; *Re Coolgardie Consolidated Gold Mines, Ltd.* (1897), 13 T. L. R. 301, C. A. (mines); *Re M'Donald Gold Mines, Ex parte Duncan* (1898), 14 T. L. R. 204, C. A. (mines); *Re Varieties, Ltd.*, [1893] 2 Ch. 235, where a resolution for voluntary liquidation passed by those whose conduct required investigation was disregarded.

(e) *Re London and County Coal Co.* (1866), L. R. 3 Eq. 355, 358.

(f) *Re Crown Bank* (1890), 44 Ch. D. 634.



SECT. 16.  
Winding up  
by the  
Court.

and its paid-up capital is exhausted, and its uncalled capital can only be called up in a winding up (*g*); or where a loss has been made on the company's principal adventure, such as providing seats for a procession which has taken place and the company is about to embark on further *ultra vires* adventures (*h*); or where a company is fraudulent in its inception and carries on business at a loss, without capital of its own (*i*); or where it is carrying on business at a loss and its remaining assets are insufficient to pay its debts (*k*); or where it desires to go into liquidation with a view to an object which alone can save it from insolvency (*l*); or where the business of the company is being carried on in its name for the sole benefit of debenture-holders who have taken possession (*m*).

Misconduct of directors (*n*) or of liquidators (*o*), or the fact that its business has been carried on at a heavy loss (if the company is not insolvent) (*o*), or the issue of shares at a discount (*p*), is not *per se* a ground for winding up. Nor is the fact that the company has acted dishonestly to outsiders (*q*).

SUB-SECT. 3.—Petitions.

(i.) *In General.*

Who may  
petition.

**660.** An application for the winding up of a company by the court is by petition, which may be presented by the company itself (*r*); or by any creditor or creditors (including any contingent or prospective creditor or creditors (*s*)); or by any contributory or

- (*g*) *Re Bristol Joint Stock Bank* (1890), 44 Ch. D. 703.  
 (*h*) *Re Amalgamated Syndicate*, [1897] 2 Ch. 600; but not necessarily where the company is going to do something *ultra vires* (*Re Irrigation Co. of France, Ex parte Fox* (1871), 6 Ch. App. 176, 184; *Re Pioneers of Mashonaland Syndicate*, [1893] 1 Ch. 731, 734).  
 (*i*) *Re Brinsmead (Thomas Edward) & Sons*, [1897] 1 Ch. 406, C. A.; *Re London and County Coal Co.* (1866), L. R. 3 Eq. 355.  
 (*k*) *Re Wey and Arun Junction Canal Co.* (1867), L. R. 4 Eq. 197; *Re Diamond Fuel Co.* (1879), 13 Ch. D. 400, C. A.; *Re Great Northern Copper Mining Co. of Australia* (1869), 17 W. R. 462; *Re Bristol Joint Stock Bank*, *supra*.  
 (*l*) *Re Australian Joint Stock Bank*, [1897] W. N. 48.  
 (*m*) *Re Melson (Alfred) & Co., Ltd.*, [1906] 1 Ch. 841; *Re Crigglestone Coal Co., Ltd.*, [1906] 2 Ch. 327, C. A.  
 (*n*) *Re Anglo-Greek Steam Co.* (1866), L. R. 2 Eq. 1; *Re Bwlch-y-Plym Co.* (1867), 17 L. T. 235; *Re Gold Co.* (1879), 11 Ch. D. 701, C. A.  
 (*o*) *Re Factage Parisien* (1863), 13 W. R. 214, 330; *Re London and Mediterranean Banking Co.* (1866), 15 W. R. 33; *Re Suburban Hotel Co.* (1867), 2 Ch. App. 737; *Re Joint Stock Coal Co.* (1869), L. R. 8 Eq. 146; *Re New Zealand Quartz Crushing Co.*, [1873] W. N. 174.  
 (*p*) *Re Pioneers of Mashonaland Syndicate*, *supra*.  
 (*q*) *Re Medical Battery Co.*, [1894] 1 Ch. 444. See also, generally, *Re West Surrey Tanning Co.* (1866), L. R. 2 Eq. 737; *Re Fromm's Extract Co.* (1901), 17 T. L. R. 302, C. A.; *Re Kronand Metal Co.*, [1899] W. N. 14; *Re London and County Coal Co.* (1866), L. R. 3 Eq. 355; *Re General Phosphate Corporation*, [1893] W. N. 142.  
 (*r*) As to the costs of a petition presented by directors in their own names and dismissed, see *Smith v. Manchester (Duke)* (1883), 24 Ch. D. 611. If a petition is presented in the name of the company care must be taken that it is authorised by those who have the control of the company's affairs; see p. 223, *ante*.  
 (*s*) As, for instance, the holder of a bond whereby the company undertakes in consideration of monthly payments to pay the holder a sum certain on a certain day (*Re British Equitable Bond and Mortgage Corporation*, [1910] 1 Ch. 574).

SECT. 16.  
Winding-up  
by the  
Court.

contributories; or by all or any of those parties, together or separately (*t*); or by the official receiver in certain cases (*a*). A petition to wind up a trustee savings bank may be presented by the National Debt Commissioners or by a commissioner appointed under the Trustee Savings Banks Act, 1887, as well as by any person entitled to present a winding-up petition against a company (*b*).

An action for damages will lie for presenting a winding-up petition maliciously and without reasonable cause, though no special damage can be proved (*c*).

(ii.) *Creditor's Petition.*

**661.** The following persons are entitled to petition as creditors:—The assignee of a debt, if the assignment is not made while the creditor's petition is pending (*d*); the equitable assignee of part of a debt (*e*); the executor of a creditor, even before probate (*f*); a creditor in respect of a debt incurred by voluntary liquidators (*g*); a secured creditor (*h*); a judgment creditor (*i*); the holder of a bearer debenture (*j*); the holder of a debenture of a company incorporated by special Act and not registered under the Act of 1908 (*k*); and the holder of an investment bond (of an insolvent company)

Who may  
petition as  
creditors.

Prior to s. 28 of the Companies Act, 1907 (7 Edw. 7, c. 50), a contingent or prospective creditor could not petition except in the case of a life assurance company; see *Life Assurance Companies Act*, 1870 (33 & 34 Vict. c. 61), s. 21, now repealed and replaced by *Assurance Companies Act*, 1909 (9 Edw. 7, c. 49); see p. 636, *post*. As to a landlord in respect of rent not yet due, see *Re United Club and Hotel Co.* (1889), 60 L. T. 665; and as to a bill of exchange not yet matured, see *Re Powell (W.) & Sons*, [1892] W. N. 94; *Re Australian Joint Stock Bank*, [1897] W. N. 48. And see *Re Melbourne Brewery and Distillery*, [1901] 1 Ch. 453. As to the right of a creditor to a winding-up order, see note (*a*), p. 415, *post*.

(*t*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 137 (1) [*Companies Act*, 1862 (25 & 26 Vict. c. 89), s. 82; *Companies Act*, 1907 (7 Edw. 7, c. 50), s. 28]. If the petitioner dies before the hearing, an order of revivor may be made in favour of his personal representatives (*Re Dymovor Duffryn Collieries Co.*, [1878] W. N. 199; *Re Commercial Bank of London*, [1888] W. N. 214, where the order had been made in ignorance).

(*a*) See p. 403, *post*.

(*b*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 268 (1) (vi.) [*Trustee Savings Banks Act*, 1887 (50 & 51 Vict. c. 47), s. 3].

(*c*) *Quartz Hill Gold Mining Co. v. Eyre* (1883), 11 Q. B. D. 674, C. A.

(*d*) *Re London and Birmingham Flint Glass and Alkali Co., Ltd., Ex parte Wright* (1859), 1 De G. F. & J. 257; *Re Paris Skating Rink Co.* (1877), 5 Ch. D. 959, C. A.

(*e*) *Re Montgomery Moore Ship Collision Doors Syndicate* (1903), 72 L. J. (CH.) 624; but see *Bowles v. Baker*, [1910] W. N. 110.

(*f*) *Re Masonic and General Life Assurance Co.* (1885), 32 Ch. D. 373. Probate must be obtained before an order is made (*ibid.*).

(*g*) *Re Bank of South Australia* (2), [1895] 1 Ch. 578, C. A.

(*h*) *Re Portsmouth Borough (Kingston, Fratton and Southsea) Tramways Co.*, [1892] 2 Ch. 362; compare *Moor v. Anglo-Italian Bank* (1879), 10 Ch. D. 681; *Re Cambrian Mining Co., Ex parte Fell*, [1881] W. N. 125.

(*i*) *Re United Stock Exchange* (1884), 51 L. T. 687. The judgment is not conclusive evidence (*ibid.*); compare *Bowles v. Hope Life Insurance and Guarantee Co.* (1865), 11 H. L. Cas. 389.

(*j*) *Re Olathe Silver Mining Co.* (1884), 27 Ch. D. 278; compare *Re Uruguay Central and Hygueritas Rail. Co. of Monte Video* (1879), 11 Ch. D. 372.

(*k*) *Re Portsmouth Borough (Kingston, Fratton and Southsea) Tramways Co.*,

§ 16. Winding up by the Court.

which has not yet matured for payment (*l*). But the holder of debenture stock constituted by a trust deed is not a creditor in respect of interest for the payment of which there is not a direct covenant by the company with himself (*m*).

There is nothing in the Act requiring the debt to be of any minimum amount except in the case of a statutory demand, but the court will not as a rule make a winding-up order in respect of a debt less than £50 (*n*).

Who may not petition.

**662.** A winding-up order cannot be obtained by the surety, in respect of a mortgage debt, of another company which has assigned the equity of redemption to the company petitioned against on the terms that the latter indemnifies the former, even if he has paid part of the debt (*o*); or by a landowner whose land has been taken and whose purchase and compensation money has been assessed under the Lands Clauses Consolidation Act, 1845 (*p*), but whose title has not been investigated or accepted by the company (*q*); or by a person claiming unliquidated damages (*r*); or by a judgment creditor who has attached a debt due from the company to his judgment debtor (*s*), his course being to obtain judgment in an action and then petition (*t*).

A winding-up order ought not to be made on the petition of a creditor who has so charged or dealt with his debt as to pass the real interest therein to another person (*u*).

A winding-up order will not be made on a debt which is *bonâ fide* disputed by the company (*w*); but the court must see that the

[1892] 2 Ch. 362; *Re Herne Bay Waterworks Co.* (1878), 10 Ch. D. 42; *Re Exmouth Docks Co.* (1873), L. R. 17 Eq. 181.

(*l*) *Re British Equitable Bond and Mortgage Corporation*, [1910] 1 Ch. 574.

(*m*) *Re Dunderland Iron Ore Co.*, [1909] 1 Ch. 446.

(*n*) *Re Standring (Herbert) & Co.*, [1895] W. N. 99; *Re Fancy Dress Balls Co.*, [1899] W. N. 109; *Re Milford Docks Co.*, *Lister's Petition* (1883), 23 Ch. D. 292, 295. If the order is made, it is usually without costs (*ibid.*). But where the creditor is met with defiance, as when the company refuses to make calls, a winding-up order, with costs, will be made (*Re World Industrial Bank, Ltd.*, [1909] W. N. 148). And an order with costs will be made when the petitioner is supported by other creditors, making an aggregate indebtedness of over £50 (*Re Leyton and Walthamstow Cycle Co.*, [1901] W. N. 225). In *Re Yate Collieries and Limeworks Co.*, [1883] W. N. 171, NORTH, J., held that a creditor for less than £50 had established that the company was unable to pay its debts by proving that he was a judgment creditor, and that he had not issued execution on his judgment because the company's solicitors had informed him that a mortgagee had taken possession of all its property.

(*o*) *Re Law Courts Chambers Co.* (1889), 61 L. T. 669.

(*p*) 8 & 9 Vict. c. 18; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 83.

(*q*) *Re Milford Docks Co.*; *Lister's Petition*, *supra*.

(*r*) *Re Pen-y-Van Colliery Co.* (1877), 6 Ch. D. 477; *Re Gold Hill Mines* (1883), 23 Ch. D. 210, 213, C. A.

(*s*) *Re Combined Weighing and Advertising Machine Co.* (1889), 43 Ch. D. 99, C. A.

(*t*) *Pritchett v. English and Colonial Syndicate*, [1899] 2 Q. B. 428, C. A.

(*u*) *Re Pentalka Exploration Co.*, [1898] W. N. 55. This difficulty may be got over by joining the mortgagee as a co-petitioner (*Re Bartitsu Light Cure Institute* (1909), *Times*, January 13, 1909).

(*w*) *Re Gold Hill Mines* (1883), 23 Ch. D. 210, C. A.; *Re Brighton Club and*

§ 16. Winding up by the Court.

dispute is based on a substantial ground (*x*). If the petition has actually been presented it may be either dismissed or stayed (*a*), and an injunction may be granted restraining the advertisement of the petition (*b*). Where a petition has not been presented but is threatened in respect of a disputed debt, an injunction may be granted restraining the presentation (*c*). To save expense the court will sometimes decide the dispute as to the debt (*d*); in other cases the court adjourns the petition to enable the question to be decided in an action (*e*), and may order the amount of the alleged debt to be paid into court (*f*). Where the judgment for the debt on which the petition is presented is reversed before the hearing, the petition will be dismissed (*g*).

**663.** The court cannot give a hearing to a petition for winding up a company by a contingent or prospective creditor until such security for costs has been given as the court thinks reasonable, and until a *primâ facie* case for winding up has been established to the satisfaction of the court (*h*).

Contingent creditors.

(iii.) *Shareholder's Petition.*

**664.** The statutory right of a contributory to petition cannot be excluded or limited by the articles of association (*i*).

Petition by contributory.

A contributory is not entitled to present a winding-up petition unless (1) either the number of members is reduced, in the case of a private company, below two, or in the case of any other company,

*Norfolk Hotel Co.* (1865), 35 Beav. 204; *Re London Wharfing and Warehousing Co.* (1865), 35 Beav. 37.

(*x*) *Re King's Cross Industrial Dwellings Co.* (1870), L. R. 11 Eq. 149; *Re Imperial Hydropathic Hotel Co.*, Blackpool (1882), 49 L. T. 147, C. A.; *Re Great Britain Mutual Life Assurance Society* (1880), 16 Ch. D. 246, C. A.

(*a*) *Re Gold Hill Mines* (1883), 23 Ch. D. 210, C. A.; *Re Compagnie Générale des Asphaltes de Paris, Ex parte Neuchatel Asphalte Co.*, [1883] W. N. 17; *Re Rhodesian Properties, Ltd.*, [1901] W. N. 130.

(*b*) *Re A Company*, [1894] 2 Ch. 349.

(*c*) *Cadiz Waterworks Co. v. Barnett* (1874), L. R. 19 Eq. 182; *Niger Merchants Co. v. Capper* (1877), 18 Ch. D. 557, n.; *Cercle Restaurant Castiglione Co. v. Lavery* (1881), 18 Ch. D. 555; *New Travellers' Chambers, Ltd. v. Cheese and Green* (1894), 70 L. T. 271; *Merchant Banking Co. of London v. Hough*, [1874] W. N. 230; *Brown (John) & Co. v. Keeble*, [1879] W. N. 173.

(*d*) *Re Imperial Silver Quarries Co.* (1868), 16 W. R. 1220.

(*e*) *Re Imperial Guardian Life Assurance Society* (1869), L. R. 9 Eq. 447; *Re Inventors' Association* (1865), 12 L. T. 840; *Re Catholic Publishing and Book-selling Co.* (1864), 2 De G. J. & Sm. 116, C. A.

(*f*) *Re Compagnie Générale des Asphaltes de Paris, Ex parte Neuchatel Asphalte Co.*, *supra*.

(*g*) *Re Anglo-Bavarian Steel Ball Co.*, [1899] W. N. 80.

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 137 (1) (i.) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 28]. There is a similar provision in the Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 15; see p. 636, *post*. Presumably, where the company is already in voluntary liquidation it is unnecessary to consider whether a *primâ facie* case has been established or to order security; see *Re British Alliance Assurance Corporation* (1878), 9 Ch. D. 635. As to a creditor petitioning during a voluntary winding up, see p. 416, *post*.

(*i*) *Re Peveril Gold Mines, Ltd.*, [1898] 1 Ch. 122, C. A.; see *Payne v. Cork Co., Ltd.*, [1900] 1 Ch. 308, 315.

SECT. 16. below seven; or (2) the shares in respect of which he is a contributory, or some of them, either were originally allotted to him or have been held (*j*) by him, and registered in his name, for at least six months during the eighteen months before the commencement of the winding up, or have devolved on him through the death of a former holder (*k*).

Husband of shareholder. Where any person, as the husband of a female contributory, is himself a contributory, and a share has during the whole or any part of the six months been held by or registered in the name of the wife, or by or in the name of a trustee for the wife or for the husband, the share is deemed to have been held by and registered in the name of the husband (*l*).

Quasi-shareholders. A petition may be presented by a person who, although not registered, has obtained a judgment ordering the company to allot him shares and register him as a shareholder (*m*), or by the holder of scrip certificates entitling the holder to be a shareholder (*n*).

Default in filing statutory report. A petition on the ground of default in filing the statutory report, or in holding the statutory meeting, can only be presented by a shareholder, and then only after the expiration of fourteen days after the last day on which the meeting ought to have been held (*o*).

Where voluntary winding up. Where there is a voluntary winding up, whether under supervision or not, which cannot be continued with due regard to the interests of contributories, a contributory may present a petition for a winding up by the court (*p*).

Shareholder in arrear. Petitions by shareholders in arrear with calls have been dismissed on the ground that they have not performed their duty to the company (*q*). There is, however, no provision in the Act that all calls due must have been paid, and if calls on a petitioning shareholder are in arrear, the court will allow the petition to proceed on his paying the calls into court (*r*) or undertaking to submit to any order which the court may think fit to make as to the payment of calls, in which case, if the petition is dismissed, the undertaking will be enforced by ordering the calls to be paid (*s*).

(*j*) This means that the name of the contributory is registered as that of the holder of shares (*Re Wala Wynaad Indian Gold Mining Co.* (1882), 21 Ch. D. 849); compare *Re Positive Government Security Life Assurance Co.*, [1877] W. N. 23. As to the considerations to which the court will have regard on the question of ordering a winding up at the instance of a shareholder, see p. 413, *post*.

(*k*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 137 (1) (a) (i.), (ii.) [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 40].

(*l*) *Ibid.*, s. 137 (3) [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 40]; and see Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 6, 7, 13, 14.

(*m*) *Re Patent Steam Engine Co.* (1878), 8 Ch. D. 464.

(*n*) *Re Littlehampton etc. Steamship Co.* (1865), 2 De G. J. & Sm. 521, C. A.; compare *Re A Company*, [1894] 2 Ch. 349.

(*o*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 137 (1) (b) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 12 (3)].

(*p*) *Ibid.*, s. 137 (2); and see p. 416, *post*.

(*q*) *Re European Life Assurance Society* (1870), L. R. 10 Eq. 403; *Re Steam Stoker Co.* (1875), L. R. 19 Eq. 416.

(*r*) *Re Diamond Fuel Co.* (1879), 13 Ch. D. 400, not following *Re European Life Assurance Society*, *supra*; *Re Steam Stoker Co.*, *supra*.

(*s*) *Re Crystal Reef Gold Mining Co.*, [1892] 1 Ch. 408.

A fully-paid shareholder may, as a contributory, present a winding-up petition if he alleges and proves that there is a reasonable probability of a surplus being left for distribution amongst shareholders (*t*), but not otherwise (*a*).

(iv.) *Official Receiver's Petition.*

665. The official receiver attached to the court may present a petition for the winding up of a company already in liquidation, whether subject or not to the supervision of the court. The court cannot make a winding-up order on the petition unless it is satisfied that the existing winding up cannot be continued with due regard to the interests of the creditors or contributories (*b*), and it is not a matter of course to make a compulsory winding up order on the official receiver's petition. An order will be made, however, when the official receiver, after such an order, will possess any power which the voluntary liquidator cannot exercise, and which is necessary in order that there may be an efficient winding up in the interests of the creditors or contributories, as for instance, where misfeasance proceedings are contemplated and a public examination is absolutely necessary to obtain a proper disclosure of facts (*c*).

(v.) *Procedure on Petition.*

666. Every petition for the winding up of a company by the court, or subject to the supervision of the court, must be in the prescribed form, with such variations as circumstances may require (*d*).

A petitioner must in his petition allege and prove the facts entitling him to present it, showing that one or more of the grounds specified in the Act for making a compulsory order exist; unless these allegations are contained in the petition it is demurrable (*e*), and the court will dismiss it (*f*), except in the case where a shareholder omits to state that he has held his shares for six months (*g*).

(*t*) *Re National Savings Bank Association* (1866), 1 Ch. App. 547; *Re Diamond Fuel Co.* (1879), 13 Ch. D. 400, C. A.; *Re Rica Gold Washing Co.* (1879), 11 Ch. D. 36, C. A.; see *Re Irrigation Co. of France, Ex parte Fox* (1871), 6 Ch. App. 176, 190; *Re Vron Colliery Co.* (1882), 20 Ch. D. 442, C. A.; *Re Gold Co.* (1879), 11 Ch. D. 701, C. A.; *Re Pioneers of Mashonaland Syndicate*, [1893] 1 Ch. 731.

(*a*) *Re Kaslo-Slocan Mining and Financial Corporation*, [1910] W. N. 13.

(*b*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 137 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 14].

(*c*) *Re 1897 Jubilee Sites Syndicate*, [1899] 2 Ch. 204.

(*d*) Companies (Winding-up) Rules, r. 25; and *ibid.*, Forms 4, 5.

(*e*) *Re Wear Engine Works Co.* (1875), 10 Ch. App. 188; *Re Steam Stoker Co.* (1875), L. R. 19 Eq. 416.

(*f*) *Re Spence's Patent Non-conducting Composition and Cement Co.* (1869), L. R. 9 Eq. 9; *Re Wear Engine Works Co.*, *supra*; *Re Langham Skating Rink Co.* (1877), 5 Ch. D. 669, C. A.; compare *Re Queen's Benefit Building Society* (1871), 6 Ch. App. 815, where amendment of the petition was allowed.

(*g*) *Re City and County Bank* (1875), 10 Ch. App. 470; *Re Glendower Steamship Co.*, [1899] W. N. 114. Formerly a fully-paid shareholder had to allege and prove that there were such assets of the company as, in the event of a winding up, would give a surplus for fully-paid shareholders; and at one time it was required that a creditor's petition should allege that the company had assets

SECT. 16. Winding up by the Court.

Petition by official receiver.

Form of petition.

Contents of petition.

SECT. 16. Unless the address of the petitioner is given, security for costs will be ordered (h).  
 Winding up by the Court.

Presentation of petition.

667. A petition must be presented at the office or chambers of the registrar of the court to which it is addressed, who appoints the time and place at which the petition is to be heard (i). Notice of the time and place appointed for hearing the petition is written on the petition and sealed copies thereof, and the registrar may at any time before the petition has been advertised alter the time appointed and fix another time (k).

The winding-up petition must have a distinctive number assigned to it in the office of the registrar, and all subsequent proceedings in the matter must bear the same number as the petition (l).

Filing of petition.

668. All petitions and other proceedings in the High Court in a winding-up matter are to be kept and remain of record in the office of the registrar and, subject to the directions of the court, placed in one continuous file, and no proceeding in any winding-up matter is to be filed in the Central Office (m).

In courts other than the High Court a file of proceedings is to be kept on which, subject to the directions of the court, all petitions and other proceedings in the matter are to be placed and remain of record as far as possible in continuous order (n).

Advertisement of petition.

669. Every petition must be advertised seven clear days (o) before the hearing as follows:—(1) In the case of a company whose registered office, or if there is no such office, then whose principal

available for distribution in the winding up (*Re Rica Gold Washing Co.* (1879), 11 Ch. D. 36, C. A.; *Re Diamond Fuel Co.* (1879), 13 Ch. D. 400, C. A.; *Re Irrigation Co. of France, Ex parte Fox* (1870), 6 Ch. App. 176; and see *Re Vron Colliery Co.* (1882), 20 Ch. D. 442, 447, C. A.; Winding-up Petitions (Practice Note (1902), 18 T. L. R. 503). But s. 141 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), extends the principle of *Re Crigglestone Coal Co., Ltd.*, [1906] 2 Ch. 327, C. A. (see note (a), p. 415, *post*), to a contributory petition, and the above decisions and practice appear no longer to apply.

(h) *Re Sturgis (British) Motor Power Syndicate* (1885), 53 L. T. 715.

(i) The provisions of R. S. C., 1887, r. 2, relating to petitions in the district registries of Liverpool and Manchester, are to apply to petitions presented in those registries under the Act of 1908 and Rules of 1909 (Companies (Winding-up) Rules, r. 219). The rule referred to provides that petitions presented in the district registries referred to, requiring answer must be answered in the name of one of the district registrars of such registries, and that the R. S. C., and particularly Ord. 62, r. 18, are, as regards such petitions, to be construed as if the district registrars of Liverpool and Manchester respectively were mentioned in place of the registrars of the Chancery Division.

(k) Companies (Winding-up) Rules, r. 26. At any time after the presentation of the petition, and before the making of a winding-up order, the court may appoint a provisional liquidator (see p. 420, *ante*), and actions against the company may be stayed or restrained (see p. 533, *post*).

(l) *Ibid.*, r. 11 (2).

(m) Companies (Winding-up) Rules, r. 16.

(n) *Ibid.*, r. 17.

(o) The term may be shortened or extended (*ibid.*, r. 216; and see *Re City and County Bank* (1875), 10 Ch. App. 470; *Re Cork and Youghal Rail. Co.* (1866), 14 L. T. 750; *Re Land and Sea Telegraph Co.* (1870), 18 W. R. 1150; *Re McLean and Co.*, [1881] W. N. 8). The days may be counted during vacation (*Re London Indiarubber Co.* (1866), 14 W. R. 594).

or last known principal place of business, is or was situate within ten miles of the principal entrance of the Royal Courts of Justice, once in the *London Gazette*, and once at least in one London daily morning newspaper, or in such other newspaper as the court directs; (2) in the case of any other company, once in the *London Gazette*, and once at least in one local newspaper circulating in the district where the registered office, or principal or last known principal place of business, as the case may be, of such company is or was situate, or in such other newspaper as the court directs.

The advertisement must state the day on which the petition was presented, and the name and address of the petitioner, and of his solicitor and London agent (if any), and contain a note at the foot thereof, stating that any person who intends to appear on the hearing of the petition, either to oppose or support, must send notice of his intention to the petitioner, or to his solicitors or London agent, within the time and in the manner prescribed (p). An advertisement of a petition for the winding up of a company by the court which does not contain such a note is to be deemed irregular (q). If the petitioner or his solicitor does not within the time prescribed duly advertise the petition (r), the appointment of the time and place at which the petition is to be heard is to be cancelled by the registrar, and the petition removed from the file in the Companies (Winding-Up) Office, unless the judge or the registrar otherwise directs (s).

The advertisement states that a copy of the petition will be furnished to any creditor or contributory applying for the same (t), and the petitioner's solicitor must ascertain whether the applicants are creditors or contributories (u). Every contributory or creditor is entitled to be furnished, by the solicitor of the petitioner, with a copy of the petition, within twenty-four hours after requiring the same, on paying at the rate of 4d. per folio of seventy-two words for such copy (a).

A material error in the advertisement may invalidate it, as, for instance, in the name of the company (b) (except where no one could be deceived (c)), or as to the day of hearing (d), or the title of the

(p) By Companies (Winding-up) Rules, r. 27; see p. 408, *post*.

(q) *Ibid.*

(r) See note (o), p. 404, *ante*.

(s) Companies (Winding-up) Rules, r. 27; and see *ibid.*, Form 6.

(t) See *ibid.*, Form 6.

(u) *Re Cheltenham and Swansea Railway Carriage and Wagon Co.* (1869), L. R. 8 Eq. 580, 583.

(a) Companies (Winding-up) Rules, r. 30.

(b) *Re City and County Bank* (1875), 10 Ch. App. 470, 477.

(c) *Re Army and Navy Hotel* (1886), 31 Ch. D. 644; *Re Consolidated Mineral Lead Mining Co.*, [1876] W. N. 234; *Re Newcastle Machinists Co.*, [1888] W. N. 246; *Re London and Provincial Pure Ice Manufacturing Co.*, [1904] W. N. 136; *Re Birch (Samuel) Co., Ltd.*, [1907] W. N. 31.

(d) *Re Joint-Stock Companies Winding up Act* (1849), 13 Beav. 434; *Re Bull, Bevan & Co.*, [1891] W. N. 170. But where a wrong date for giving notice of intention to appear was inserted an order was made without re-advertising (*Re Moss (Saul) & Sons, Ltd.*, [1906] W. N. 142). As to dispensing with advertisement in a second paper, see *Re London Indiarubber Co.* (1866), 14 W. R. 527; compare *Re Worthing Royal Sea House Hotel Co.*, [1872] W. N. 74; *Re Broad's Patent Night Light Co.*, [1892] W. N. 5.

SECT. 16.  
 Winding up  
 by the  
 Court.

Contents.

SECT. 16. petition (e), or where the footnote is omitted from the form of Winding up by the Court. advertisement (f).

If a petition presented after a voluntary winding up has commenced asks for a compulsory order only, or for a compulsory order and in the alternative for a supervision order (g), the court refuses to make a supervision order until the petition has been amended and re-advertised (h). So again, if the petition asks only for a supervision order, and is subsequently amended by asking for a compulsory order, the court requires the petition to be re-advertised before making a compulsory order (i). The court on making a supervision order will dispense with re-advertising or amending the petition, where it is presented before the commencement of the voluntary winding up and the affidavits prove the passing of the winding-up resolution (k), or where a supervision order is discharged for irregularity in the resolutions, and a compulsory order is made on the rehearing (l).

670. After a petition has been presented, the petitioner, or his solicitor, must, on a day to be appointed by the registrar, attend before the registrar and satisfy him that the petition has been duly advertised, that the prescribed affidavit verifying the statements therein and the affidavit of service (if any) have been duly filed, and that the rules as to petitions for winding up companies have been duly complied with by the petitioner. No order for winding up is to be made on the petition of any petitioner who has not, prior to the hearing of the petition, so attended and satisfied the registrar (m).

671. Every petition (not being one presented by the company itself) must be served upon the company (n) at its registered office, if any, and if there is no registered office, then at the principal or last known principal place of business of the company, if any such can be found, by leaving a copy with any member, officer, or servant of the company there, or in case no such member, officer, or servant can be found there, then by leaving a copy at such registered office or principal place of business, or by serving it on such member or members of the company as the court may direct (o).

(e) *Re Marezzo Marble Co.* (1874), 43 L. J. (CH.) 544.

(f) *Re Hille India Rubber Co.*, [1897] W. N. 6; see *Re Mont de Piété of England*, [1892] W. N. 166.

(g) *Re New Morgan Gold Mining Co.*, [1893] W. N. 79.

(h) *Re New Oriental Bank Corporation*, [1892] 3 Ch. 563; Practice Note, [1902] W. N. 77; see *Re Civil Service Brewery Co.*, [1893] W. N. 5; *Re Waterproof Materials Co.*, [1893] W. N. 18; *Re United Bacon Curing Co.*, [1890] W. N. 74, where advertisement was not required.

(i) *Re National Wholemeal Bread and Biscuit Co.*, [1891] 2 Ch. 151.

(k) *Re Marine and General Land, Building and Investment Co.* (1890), 62 L. T. 723.

(l) *Re Patent Floor Cloth Co.* (1869), L. R. 8 Eq. 664. An application to rectify a slip in the proceedings need not be advertised (*Re Shield's Marine Insurance Co.*, [1867] W. N. 296).

(m) Companies (Winding-up) Rules, r. 32; see *Re Kershaw and Pole, Ltd.*, [1891] W. N. 202.

(n) Service on a solicitor appointed for the purpose is sufficient (*Re Regent United Service Stores* (1878), 8 Ch. D. 75, C. A.; compare *Re Fortune Copper Mining Co.* (1870), L. R. 10 Eq. 390). As to service in case of a defunct company, see *Re Anglo-American Exploration and Development Co.*, [1898] 1 Ch. 100.

(o) When there is no registered office, or the office is not occupied, service

Where the company is being wound up voluntarily, the petition must also be served upon the voluntary liquidator, if any (p). The liquidator should not be served where the petitioning company is in voluntary liquidation (q).

672. Every petition for winding up by the court must be verified by an affidavit, referring thereto, which must be made by the petitioner (r), or by one of the petitioners, if more than one, or, in case the petition is presented by a corporation, by some director, secretary, or other principal officer thereof (s), and must be sworn and filed within four days after the petition is presented (t). Such affidavit is sufficient *prima facie* evidence of the statements in the petition (a), unless fraud is charged, in which case the facts alleged to constitute fraud must be set out in an affidavit (b). When the petition is presented by the Attorney-General on behalf of the Crown, the affidavit need not be made by the Attorney-General himself, but may be made by any fit and proper person, such as, in an income-tax case, the solicitor to the Inland Revenue Commissioners (c).

may be sufficient if made on the late secretary (*Re Petroleum Co.* (1866), 15 W. R. 29; see *Re Thames Mutual Club Insurance Co.* (1866), 15 L. T. 263; *Re Iron Slate Co.*, [1878] W. N. 70); the chairman or directors (*Re National Credit and Exchange Co.* (1862), 11 W. R. 161; *Re Unity General Assurance Association* (1863), 11 W. R. 355; *Re London and Westminster Wine Co.* (1863), 12 W. R. 6; *Re South Essex Estuary and Reclamation Co.* (1868), 18 L. T. 178); subscribers to the memorandum (*Re Inventors' Association* (1865), 13 W. R. 1015; *Re Great Cwmaylog Silver Lead Mining Co.* (1868), 16 W. R. 270; *Re Velletri and Terrencina Co.* (1868), 18 L. T. 350); a liquidator (*Re Stewart and Brother*, [1880] W. N. 15); but not a workman employed on the site of the office (*Re Manchester and London Life Assurance and Loan Association* (1870), L. R. 9 Eq. 643). As to unregistered companies, see *Re City of London and Colonial Financial Association* (1867), 36 L. J. (CH.) 832, C. A. A consent brief for persons who ought to have been served has been held to cure want of service (*Re Panonia Leather Cloth Co.* (1865), 13 W. R. 1015, n.; but see *Re Manchester and London Life Assurance and Loan Association*, *supra*).

(p) Companies (Winding-up) Rules, r. 28. For forms of affidavits of service, see *ibid.*, Forms 7, 8.

(q) *Re Chester (Edward) & Co.* (1903), 52 W. R. 189.

(r) The rule is merely directory as to the affidavit being made by the petitioner, and in a proper case it may be made by his solicitor or agent, especially when the latter knows the facts better (*Re African Farms, Ltd.*, [1906] 1 Ch. 640; *Re Carrara Marble Co.*, [1896] W. N. 87; *Re Fortune Copper Mining Co.* (1870), L. R. 10 Eq. 390 (petitioner abroad); compare *Re Charterland Stores and Trading Co.*, [1900] 2 Ch. 870).

(s) The liquidator is a principal officer of a company in liquidation (*Re Review Publishing Co.*, [1893] W. N. 5).

(t) The time for filing may be enlarged (Companies (Winding-up) Rules, r. 216); see *Re East Cambrian Gold Mining Co.* (1865), 12 L. T. 587; *Re London and Westminster Co-operative Store Co.* (1868), 17 L. T. 559; *Re Patent Screwed Boot and Shoe Co.* (1863), 32 Beav. 142; *Re Kentish Royal Hotel Co.* (1865), 13 W. R. 448; *Re Western Benefit Building Society* (1864), 33 Beav. 368, where the affidavit was filed before the petition was presented.

(a) Companies (Winding-up) Rules, r. 2; see *Re New Callao*, [1882] W. N. 60, C. A.; and compare Companies (Winding-up) Rules, Form 9. That form is varied where the petitioner is another company.

(b) *Re Ilfracombe Permanent Mutual Benefit Building Society*, [1901] 1 Ch. 102, 110; *Re London and Hull Soap Works*, [1907] W. N. 254.

(c) *Re Brandy Distillers Co.* (1901), 17 T. L. R. 272, C. A.

SECT. 16. Winding up by the Court.

Affidavits.

Attendance to satisfy registrar.

Service of petition.

SECT. 16.  
Winding up  
by the  
Court.

Notice of the filing of the statutory affidavit need not be given, but notice should be given of the filing of additional or supplemental affidavits (*d*).

Affidavits in opposition to a petition that a company may be wound up by the court must be filed within seven days of the date on which the affidavit verifying the petition is filed. Notice of the filing of every affidavit in opposition to such a petition must be given to the petitioner or to his solicitor or London agent on the day on which the affidavit is filed (*e*).

An affidavit in reply to an affidavit filed in opposition to a petition must be filed within three days of the date on which notice of such affidavit is received by the petitioner, or his solicitor or London agent (*f*).

Notice of  
intention to  
appear.

673. Every person who intends to appear on the hearing of a petition must serve on, or send by post to, the petitioner, or his solicitor or London agent, at the address stated in the advertisement of the petition, a notice of his intention (*g*) containing the address of the person giving it, and signed by him or by his solicitor or London agent. It must be served, or if sent by post posted, in such time as in ordinary course of post to reach the address not later than six o'clock in the afternoon of the day previous to the day appointed for the hearing of the petition. The notice may be in the prescribed form with such variations as circumstances require. A person failing to give such notice is not, without the special leave of the court, allowed to appear on the hearing of the petition (*h*).

The notice of intention to appear must show on the face of it whether the person giving it intends to oppose or to support the petition (*i*); and if to support it, whether to support a compulsory or supervision order (*k*). Otherwise the persons appearing, even if at the hearing they support the successful side, will not be allowed to share in the costs (*l*).

The petitioner, or his solicitor or London agent, must prepare a list in the prescribed form of the names and addresses of the persons who have given notice of their intention to appear on the hearing of the petition, and of their respective solicitors. On the day appointed for hearing the petition a fair copy of the list, or if no notice of intention to appear has been given, a statement in writing to that effect (*a*), must be handed by the petitioner, or

(*d*) *Re British Cycle Manufacturing Co.* (1898), 77 L. T. 683.

(*e*) Companies (Winding-up) Rules, r. 35 (1).

(*f*) *Ibid.*, r. 35 (2).

(*g*) The notice cannot be given in a representative capacity (*Re Mid Kent Fruit Factory*, [1892] W. N. 65).

(*h*) Companies (Winding-up) Rules, r. 33; and see *ibid.*, Form 11. The requirement as to giving addresses is strictly enforced (*Re Descours, Parry & Co., Ltd.*, [1909] W. N. 50).

(*i*) *Re Green, McAllan and Feilden, Ltd.*, [1891] W. N. 127.

(*k*) *Re Woodrow, Hooper & Co.*, [1893] W. N. 38. As to the costs of persons appearing by the same solicitor as the petitioner, see *Re Brighton Marine Palace and Pier Co.*, [1897] W. N. 12. Notice by them appears to be unnecessary (*Re Invicta Works, Ltd.*, [1894] W. N. 39).

(*l*) See *Re Sheringham Development Co.*, [1893] W. N. 5.

(*a*) If no notice has been given, intimation should be given to the registrar.

his solicitor or London agent, to the court prior to the hearing of the petition (*b*).

674. At any time after the presentation of the winding-up petition, and before the winding-up order, the company, or any creditor or contributory, may apply to have pending litigation against the company stayed or restrained (*c*), or to have a provisional liquidator appointed (*d*).

675. Security for costs will be ordered to be given by a petitioner who is ordinarily residing abroad, or in Scotland or Ireland (*e*), unless he is a judgment creditor (*f*), or his claim is admitted (*g*), in which cases security will, however, be ordered if a voluntary winding up is pending and the liquidator alleges that he has no assets (*h*); or by a petitioner who has given a false address (*i*); or by a petitioner who has filed a bankruptcy petition (*j*), or by a petitioning company which is in liquidation (*k*). A shareholder opposing a petition cannot be ordered to give security (*l*).

676. Winding-up petitions, whether in the High Court or in any other court, must be heard in open court (*m*). On petition days unopposed petitions are taken before opposed petitions, and are disposed of at the first calling on of the cases (*n*).

Subject to the orders of the Lord Chancellor, the place of sitting of each county court having winding-up jurisdiction is for the purposes of such jurisdiction the town and place in which the court holds its sittings for the general business of the court under the County Court Acts (*o*). Subject to the provisions of the Act of 1908, the times of the sitting of each court, other than the High Court, in winding-up matters are to be those appointed for the transaction of the general business of the court, unless the judge of any such court otherwise orders (*p*).

On hearing the petition the court may dismiss it with or without

(*Re Australian Alkaline Reduction and Smelting Syndicate*, [1891] W. N. 209; and see *Re Inman & Co.*, [1891] W. N. 202).

(*b*) Companies (Winding-up) Rules, r. 34. In default of compliance with this rule, costs may be disallowed (Practice Note, [1906] W. N. 127).

(*c*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 140; see p. 533, *post*.

(*d*) *Ibid.*, s. 149; see p. 420, *post*.

(*e*) *Re Royal Bank of Australia, Ex parte Latta* (1850), 3 De G. & Sm. 186; *Re Home Assurance Association* (No. 2) (1871), L. R. 12 Eq. 112; *Fontaine's Case* (1889), 41 Ch. D. 118, C. A.; *Re East Llangynog Lead Mining Co.*, [1875] W. N. 81.

(*f*) *Re Contract and Agency Corporation* (1887), 57 L. J. (OH.) 5.

(*g*) *Re Alabama Portland Cement Co.*, [1909] W. N. 157.

(*h*) *Ibid.*

(*i*) *Re Sturgis (British) Motor Power Syndicate* (1885), 53 L. T. 715.

(*j*) *Malcolm v. Hodgkinson* (1873), L. R. 8 Q. B. 209; *Brocklebank v. Lynn Steamship Co.* (1878), 3 C. P. D. 365; *Re Carta Para Mining Co.* (1881), 19 Ch. D. 457.

(*k*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 278.

(*l*) *Re Percy and Kelly, Nickel, Cobalt, and Chrome Iron Mining Co.* (1876), 2 Ch. D. 531.

(*m*) Companies (Winding-up) Rules, rr. 5, 6.

(*n*) *Re Inman & Co., Ltd.*, *supra*.

(*o*) Companies (Winding-up) Rules, r. 9.

(*p*) *Ibid.*, r. 10.

SECT. 16.  
Winding up  
by the  
Court.  
Stay of  
action.

Security for  
costs.

Hearing of  
petition.

Place and  
time.

Powers of  
court.



SECT. 16.  
Winding up  
by the  
Court.

Costs.

costs, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it deems just (*g*). Only the petitioner, the company, and creditors and contributories supporting and opposing are entitled to appear on the petition (*r*).

677. The court has a discretion as regards orders as to costs (*s*). When a winding-up order is made the company is usually given its costs, and one set of costs is generally given to the petitioner, another among all the creditors supporting him, and a third among the contributories supporting him (*t*). The same rule is followed when the petitioner for a compulsory order accepts a supervision order (*u*). When the petition, not being by the company, is dismissed, the petitioner generally has to pay one set of costs to the company, another set among all the creditors opposing, and a third set among all the contributories opposing (*w*). Secured creditors are allowed to share in the set given to creditors (*a*). A petition may be dismissed without costs (*b*); and costs will not be given to a petitioner where the petition is dismissed (*c*). If he continues the petition after an offer to pay his debt and costs, he will not get the costs incurred after the offer (*d*), and may have to pay costs (*e*).

Where two petitions are presented for winding-up the same

(*g*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 141 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 86]; *Re Catholic Publishing and Bookselling Co.* (1864), 33 L. J. (CH.) 325, C. A. As to allowing amendment, see *Re Queen's Benefit Building Society* (1871), 6 Ch. App. 815; *Re Rica Gold Washing Co.* (1879), 11 Ch. D. 36, 42, C. A.; *Re White Star Consolidated Gold Mining Co.* (1883), 48 L. T. 815; as to the right of a creditor appearing to have the petition disposed of, see *Re Norton Iron Co.* (1877), 47 L. J. (CH.) 9; *Re Margate Hotel Co.*, [1888] W. N. 73; *Re Spence's Patent Non-conducting Composition and Cement Co.* (1869), L. R. 9 Eq. 9; *Re Home Assurance Association* (1871), L. R. 12 Eq. 59.

(*r*) *Re New Gas Co.* (1877), 5 Ch. D. 703, C. A.; *Re Bradford Navigation Co.* (1870), 5 Ch. App. 600; and see p. 408, *ante*.

(*s*) Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 5; *Re Fisher*, [1894] 1 Ch. 450, C. A.; as to the costs on the withdrawal of a petition, see p. 413, *post*.

(*t*) *Re Criterion Gold Mining Co.* (1889), 58 L. J. (CH.) 277; *Re Peckham etc. Tramways Co.* (1888), 57 L. J. (CH.) 462. As to what costs are included as contributories' costs, see *Re Ibo Investment Trust, Ltd.*, [1904] 1 Ch. 26.

(*u*) *Re Chepstow Bobbin Mills Co.* (1887), 36 Ch. D. 563. As to costs of persons appearing by the petitioner's solicitor, see *Re Military and General Tailoring Co.* (1877), 47 L. J. (CH.) 141; *Re Brighton Marine Palace and Pier Co.*, [1897] W. N. 12. Creditors and contributories appearing by the same solicitor are, as a rule, entitled to only one set of costs, although represented by separate counsel (*Re Ibo Investment Trust, Ltd.*, *supra*; *Re Silberhütte Supply Co.*, [1910] W. N. 81). As to the costs of a provisional liquidator, see *Re General International Agency Co.* (1865), 36 Beav. 1; *Re Times Life Assurance and Guarantee Co.* (1869), L. R. 9 Eq. 382. As to the priority of a petitioner's costs, see p. 526, *post*.

(*w*) *Re New Gas Co.*, *supra*; *Re Diamond Fuel Co.*, [1878] W. N. 11.

(*a*) *Re Carmarthenshire Anthracite Coal and Iron Co.* (1875), 45 L. J. (CH.) 200. But creditors are not entitled to costs (*Re Hull and County Bank* (1878), 10 Ch. D. 130).

(*b*) *Re Great Northern Copper Mining Co.* (1866), 14 W. R. 705.

(*c*) *Re Tyneside Permanent Benefit Building Society*, [1885] W. N. 148.

(*d*) *Re Times Life Assurance and Guarantee Co.*, *supra*; *Re Adjustable Horse Shoe Syndicate, Ltd.*, [1890] W. N. 157; compare *Re Flagstaff Silver Mining Co. of Utah* (1875), L. R. 20 Eq. 268.

(*e*) *Re Imperial Guardian Life Assurance Society* (1869), L. R. 9 Eq. 447; see *Re Adjustable Horse Shoe Syndicate, Ltd.*, *supra*.

SECT. 16.  
Winding up  
by the  
Court.

Costs of two  
petitions.

company they have priority according to their dates of presentation (*f*), and if one order is made on both petitions the carriage of the order (if any) is, or used to be, generally given to the first petitioner (*g*). The second petitioner is usually allowed his costs up to the time he has notice of the presentation of the first petition (*h*); but if he proceeds with the second petition he may be ordered to pay the subsequent costs (*i*), unless he shows that there was some good ground for his doing so, as, for instance, that the first petition was not presented *bonâ fide* but in collusion with the company (*j*), or that some benefit was secured for creditors by the second petition (*k*). If good ground is shown, and the order is made on the first petition, he will be allowed to share in the set of costs given to the class supporting the petition whom he represents, or to have the costs of his petition (*l*).

One of several petitions may be dismissed on its merits, though on another an order has been made (*m*).

Where the petition is presented on the ground of default in filing the statutory report or in holding the statutory meeting, the court may order the costs to be paid by any persons who, in its opinion, are responsible for the default (*n*).

Where a personal charge is made against a director by the petition, he is entitled to appear separately, and, if free from blame, to be paid a separate set of costs (*o*). Calls owing by a petitioning shareholder cannot be set off against the costs of a petition ordered to be paid to him (*p*). Where a petitioner refuses an offer by the company to pay the amount claimed into court and to pay to him

(*f*) *Re Building Societies' Trust, Ltd.* (1890), 44 Ch. D. 140; *Re Standard Portland Cement Co.* (1890), 69 L. J. (CH.) 408.

(*g*) *Re Stortforth Lane Colliery Co.* (1879), 10 Ch. D. 487; see *Re London and Australian Agency* (1873), 22 W. R. 45; *Re Constantinople and Alexandria Hotels Co.* (1865), 13 W. R. 851.

(*h*) *Re General Financial Bank* (1882), 20 Ch. D. 276, C. A.; *Re Brooke (G. F.) & Co.*, [1888] W. N. 213; see *Re Owen's Wheel and Tyre Co.* (1873), 22 W. R. 151; *Re London and Australian Agency*, *supra*; *Re Sheringham Development Co.*, [1893] W. N. 5.

(*i*) *Re Joint Stock Coal Co.* (1869), L. R. 8 Eq. 146; *Re Accidental and Marine Insurance Co.* (1867), 36 L. J. (CH.) 75; *Re Empire Assurance Corporation* (1867), 16 L. T. 341.

(*j*) *Re Norton Iron Co.* (1877), 47 L. J. (CH.) 9; *Re Building Societies' Trust, Ltd.*, *supra*.

(*k*) *Re Commercial Bank of South Australia* (1886), 33 Ch. D. 174.

(*l*) *Re General Financial Bank*, *supra*; *Re Marron Bank Paper Mill Co.* (1878), 38 L. T. 140; and see, generally, *Re Doré Gallery, Ltd.*, [1891] W. N. 98; *Re British and Foreign Generating Apparatus Co.* (1865), 12 L. T. 368; *Re Humber Ironworks Co.* (1866), L. R. 2 Eq. 15; *Re United Service Co.* (1868), L. R. 7 Eq. 76; *Re Standard Portland Cement Co.*, [1890] W. N. 91; *Re Scott and Jackson, Ltd.*, [1893] W. N. 184.

(*m*) *Re European Banking Co., Ex parte Baylis* (1866), L. R. 2 Eq. 521.

(*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 141 (2) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 12 (8)].

(*o*) *Re Anglo-Greek Steam Co.* (1866), L. R. 2 Eq. 1. If he appears by the company's solicitors he is not entitled to share in the contributories' set of costs (*Re Ibo Investment Trust, Ltd.*, [1904] 1 Ch. 26). As to costs of copying and procuring evidence, see *ibid*.

(*p*) *Re General Exchange Bank* (1867), L. R. 4 Eq. 138; *Re Equestrian and Public Buildings Co.* (1888), 1 Meg. 115.

SECT. 16.  
Winding up  
by the  
Court.

Adjournment  
of winding-up  
petition.

such costs of the petition as the court shall adjudge, he will be ordered to pay all costs of the petition subsequently incurred (q).

**678.** Adjournments for the purposes of enabling evidence to be completed, witnesses cross-examined, compromises arrived at, or reconstructions carried out are of frequent occurrence; but long unconditional adjournments may do great harm, not only by paralysing the company, but by invalidating intermediate transactions if a winding-up order is ultimately made (r). An adjournment will not be allowed pending an appeal by the company to the House of Lords where the company is unwilling to give security for costs already incurred in the litigation, although security for the costs of the appeal has been given (s).

Where an adjournment for a considerable time is allowed, it is often on the terms that the company shall undertake not to consent to a winding-up order on the petition of any other creditor, or to a voluntary winding up, to give notice to the petitioner of the presentation of any other winding up petition, and to consent that, on the presentation of any other petition, the present application for winding-up may be renewed so that the court may be able to deal with it as if there had been no suspension (t).

Substitution  
of petitioner.

**679.** When a petitioner consents to withdraw his petition, or to allow it to be dismissed, or the hearing adjourned, or fails to appear in support of his petition when it is called on in court on the day originally fixed for the hearing thereof, or on any day to which the hearing has been adjourned (u), or, if appearing, does not apply for an order in the terms of the prayer of his petition, the court may, upon such terms as it may think just, substitute as petitioner any creditor or contributory who in the opinion of the court would have a right to present a petition, and who is desirous of prosecuting the petition (w).

An application for substitution will only be entertained where the original petition was founded on a valid subsisting debt (x).

(q) *Re Imperial Guardian Life Assurance Society* (1869), L. R. 9 Eq. 447; *Re Langley Mill Steel and Iron Works Co.* (1871), L. R. 12 Eq. 26.

(r) See *Re Chapel House Colliery Co.* (1883), 24 Ch. D. 259, 267, C. A.; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 139, 205; and see *Bowes v. Hope Life Insurance and Guarantee Co.* (1865), 11 H. L. Cas. 389; *Re Metropolitan Railway Warehousing Co.* (1867), 17 L. T. 108, 111; *Re Great Western (Forest of Dean) Coal Consumers' Co.* (1882), 21 Ch. D. 769; *Re Western of Canada Oil, Lands, and Works Co.* (1873), L. R. 17 Eq. 1.

(s) *Re British Liquid Air Co.* (1908), 126 L. T. Jo. 7.

(t) *Re St. Thomas' Dock Co.* (1876), 2 Ch. D. 116, 122, where the order was never drawn up; *Re St. Neot's Water Co.* (1905), W. N. 133.

(u) The part of the rule referring to non-appearance was inserted to amend the old rule (Companies (Winding-up) Rules, 1903, r. 36) which could be evaded by the petitioner failing to appear (*Re Vanguard Motorbus Co.*, [1908] W. N. 99). As to the costs when the petitioner does not appear, see *Re Anglo-Virginian Freehold Land Co.*, [1880] W. N. 155.

(w) Companies (Winding-up) Rules, r. 36. As to the procedure when a new petitioner is substituted, see *Re Invicta Works, Ltd.*, [1894] W. N. 39. A petitioner cannot himself transfer to any other person the right to proceed with his petition (*Re Paris Skating Rink Co.* (1877), 5 Ch. D. 959, C. A.).

(x) *Re Charles, Ltd.* (1906), 51 Sol. Jo. 101.

SECT. 16.  
Winding up  
by the  
Court.

Subject as aforesaid, the petitioner is *dominus litis* and may at the hearing withdraw his petition subject to his liability to pay the costs of persons appearing (y). Where a petitioner elects at the hearing to withdraw his petition or have it dismissed, or does not appear to support it at the hearing, the court orders him to pay the costs of those who have duly given notice of their intention to appear, one set of costs being given to those who support the petition and another set to those who oppose it (a).

If the debt is paid, the petition may be continued to obtain costs (b), unless an indemnity in regard to them has been given (c).

**680.** With the consent of the petitioner, but not otherwise, a compulsory order may be made on a petition for a supervision order, or *vice versa* (d).

**681.** The court may, in deciding between a winding up by the court and a supervision order, or whether a petition should be dismissed or adjourned, and as to all other matters relating to a winding up, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence (e). For the purpose of ascertaining those wishes it may direct meetings of the creditors or contributories to be called, held, and conducted in such manner as it directs, and may appoint a person to act as chairman of any such meeting, and to report the result thereof to the court, regard being had in the case of creditors to the value of each creditor's debt, and in the case of contributories to the number of votes conferred on each contributory by the articles (f). The court may be satisfied as to the views of the general body of creditors or

Order in  
terms not  
prayed for.

Wishes of  
creditors and  
contribu-  
tories.

(y) *Re Mid Wales Hotel Co.* (1868), 17 L. T. 597; *Re An Insurance Co.* (1875), 33 L. T. 49; *Re Home Assurance Association* (1871), L. R. 12 Eq. 59; *Re Hereford and South Wales Waggon and Engineering Co.* (1874), L. R. 17 Eq. 423.

(a) *Re British Electric Street Tramways*, [1903] 1 Ch. 725; *Re Patent Cocoa Fibre Co.* (1876), 1 Ch. D. 617, 618; *Re Criterion Gold Mining Co.* (1889), 41 Ch. D. 146; *Re Vanguard Motorbus Co.*, [1908] W. N. 99. As to earlier orders giving separate sets of costs, see *Re North Brazilian Sugar Factories, Ltd.* (1886), 56 L. T. 229; *Re Peckham etc. Tramways Co.* (1888), 57 L. J. (CH.) 462; *Re Paper Bottle Co.* (1888), 40 Ch. D. 52; *Re Nacupai Gold Mining Co.* (1884), 28 Ch. D. 65. But the court has allowed a petition to be withdrawn without payment of costs (*Re District Bank of London* (1887), 35 Ch. D. 576); *Re Tallochkoff Electric Light and Power Co.*, [1883] W. N. 189; *Re Walkham United Mines*, [1882] W. N. 134; see *Re United Stock Exchange, Ltd., Ex parte Philp and Kidd* (1884), 28 Ch. D. 183, where the petition had not been advertised). Separate costs may be refused to persons appearing by the same solicitor as the petitioner (*Re British Guardian Life Assurance Society* (1876), 24 W. R. 637).

(b) *Re Flagstaff Silver Mining Co. of Utah* (1875), L. R. 20 Eq. 268.

(c) *Re Adjustable Horse Shoe Syndicate, Ltd.*, [1890] W. N. 157; compare *Re Times Life Assurance and Guarantee Co.* (1869), L. R. 9 Eq. 382.

(d) *Re Electric and Magnetic Co.* (1881), 50 L. J. (CH.) 491; *Re Chepstow Bobbin Mills Co.* (1887), 36 Ch. D. 563; *Re New Oriental Bank Corporation*, [1892] 3 Ch. 563. As to re-advertising, see p. 406, *ante*.

(e) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 145, 201 [Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 91, 149]; *Re Western of Canada Oil, Lands, and Works Co.* (1873), L. R. 17 Eq. 1; *Re Radford and Bright, Ltd.*, [1901] 1 Ch. 272, 277, and the cases cited *infra*. As to creditors' views as to whether a supervision order should be made, see *Re West Hartlepool Ironworks Co.* (1875), 10 Ch. App. 618.

(f) *Ibid.*, s. 219 [Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 91, 149]. Except where and so far as the nature of the subject-matter or the context

SECT. 16.  
Winding up  
by the  
Court.

Where  
different  
classes of  
creditors.

contributories without calling meetings (g). Where the interests of shareholders only are concerned, as in a case where it is alleged that the substratum of a solvent company is gone, their wishes only will be regarded (h). Where the company is insolvent, the wishes of the creditors only are regarded (i).

In the case of creditors of different classes the interest of the class particularly affected must be primarily considered. Thus, on the question of winding up a company whose assets are entirely covered by debentures, the wishes of the unsecured creditors must be regarded in preference to those of the secured creditors (j). If the court has no power to make a winding-up order, it cannot direct a meeting to be held (k); but the power to direct meetings is in existence when the petition comes on for hearing (l). The power to regard the wishes of creditors and contributories is not then confined to cases where the question is whether the winding up should be compulsory or under supervision, but extends to cases in which the question is whether a winding-up order should be made or not, where either shareholders (m) or creditors (n) are interested, and in which the question is whether the petition shall or shall not stand over (o). The court is not bound to accede to the wishes of the majority (p). In the case of shareholders, refusal to accede to their wishes as shown by the majority of votes is generally based on the fact that such majority is deceptive and does not represent the majority of the independent shareholders (q); and, in the case of creditors, the court has acceded to their wishes as far as possible. Thus, in cases of a voluntary winding up where they have not proved that the creditors will be prejudiced by a continuance of the voluntary winding up the court has, nevertheless, made a compulsory order (r).

may otherwise require, rr. 123—138 apply to meetings called under s. 219 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), but so nevertheless that such rules shall take effect as to such meetings subject and without prejudice to any express directions of the court (Companies (Winding-up) Rules, r. 122); and see p. 466, *post*.

(g) *Re West Hartlepool Ironworks Co.* (1875), 10 Ch. App. 618; *Re Joint Stock Coal Co.* (1869), L. R. 8 Eq. 146.

(h) *Re Langham Skating Rink Co.* (1877), 5 Ch. D. 669, C. A. As to petitions by small minorities of shareholders, see *Re Shepherd's Bush Improvement, Ltd.* (1909), *Times*, March 9th, 1909.

(i) *Re Lonsdale Vale Ironstone Co.* (1868), 16 W. R. 601.

(j) *Re Crigglestone Coal Co., Ltd.*, [1906] 2 Ch. 327, 333, C. A.; *Re St. Thomas' Dock Co.* (1876), 2 Ch. D. 116; *Re Chapel House Colliery Co.* (1883), 24 Ch. D. 259, C. A.

(k) *Re Joint Stock Coal Co.*, *supra*; see *Re Langham Skating Rink Co.*, *supra*.

(l) *Re Western of Canada Oil, Lands, and Works Co.* (1873), L. R. 17 Eq. 1.

(m) *Re London Suburban Bank* (1871), 6 Ch. App. 641; *Re Sanderson's Patents Association* (1871), L. R. 12 Eq. 188; *Re Kronand Metal Co.*, [1899] W. N. 14; *Re Middlesborough Assembly Rooms Co.* (1880), 14 Ch. D. 104, C. A.

(n) *Re Langley Mill Steel and Iron Works Co.* (1871), L. R. 12 Eq. 26.

(o) *Re Brighton Hotel Co.* (1868), L. R. 6 Eq. 339; *Re Great Western (Forest of Dean) Coal Consumers' Co.* (1882), 21 Ch. D. 769; *Re St. Thomas' Dock Co.*, *supra*.

(p) *Re West Surrey Tanning Co.* (1866), L. R. 2 Eq. 737; *Re Gold Co.* (1879), 11 Ch. D. 701, 710, C. A.; *Re Land Development Association*, [1892] W. N. 23; *Re The Varieties, Ltd.*, [1893] 2 Ch. 235.

(q) *Ibid.*

(r) *Re Bishop (E.) & Sons, Ltd.*, [1900] 2 Ch. 254; see *Re New Oriental Bank Corporation* [1892] 3 Ch. 563 (supervision order made at the instance of creditors); *Re Suburban Hotel Co.* (1867), 2 Ch. App. 737, 743; *Re Haven Gold*

SECT. 16.  
Winding up  
by the  
Court.

Winding up  
of company  
without  
available  
assets.

682. The court is not to refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets (s). Where, however, a company against which a winding-up order has been made has no available assets, the official receiver is not required to incur any expense in relation to the winding up without the express directions of the Board of Trade (a).

*Mining Co.* (1882), 20 Ch. D. 151, C. A.; *Re German Date Coffee Co.* (1882), 20 Ch. D. 169, C. A.; *Re Middlesborough Assembly Rooms Co.* (1880), 14 Ch. D. 104, C. A.; *Re Rock Investment Trust* (1891), 35 Sol. Jo. 447 (cases where it was alleged that the substratum of the company was gone); *Re City and County Bank* (1875), 10 Ch. App. 470 (shareholder's petition ordered to stand over for general meeting to consider the question of a voluntary winding up); *Re Petersburg and Viborg Gas Co.*, [1874] W. N. 196 (shareholder's petition dismissed at the instance of the other shareholders). See also *Re Professional, Commercial and Industrial Benefit Building Society* (1871), 6 Ch. App. 856, 863; *Re General Phosphate Corporation*, [1893] W. N. 42; *Re International Contract Co., Ex parte Spartali and Tabor* (1866), 14 L. T. 726; *Re British Oil and Cannel Coal Co.* (1867), 15 L. T. 601; *Re London and Provincial Starch Co., Ex parte Adams* (1867), 16 L. T. 474.

(s) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 141 (1) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 29]. This gives statutory effect to the decisions referred to in note (a), *infra*. The absence of assets is no ground for referring an order (*Re Bartitsu Light Cure Institute, Ltd.* (1909), *Times*, January 13, 1909), except where the petitioner is a fully paid shareholder (*Re Kaslo-Slogan Mining and Financial Corporation*, [1910] W. N. 13). In the case of a guarantee company without a share capital debentures cannot create a valid charge on the amounts guaranteed by members (*Re Irish Club Co., Ltd.*, [1906] W. N. 127).

(a) Companies (Winding-up) Rules, r. 203. Up to 1905, notwithstanding a similar provision in the rules then applicable, the old decisions were implicitly followed which established that, although as between himself and the company a creditor had a right *ex debito justitiae* to a winding-up order (*Bowes v. Hope Life Insurance and Guarantee Co.* (1865), 11 H. L. Cas. 389, 401; *Re Isle of Wight Ferry Co.* (1865) 2 Hem. & M. 597; *Re Western of Canada Oil, Lands, and Works Co.* (1873), L. R. 17 Eq. 1; *Re Manchester and Liverpool Transport Co.* (1903), 19 T. L. R. 227); unless it was proved that the company had no assets, or that no useful purpose would result from a winding up (*Re Krasnapolsky Restaurant and Winter Garden Co.*, [1892] 3 Ch. 174; *Re International Commercial Co.* (1897), 75 L. T. 639, C. A.; *Re Uruguay Central and Hygueritas Rail. Co. of Monte Video* (1879), 11 Ch. D. 372; *Re Chapel House Colliery Co.* (1883), 24 Ch. D. 259, C. A.; *Re Faversham Free Fishermen (Co. of Fraternity)* (1887), 36 Ch. D. 329, C. A.; *Re Greenwood & Co.*, [1900] 2 Q. B. 306; *Re London Health Electrical Institute* (1897), 76 L. T. 98, C. A.; *Re Ilfracombe Permanent Mutual Benefit Building Society*, [1901] 1 Ch. 102; *Re Manchester and Liverpool Transport Co.* (1903), 19 T. L. R. 227); yet as between himself and other creditors the court might refuse an order if the majority of creditors opposed the petition (*Re Brighton Hotel Co.* (1868), L. R. 6 Eq. 339; *Re Langley Mill Steel and Iron Works Co.* (1871), L. R. 12 Eq. 26; *Re Uruguay Central and Hygueritas Rail. Co. of Monte Video*, *supra*; *Re Chapel House Colliery Co.*, *supra*; *Re Universal Drug Supply Association* (1874), 22 W. R. 675; *Re London Flour Co.* (1868), 19 L. T. 136, C. A.); or might, if there was a voluntary winding up and the majority of creditors so desired, make a supervision order, even although the voluntary winding up commenced after the winding-up petition was presented (*Re West Hartlepool Ironworks Co.* (1875), 10 Ch. App. 618; *Re Owen's Patent Wheel, Tire, and Axle Co.* (1873), 29 L. T. 672; *Re Simon's Reef Consolidated Gold Mining Co.* (1882), 31 W. R. 238). But according to later decisions a company might be ordered to be wound up although its entire assets were more than covered by debentures and nothing would result for the benefit of the unsecured creditors (*Re Chic, Ltd.*, [1905] 2 Ch. 345; *Re Melson (Alfred) & Co., Ltd.*, [1906] 1 Ch. 841); and the fact that the secured creditors oppose was immaterial (*Re Crigglestone Coal Co., Ltd.*, [1906] 2 Ch. 327, C. A.). S. 141 (1) of the Companies (Consolidation) Act, 1908 (8 Edw. 7,

SECT. 16.  
Winding up  
by the  
Court.  
Effect of  
voluntary  
winding up.

**683.** The voluntary winding up of a company does not bar the right of any creditor or contributory to have it wound up by the court, if the court is of opinion, in the case of an application by a creditor, that the rights of the creditor or, in the case of an application by a contributory, that the rights of the contributory will be prejudiced by a voluntary winding up (b).

In order to succeed a creditor must allege and prove that the continuance of the voluntary winding up will be prejudicial to his rights (c), even where the voluntary winding-up resolution has been passed after the presentation, but before the hearing of the petition (d). If, however, the general body of the creditors desire a compulsory order, an existing voluntary winding up is no bar in spite of the fact that no individual creditor shows that his rights will be prejudiced by a voluntary winding up (e). A compulsory order may be made on the application of creditors, although the company is in voluntary liquidation, where the same person has been appointed as receiver in the debenture-holders' action, and as its liquidator (f); or where a *prima facie* case of fraud is established as to the formation of the company or the conduct of its business (g); or where there has been great delay in conducting the voluntary liquidation (h); or where the company's liabilities are very great (i); or where the conduct of the voluntary liquidation is unsatisfactory (j); or where the foundation of the voluntary winding up, as, for instance, a reconstruction, has gone (k); or where the passing of the resolution is a breach of faith (l); or where circumstances show that a public investigation is required (m). Where a scheme of reconstruction is eminently unfair to an independent minority of the shareholders the court will, on the petition of one of them, stop the scheme by making a compulsory

(b) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 197 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 145, amended]. So far as this enactment expressly refers to contributories it is new; see s. 145 of the Act of 1862, which only referred to a creditor. It is a contempt of court to issue circulars with a view to misrepresent the effect of a voluntary winding up (*Re Parsonage (Septimus) & Co.*, [1901] 2 Ch. 424).

(c) *Re Russell, Cordner & Co.*, [1891] 3 Ch. 171.

(d) *Re New York Exchange, Ltd.* (1888), 39 Ch. D. 415, C. A.; *Re Electrical Engineering Co.* (1891), 64 L. T. 658; *Re Medical Battery Co.*, [1894] 1 Ch. 444. There is only time to do this by passing an extraordinary resolution for voluntary winding up.

(e) *Re Bishop (E.) & Sons, Ltd.*, [1900] 2 Ch. 254 (FARWELL, J.), followed by PARKER, J., in *Re Lichtenstein (Hermann) & Co.* (1907), 23 T. L. R. 424, and by BYRNE, J., in an unreported case.

(f) *Re Medical Battery Co.*, [1894] 1 Ch. 444.

(g) *Re Varieties, Ltd.*, [1893] 2 Ch. 235; *Re National Debenture and Assets Corporation*, [1891] 2 Ch. 505, 518, 521, C. A.; see *Re Medical Battery Co.*, *supra*, where frauds on the public committed in the course of business were said to affect this question.

(h) *Re Manchester Queensland Cotton Co.* (1867), 16 L. T. 583; *Re Fire Annihilator Co.* (1863), 32 Beav. 561.

(i) *Re Barned's Banking Co.* (1866), 14 L. T. 451; see *Re Lonsdale Vale Ironstone Co.* (1868), 16 W. R. 601; *Re General Rolling Stock Co.* (1865), 34 Beav. 314.

(j) *Re Caerphilly Colliery Co., Ex parte Dolling* (1875), 32 L. T. 15.

(k) *Re Gutta Percha Corporation*, [1900] 2 Ch. 665.

(l) *Re A. B. Cycle Co.* (1902), 19 T. L. R. 84.

(m) *Re Consolidated South Rand Mines Deep, Ltd.* [1909] 1 Ch. 401.

order, if the contract with the new company has not been executed (n).

An existing voluntary winding up is generally a bar to a contributory obtaining a compulsory order, unless the resolution to wind up has been passed fraudulently, or by undue influence, or unless creditors appear to support the petition (o). In exceptional circumstances a compulsory order may be obtained, although no fraud or undue influence is proved, even if no creditor appears in support (p).

The fact that a voluntary winding up has been continued under the supervision of the court is not necessarily a bar to the obtaining of a compulsory order; for in such a case, if the court is satisfied that the winding up cannot be continued with due regard to the interests of the creditors or contributories, a compulsory winding-up order may be made on the petition of the official receiver attached to the court which has jurisdiction, or of any creditor or contributory, or, probably, by the company itself acting by its voluntary liquidator (q).

**684.** Where a company is being wound up voluntarily, and an order is made for winding up by the court, the court may, if it thinks fit, by the same or any subsequent order, provide for the adoption of all or any of the proceedings in the voluntary winding up (r). The court may adopt a B. list of contributories (s) made in the voluntary winding up, but cannot adopt the resolution for voluntary winding up so as to make the date of the resolution the date of the commencement of winding up (t). The effect of the winding up order is not to nullify or abrogate everything that has been done under the voluntary winding up (u), or avoid *ab initio* all the proceedings in it (a).

(n) *Re Consolidated South Rand Mines Deep, Ltd.*, [1909] 1 Ch. 491.

(o) *Re London and Mercantile Discount Co.* (1865), L. R. 1 Eq. 277; *Re Bank of Gibraltar and Malta* (1865), 1 Ch. App. 69; *Re Imperial Mercantile Credit Association* (1866), 12 Jur. (N. S.) 739; *Re St. David's Gold Mining Co.* (1866), 14 L. T. 539; *Re Beaujolais Wine Co.* (1867), 3 Ch. App. 15; *Re Madras Coffee Co.* (1869), 17 W. R. 643; *Re Irrigation Co. of France, Ltd.* (1870), 39 L. J. (CH.) 663; *Re London Suburban Bank* (1871), 6 Ch. App. 641; *Re Star and Garter, Ltd.* (1873), 42 L. J. (CH.) 374; *Re Sir John Moore Gold Mining Co.* (1877), 37 L. T. 242; *Re Gold Co.* (1879), 11 Ch. D. 701; *Re Hadleigh Castle Gold Mines, Ltd.*, [1900] 2 Ch. 419.

(p) *Re Varieties, Ltd.*, [1893] 2 Ch. 235; *Re Haycraft Gold Reduction and Mining Co.*, [1900] 2 Ch. 230; *Re Gutta Percha Corporation*, [1900] W. N. 164; *Re Littlehampton, Havre and Honfleur Steam-ship Co., Ex parte Ellis* (1865), 34 L. J. (CH.) 237; and see *Re 1897 Jubilee Sites Syndicate*, [1899] 2 Ch. 204; *Re Gold Co.*, *supra*; *Re National Distribution of Electricity Co., Ltd.*, [1902] 2 Ch. 34, C. A.

(q) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 137 (2); *Re London and Mediterranean Bank* (1866), 15 L. T. 153.

(r) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 198 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 146]. An adoption order was made in *Re Hertfordshire Brewery Co.* (1874), 43 L. J. (CH.) 358.

(s) See p. 495, *post*.

(t) *Re Taurine Co.* (1883), 25 Ch. D. 118, C. A.

(u) *Cleve v. Financial Corporation* (1873), L. R. 16 Eq. 363, 880.

(a) *Thomas v. Patent Lionite Co.* (1881), 17 Ch. D. 250, C. A. As to the remuneration of an invalidly-appointed liquidator in a voluntary winding up, which is followed by a compulsory order, see *Re Allison, Johnson and Foster, Ltd.*, *Ex parte Birkenshaw*, [1904] 2 K. B. 327.

SECT. 16.  
Winding up  
by the  
Court.  
Contribu-  
tory's right.

Adoption of  
voluntary  
winding-up  
proceedings.

**SECT. 16.** **685.** When an order for the winding up of a company has been pronounced in court, the registrar of the court must on the same day send to the official receiver a notice informing him that the order has been pronounced (b), and he thereupon takes possession of the company's assets (c).

**Completion of order.** **686.** It is the duty of the petitioner, or his solicitor or his London agent, and of all other persons who have appeared on the hearing of the petition, at latest on the day following the day on which the order for winding up is pronounced in court, to leave at the registrar's office all the documents required for the purpose of enabling him to complete the order forthwith (d). The registrar need not make an appointment to settle the order unless in any particular case special circumstances make an appointment necessary (e).

**Form of order.** **687.** The order will be in the prescribed form (f), and contains at the foot thereof a notice stating that it will be the duty of the person who is at the time secretary or chief officer of the company, and of such of the persons who are liable to make out or concur in making out the company's statement of affairs as the official receiver may require, to attend on the official receiver forthwith on the service of the order at the place mentioned therein (g).

**Copies and gazetting of order.** **688.** When the order has been drawn up, three copies sealed with the seal of the court must forthwith be sent by post or otherwise by the registrar of the court to the official receiver. The official receiver must cause one sealed copy to be served on the secretary or other chief officer of the company at its registered office (if any), or upon such other person or persons, or in such other manner as the court directs, and must forward to the Registrar of Companies the copy of the order which by the Act is directed to be so forwarded by the company (h), and must forthwith give notice of the order to the Board of Trade (who must cause the notice to be gazetted). He must also send notice of the order to such local paper as the Board of Trade may from time to time direct, or, in default of such direction, as he may select (i).

(vi.) *Effect of Winding-up Order.*

**Operation of winding-up order.** **689.** An order for winding up operates in favour of all the creditors and contributories of the company as if made on the joint petition of a creditor and of a contributory (k). If a winding-up

(b) Companies (Winding-up) Rules, r. 37. The notice will be in Form 13, with such variations as circumstances may require (*ibid.*).

(c) See p. 424, *post*.

(d) Companies (Winding-up) Rules, r. 38.

(e) *Ibid.*, r. 39.

(f) *Ibid.*, Form 15. Winding-up orders are not now made in the restricted form for a short time in vogue (Practice Note (1903), 20 T. L. R. 73).

(g) Companies (Winding-up) Rules, r. 40.

(h) See s. 143 of the Companies (Consolidation) Act, 1903 (8 Edw. c. 69) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 88], which requires the registrar to make a minute of the order in his books relating to the company.

(i) Companies (Winding-up) Rules, r. 41 (1). For form of notice to local paper, see *ibid.*, Form 17.

(k) Companies (Consolidation) Act, 1903 (8 Edw. 7, c. 69), s. 138 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 82].

order has been obtained by mistake, the court has no jurisdiction to rescind the order after (l), though it may do so before (m), the order has been passed and entered.

**690.** A winding up of a company by the court is deemed to commence at the time of the presentation of the petition for the winding up (n). The making of a compulsory winding-up order after a voluntary winding up alters the date of commencement of winding up to the date of the presentation of the petition where there has been no supervision order (o), and this would seem to be so even when a supervision order has been made (p).

A compulsory winding up, from the time when it commences, puts an end to or supersedes a previous voluntary winding up (a).

The date of commencement of winding up affects many matters. Thus, an action for rescission of a contract to take shares, on the ground of misrepresentation, commenced after the filing of a petition, is defeated by a compulsory winding-up order made on that petition (b). In the case of a winding up by the court, every disposition of the company's property (including choses in action) and every transfer of shares, or alteration in the status of its members, made after the commencement of the winding up, is, unless the court otherwise orders, void (c). It depends on the date of commencement of winding up whether a person is liable as a present member, or whether a person who has ceased to be a member is liable as a past member, to contribute to the company's assets (d); whether a transaction is a fraudulent preference (e); whether certain attachments, sequestrations, distresses, and executions are void or in force against the company's assets (f); whether certain floating charges are available as securities (g); and at what date the liquidator is to send to the Registrar of Companies his statement as to the proceedings in and position of the liquidation (h). The date may be important when applying bankruptcy rules in the winding up of insolvent companies (i).

**691.** When a winding-up order has been made, no action or proceeding is to be proceeded with or commenced against the

(l) *Re Lyric Syndicate* (1900), 17 T. L. R. 162.

(m) *Re Crown Bank* (1890), 44 Ch. D. 634.

(n) Companies (Consolidation) Act, 1903 (8 Edw. 7, c. 69), s. 139 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 84].

(o) *Re Taurine Co.* (1883), 25 Ch. D. 118, C. A. As to the effect of a supervision order, see p. 599, *post*.

(p) Compare *Re United Service Co.* (1868), L. R. 7 Eq. 76, and see Companies (Consolidation) Act, 1903 (8 Edw. 7, c. 69), s. 200.

(a) See p. 417, *ante*.

(b) *Kent v. Freehold Land and Brick-making Co.* (1868), 3 Ch. App. 493.

(c) Companies (Consolidation) Act, 1903 (8 Edw. 7, c. 69), s. 205 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 153].

(d) *Ibid.*, s. 123; and see p. 488, *post*.

(e) *Ibid.*, s. 210 (2), where, however, the commencement of the winding up is not expressly stated as the date from which the period runs back; see p. 544, *post*.

(f) *Ibid.*, s. 211; see pp. 533 *et seq.*, *post*.

(g) *Ibid.*, s. 212; see p. 388, *ante*.

(h) *Ibid.*, s. 224; see p. 455, *post*.

(i) *Ibid.*, s. 207; see p. 512, *post*.

**SECT. 16.** **Winding up by the Court.**

**Commencement of compulsory winding up.**

**Importance of date of commencement.**

SECT. 16. Winding up by the Court. company except by leave of the winding-up court, and subject to such terms as the court may impose (*k*). The winding-up order also has the effect of discharging all the servants of the company (*l*), and of dismissing its directors (*m*).

Directors' powers.

692. The winding-up order puts an end to the directors' powers—at any rate as to making calls (*a*)—and they cease to be officers of the company (*b*). They may, however, appeal in the name of the company from the winding-up order (*c*). The winding-up order does not dissolve the company as a corporation (*d*) or vest the company's property in the liquidator, unless a vesting order is thereby made in the case of an unregistered company (*e*).

SUB-SECT. 4.—Provisional Liquidator and Special Manager.

(i.) Provisional Liquidator before Winding-up Order.

Interim provisional liquidator.

693. A liquidator is appointed for the purpose of conducting the proceedings in winding up a company and performing the duties imposed in reference thereto (*f*).

The court may appoint the official receiver or any other fit person as provisional liquidator at any time after the presentation of a winding-up petition, and before the making of an order for winding up (*g*). A person other than the official receiver has occasionally

(*k*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 142 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 87]; see p. 533, *post*. In the case of an unregistered company, no action is to be commenced or proceeded with against any contributory of the company except by and subject to the same leave and terms (*ibid.*, s. 271 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 202]); see p. 653, *post*. There is a similar provision as regards actions or proceedings against a company registered under Part VII. of the Act, or any contributory of such a company, in respect of a debt of the company (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 266 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 198]).

(*l*) *Chapman's Case* (1866), L. R. 1 Eq. 346. As to continuing the servants in analogous duties, or employing them in the business, see *MacDowall's Case* (1886), 32 Ch. D. 366; *Re English Joint Stock Bank, Ex parte Harding* (1867), L. R. 3 Eq. 341. An agent paid by commission is not entitled to prove for the loss of his future commission (*Re English and Scottish Marine Insurance Co., Ex parte Maclure* (1870), 5 Ch. App. 737). As to proof by servants, see further p. 522, *post*. Where an entertainment company has, in consideration of payments, given certain classes of members the right of free admission, they are not entitled to compensation for the loss of the privilege occasioned by winding up (*Re Royal Aquarium and Summer and Winter Garden Society* (1903), 20 T. L. R. 35). As to the obligation to continue business, see *Hamlyn & Co. v. Wood & Co.*, [1891] 2 Q. B. 488, C. A.; *Ogdens, Ltd. v. Nelson*, [1905] A. C. 109.

(*m*) *Measures Brothers, Ltd. v. Measures*, [1910] 1 Ch. 336, affirmed (1910) 26 T. L. R. 488, C. A. The dismissal discharges a restrictive covenant as to competing in business with the company (*ibid.*).

(*a*) *Fowler v. Broad's Patent Night Light Co.*, [1893] 1 Ch. 724. As to the effect on the directors' remuneration, see *Re South Western of Venezuela (Barquisimeto) Railway*, [1902] 1 Ch. 701.

(*b*) *Madrid Bank v. Bayley* (1866), L. R. 2 Q. B. 37.

(*c*) *Re Diamond Fuel Co.* (1879), 13 Ch. D. 400, C. A. As to security for costs in such a case, see *Re Consolidated South Rand Mines Deep, Ltd.*, [1909] 1 Ch. 491.

(*d*) See p. 567, *post*.

(*e*) See p. 473, *post*.

(*f*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 149 (1); and see p. 442, *post*.

(*g*) *Ibid.*, s. 149 (2), (3) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 85]; Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 4 (5).

been appointed (*h*); but the almost invariable rule is to appoint the official receiver (*i*).

When a provisional liquidator is appointed, the court may limit and restrict his powers by the order appointing him (*k*).

694. The application for the appointment of the official receiver as interim provisional liquidator may be made by a creditor or a contributory, or by the company. On proof by affidavit of sufficient grounds for the appointment, the court, if it thinks fit, and upon such terms as in its opinion are just and necessary, may make the appointment (*l*).

695. When an order appointing the official receiver as provisional liquidator, prior to the making of a winding-up order, has been made by the court, the registrar of the court is on the same day to send to the official receiver a notice informing him that the order has been made, which notice may be in the form prescribed with such variations as circumstances may require (*m*). The order must bear the number of the petition, and state the nature and a short description of the property of which the official receiver is ordered to take possession, and the duties to be performed by him (*n*).

If no order for the winding up of the company is made upon the petition, or if an order for the winding up of the company on the petition is rescinded, or if all proceedings on the petition are stayed, or if an order is made continuing the voluntary winding up of the company subject to the supervision of the court, then, subject to any order of the court, the official receiver as provisional liquidator is entitled to be paid, out of the property of the company, all costs, charges, and expenses properly incurred by him as provisional liquidator, including fees payable to the Board of Trade under the scale of fees in force for the time being, and may retain out of such property the amounts of such costs, charges, expenses, and fees (*o*).

When the official receiver is appointed interim provisional liquidator, three sealed copies of the order have to be sent to him, as in the case of a winding-up order, one of which he serves at the company's registered office; he must also give notice of the order to the Board of Trade to be gazetted, and send notice of the order to the local paper (*p*).

(*h*) *Re Unionist Club, Ltd.*, [1891] W. N. 64; *Re Mercantile Bank of Australia*, [1892] 2 Ch. 204. As to the notification of his appointment and giving of security, see p. 440, *post*.

(*i*) *Re North Wales Gunpowder Co.*, [1892] 2 Q. B. 220, C. A.

(*k*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 151 (5) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 96].

(*l*) Companies (Winding-up) Rules, r. 31 (1); and see *Emmerson's Case* (1866), 1 Ch. App. 433; *Re Culfoden Benefit Building Society* (1868), 3 Ch. App. 462; *Re Hammermith Town Hall Co.* (1877), 6 Ch. D. 112; *Re Bound & Co.*, [1893] W. N. 21, where the powers were restricted to applying for the appointment of a special manager. The application is usually by summons.

(*m*) Companies (Winding-up) Rules, r. 37. For form of notice see *ibid.*, Form 14.

(*n*) *Ibid.*, r. 31 (2).

(*o*) *Ibid.*, r. 31 (3).

SECT. 16. Winding up by the Court.

Application for appointment.

Incidents to appointment.



SECT. 16. The court may fix the remuneration of a liquidator, even when Winding up appointed provisionally (*g*).

by the Court.

Application for appointment.

(ii.) *Special Manager.*

696. Where the official receiver becomes the liquidator of a company, whether provisionally or otherwise, he may, if satisfied that the nature of the estate or business of the company, or the interests of the creditors or contributories generally, require the appointment of a special manager of the estate or business of the company other than himself, apply to the court to, and the court may on such application, appoint a special manager thereof to act during such time as the court may direct, with such powers, including any of the powers of a receiver or manager, as may be intrusted to him by the court (*r*). The court may also, in appointing the official receiver as interim provisional liquidator, restrict his power to that of applying for the appointment of a special manager (*s*).

Evidence on application.

The official receiver's application for the appointment of a special manager must be supported by a report by the official receiver (which must be placed on the file of proceedings), in which must be stated the amount of remuneration which, in the opinion of the official receiver, ought to be allowed to the special manager, but no affidavit by the official receiver in support of the application is required (*t*).

Security, remuneration, and accounts.

697. The special manager must give such security and account in such manner as the Board of Trade directs, and receives such remuneration as may be fixed by the court (*a*). The remuneration must, unless the court otherwise in any special case directs, be stated in the order appointing the special manager; but the court may at any subsequent time for good cause shown make an order for payment to the special manager of further remuneration (*b*).

Every special manager must account to the official receiver, and the accounts must be verified by affidavit, and, when approved by the official receiver, the totals of the receipts and payments must be added by the official receiver to his accounts (*c*).

(iii.) *Provisional Liquidator after Winding-up Order.*

Ex officio provisional liquidator.

698. On a winding-up order being made the official receiver, by virtue of his office, becomes the provisional liquidator, and continues to act as such until he or another person becomes

(*g*) See p. 448, *post*. As to the remuneration of an official receiver as provisional liquidator, see p. 434, *post*.

(*r*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 161 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 5]. As to the notification of his appointment to the Board of Trade and the giving of security, see p. 440, *post*. The validity of the appointment is not affected by the subsequent dismissal of the petition; see *Re A. B. & Co.*, [1900] 2 Q. B. 429 (a bankruptcy case).

(*s*) *Re Bound & Co.*, [1893] W. N. 21. But the court may by the winding-up order give the official receiver power to carry on the company's business (*Re General Service Co-operative Stores* (1891), 64 L. T. 223).

(*t*) Companies (Winding-up) Rules, r. 48 (1).

(*a*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 161 (2), (3); [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 5 (2), (3).]

(*b*) Companies (Winding-up) Rules, r. 48 (2).

(*c*) *Ibid.*, r. 49. For form of affidavit, see *ibid.*, Form 20.

liquidator and is capable of acting as such. No other person can then or subsequently be appointed provisional liquidator (*d*).

SECT. 16. Winding up by the Court.

SUB-SECT. 5.—*Official Receivers.*

(i.) *Appointment, Removal, and Status.*

699. The term "official receiver," as used in relation to the winding up of companies by the court, means the official receiver, if any, attached to the court for bankruptcy purposes, or if there is more than one such official receiver, then such one of them as the Board of Trade may appoint, or if there is no such official receiver, then an officer appointed for the purpose by the Board of Trade; and any such officer is, for the purpose of his duties under the Act of 1908, to be styled the official receiver (*e*). The official receiver in companies' liquidation in London is a distinct person from the official receiver in bankruptcy; but in the provinces the official receiver in companies' liquidation is generally, if not invariably, the same person as the official receiver in bankruptcy.

Definition.

The official receiver is appointed by and is an officer of the Board, but he is also an officer of the court (*f*). Judicial notice is to be taken of his appointment (*g*). When the Board appoints any officer to act as deputy for or in the place of an official receiver, notice thereof must be given by letter to the court to which such official receiver is or was attached, specifying the duration of such acting appointment. During his tenure of office the deputy has all the status, rights, and powers and is subject to all the liabilities of an official receiver (*h*). Where an official receiver is removed from his office by the Board, notice of the removal order must be communicated by letter to the court to which he was attached (*i*).

Appointment.

Notice to the court.

The Board may, by general or special directions, determine what acts or duties of the official receiver in relation to winding up are to be performed by him in person, and in what cases he may discharge his functions through the agency of his clerks or other persons in his regular employ, or under his official control (*k*).

Allocation of duties.

700. An assistant official receiver, appointed by the Board of Trade, is an officer of the court, like the official receiver to whom he is assistant, and, subject to the directions of the Board, he may represent the official receiver in all proceedings in court, or in any administrative or other matter. Judicial notice is to be taken of his appointment; and he may be removed in the same manner as an official receiver (*l*).

Assistant official receiver.

(*d*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 149 (2) (b); see p. 424, *post*.

(*e*) *Ibid.*, s. 146 [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 4 (2)]; Companies (Winding-up) Rules, r. 2.

(*f*) Companies (Winding-up) Rules, r. 201; *Bottomley v. Brougham*, [1908] 1 K. B. 584; *Burr v. Smith*, [1909] 2 K. B. 306, C. A.

(*g*) Companies (Winding-up) Rules, r. 193.

(*h*) *Ibid.*

(*i*) *Ibid.*, r. 199.

(*k*) *Ibid.*, r. 200.

(*l*) *Ibid.*, r. 201.

**SECT. 16.**  
**Winding up**  
**by the**  
**Court.**

In the absence of the official receiver any officer of the Board of Trade duly authorised for the purpose by the Board, and any clerk of the official receiver duly authorised by him in writing, may by leave of the court act on behalf of the official receiver, and take part for him in any public or other examination and in any unopposed application to the court (m).

(ii.) *Duties and Powers in general.*

Receiver in  
debenture-  
holders'  
action.

**701.** The official receiver's services may be required in proceedings outside a winding up. Thus, where an application is made to the court to appoint a receiver on behalf of the debenture-holders or other creditors of a company which is being wound up by the court, the official receiver may be so appointed (n).

*Ex officio*  
provisional  
liquidator

**702.** On a winding-up order being made the official receiver, by virtue of his office, becomes the provisional liquidator of the company (o). He continues to act as such until he or another person becomes liquidator and is capable of acting as such (p), after which no one else can be appointed provisional liquidator (q). The official receiver takes possession of the assets (r); but where a company against which a winding-up order has been made has no available assets, he is not to be required to incur any expense in relation to the winding up without the express directions of the Board of Trade (s). The official receiver as provisional liquidator has, after the winding-up order, the powers of a permanent liquidator with reference to settling a list of contributories, and probably most, if not all, of the other powers of a permanent liquidator (t).

If no application is made to the court for the appointment of a

Permanent  
liquidators.

(m) Companies (Winding-up) Rules, r. 202.

(n) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 162 [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 4 (6)]; see *Strong v. Carlyle Press*, [1893] 1 Ch. 268, C. A.; *British Linen Co. v. South American and Mexican Co.*, [1894] 1 Ch. 108, C. A.; *Re Stubbs (Joshua), Ltd., Barney v. Stubbs (Joshua), Ltd.*, [1891] 1 Ch. 475, 481, C. A.; *Perry v. Oriental Hotels Co.* (1870), 5 Ch. App. 420; *Re Pound (Henry), Son and Hutchins* (1889), 42 Ch. D. 402, C. A.; *Re Vimbos, Ltd.*, [1900] 1 Ch. 470; *Re Maudslay, Sons and Field, Maudslay v. Maudslay, Sons and Field*, [1900] 1 Ch. 602; and p. 378, *ante*.

(o) As to his being interim provisional liquidator, see p. 421, *ante*.

(p) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 149 (3) (b).

(q) *Re North Wales Gunpowder Co.*, [1892] 2 Q. B. 220, C. A.; *Re Reid (John) & Sons, Ltd.*, [1900] 2 Q. B. 634.

(r) In the rules "liquidator" includes an official receiver when acting as liquidator (Companies (Winding-up) Rules, r. 2). And he is acting as liquidator from the time when the winding-up order is pronounced and then begins to act as provisional liquidator (*Re English Bank of the River Plate*, [1892] 1 Ch. 391, 393). As liquidator, he must take into his custody or under his control all the property and things in action to which the company is or appears to be entitled (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 150 (1)). This is clear from another rule which requires the official receiver, when another person's appointment as liquidator is complete, to forthwith put the latter into possession of all property of the company of which the official receiver may have custody (Companies (Winding-up) Rules, r. 161 (1)); see p. 444, *post*.

(s) Companies (Winding-up) Rules, r. 203.

(t) *Re English Bank of the River Plate, supra*. In the Companies (Winding-up) Rules, unless the context or subject-matter otherwise requires, "liquidator" includes the official receiver when acting as liquidator (*ibid.*, r. 2).

**SECT. 16.**  
**Winding up**  
**by the**  
**Court.**

permanent liquidator in the place of the official receiver, or if no liquidator is appointed by the court, the official receiver will be the liquidator (u). If a vacancy occurs in the office of a liquidator appointed by the court, the official receiver, by virtue of his office, is the liquidator during the vacancy (a).

Committee  
of inspection.

Where there is no committee of inspection, its functions devolve on the Board of Trade, but, subject to the Board's direction, may be discharged by the official receiver (b).

Besides the duties mentioned above he has many separate duties to perform in his character of official receiver, the nature of which appears below.

**703.** An appeal to the court from an act or decision of the official receiver, acting otherwise than as liquidator of a company, must be brought within twenty-one days from the time when the decision or act appealed against is done, pronounced, or made (c).

Appeal from  
official  
receiver.

(iii.) *Statement of Affairs.*

**704.** Having, as liquidator, commenced to collect the assets of the company (d) by taking possession, and, as official receiver, performed his duties with reference to the winding-up order and the advertisement thereof, his next duties as official receiver are with reference to (1) the statement of affairs; (2) the submission of his preliminary report to the court; and (3) the summoning of the first meetings of creditors and contributories.

Duties as  
to statement  
of affairs.

**705.** Where the court has made a compulsory winding-up order, there must be made out and submitted to the official receiver a statement as to the affairs of the company in the prescribed form (e), verified by affidavit, and showing the particulars of its assets, debts, and liabilities, the names, residences, and occupations of its creditors, the securities held by them respectively, the dates when the securities were respectively given, and such further or other information as may be prescribed or as the official receiver may require (f). The statement must be made out in duplicate, one copy of which must be verified by affidavit (g). The official receiver must cause the verified statement of affairs to be filed with the registrar of the court in which the winding up is proceeding (h).

Submission  
and verifica-  
tion of  
statement.

(u) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 152; see p. 438, *post*.

(a) *Ibid.*, s. 149 (7).

(b) *Ibid.*, s. 160 (9); Companies (Winding-up) Rules, r. 205; as to the committee of inspection, see p. 438, *post*.

(c) Companies (Winding-up) Rules, r. 206.

(d) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 150 (1), 163 (1).

(e) The form is prescribed by the Companies (Winding-up) Rules, r. 50; for the form, see *ibid.*, Form 26.

(f) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 147 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 7 (1)].

(g) Companies (Winding-up) Rules, r. 50 (1).

(h) *Ibid.*, r. 50 (1), (2).

SECT. 16.  
Winding up  
by the  
Court.

Persons who  
must submit  
and verify  
statement.

**706.** The statement must be submitted and verified by one or more of the persons who are at the time of the winding-up order the directors, and by the person who is at that time the secretary or other chief officer of the company, or by such of the persons being or having been directors or officers of the company or having taken part in the formation of the company at any time within one year before the winding-up order, as the official receiver, subject to the direction of the court, may require to submit and verify the same (i). Even if a man has ceased to be legally a director, but has been *de facto* acting as a director within the prescribed period of a year, he is within this provision (j). Every person who has been required by the official receiver to submit and verify a statement of affairs must be furnished by him with forms and instructions for the preparation of the statement (k). He may from time to time hold personal interviews with every such person for the purpose of investigating the company's affairs, and it is the duty of every such person to attend on him at such time and place as he may appoint and give him all information that he may require (l).

Time for  
submitting  
statement.

**707.** The statement must be submitted within fourteen days from the date of the order, or within such extended time as the official receiver or the court may for special reasons appoint (m). When any person requires any extension of time for submitting the statement of affairs, he must apply to the official receiver, who may, if he thinks fit, give a written certificate extending the time, which must be filed with the proceedings in the winding up and renders an application to the court unnecessary (n).

Expenses  
of persons  
making  
statement.

**708.** Any person making or concurring in making the statement and affidavit required is allowed and paid by the official receiver, out of the assets of the company, such costs and expenses incurred in and about the preparation and making of the statement and affidavit as the official receiver may consider reasonable, subject to an appeal to the court (o). Before incurring any such costs or expenses he must apply to the official receiver for his sanction, and submit a statement of the estimated costs and expenses which it is intended to incur. Except by order of the court, no person is to be allowed out of the assets of the company any costs or expenses which have not before being incurred been sanctioned by the official receiver (p).

Attendances  
as to state-  
ment.

**709.** After the statement of affairs has been submitted to the official receiver it is the duty of each person who has made or

- (i) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 147 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 7 (2)].  
 (j) *Re New Par Consols*, [1898] 1 Q. B. 573.  
 (k) Companies (Winding-up) Rules, r. 50 (1).  
 (l) *Ibid.*, r. 50 (2).  
 (m) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 147 (3) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 7 (3)].  
 (n) Companies (Winding-up) Rules, r. 51.  
 (o) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 147 (4) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 7 (4)].  
 (p) Companies (Winding-up) Rules, r. 54.

concurring in making it, if and when required, to attend on the official receiver and answer all such questions as may be put to him, and give all such further information as may be required of him by the official receiver in relation to the statement (q).

SECT. 16.  
Winding up  
by the  
Court.

**710.** Any person who, without reasonable excuse, makes default in complying with the above-mentioned requirements is liable to a fine not exceeding £10 for every day during which the default continues (r). Any such default may be reported by the official receiver to the court (s) with a view to the defaulter being ordered to submit the statement and committed in default (t). Applications for orders must be made to the winding-up judge himself, who must be satisfied that the person required to make the statement had the materials for so doing (a).

Penalties.

**711.** Any person stating himself in writing to be a creditor or contributory of the company is entitled, by himself or by his agent, at all reasonable times, on payment of the prescribed fee, to inspect the statement of affairs, and to a copy thereof or extract therefrom; but any person untruthfully so stating himself to be a creditor or contributory is guilty of a contempt of court and punishable accordingly on the application of the liquidator or of the official receiver (b).

Inspection.

**712.** The official receiver must, before summoning the first meeting of creditors and contributories, as soon as practicable, send to each creditor mentioned in the statement of affairs, and to each person appearing from the company's books or otherwise to be a contributory of the company, a summary of the statement of affairs, including the causes of the company's failure, and any observations thereon which the official receiver thinks fit to make; but the proceedings at a meeting are not invalidated by reason of any summary or notice required by the rules not having been sent or received before the meeting (c).

Summary.

(iv.) *Preliminary Report.*

**713.** As soon as practicable after receipt of the statement of the company's affairs the official receiver must submit a preliminary report to the court (1) as to the amount of capital issued, subscribed and paid up, and the estimated amount of assets and liabilities; and (2) if the company has failed, as to the causes of the failure; and (3) whether in his opinion further inquiry is desirable as to any

Official  
receiver's  
preliminary  
report.

- (q) Companies (Winding-up) Rules, r. 52.  
 (r) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 147 (5) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 7 (5)].  
 (s) Companies (Winding-up) Rules, r. 53.  
 (t) *Re New Par Consols*, [1898] 1 Q. B. 573; *Re New Par Consols* (No. 2), [1898] 1 Q. B. 669, C. A.  
 (a) *Re Columbian Gold Mines*, [1894] W. N. 92.  
 (b) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 147 (6) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 7 (6)]; see the similar provisions in the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 16 (4); and title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 71.  
 (c) Companies (Winding-up) Rules, r. 120 [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), Sched. 1, r. 3].

SECT. 16. matter relating to the promotion, formation, or failure of the company, or the conduct of the business thereof (*d*).

A public examination cannot be ordered on the preliminary report; a further report is necessary (*e*). One of the objects of requiring the preliminary report, is to bring before the court early information important in guiding its judgment as to the persons who ought to be privately examined (*f*).

(v.) *Summoning First Meetings of Creditors and Contributories.*

Official receiver's duties as to first meetings.

714. When a compulsory winding-up order has been made, the official receiver must summon separate first meetings of the creditors and contributories to determine whether or not application is to be made to the court to appoint a liquidator (in his place), and a committee of inspection (*g*).

First meetings of creditors and contributories must be held within twenty-one days, or if a special manager has been appointed, then within one month, after the date of the winding-up order, or within such further time as the court may approve. The dates of such meetings are to be fixed, and they must be summoned by the official receiver (*h*). He must forthwith give notice of the days fixed by him for the first meetings to the Board of Trade, which must gazette the same (*i*).

The first meetings are to be summoned by notices (*k*), which may be in the prescribed forms. The notices to creditors must state a time within which the creditors must lodge their proofs in order to entitle them to vote at the first meeting of creditors (*l*).

The official receiver must also give to each of the directors and other officers of the company who, in his opinion, ought to attend the first meetings of creditors and contributories seven days' notice of the time and place appointed for each meeting; this notice may either be delivered personally or sent by prepaid post letter, as may be convenient. It is the duty of every director or officer who receives notice of such meeting to attend, if so required, by the official receiver (*m*).

(vi.) *Books and Accounts.*

Record and cash books.

715. The official receiver, until a liquidator is appointed by the court, must keep a book called the "record book," in which he

(*d*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 148 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 8 (1)].

(*e*) *Ibid.*, s. 148 (2); *Re Great Kruger Gold Mining Co., Ex parte Barnard*, [1892] 3 Ch. 307, C. A.; *Ex parte Barnes*, [1896] A. C. 146; *Re Civil, Naval, and Military Outfitters, Ltd.*, [1899] 1 Ch. 215, C. A. This further report should be made on the personal responsibility of the official receiver, not under the direction of the Board of Trade (Practice Note, [1894] W. N. 44).

(*f*) *Ex parte Barnes, supra*.

(*g*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 152 (1). As to these meetings, see further, p. 466, *post*.

(*h*) Companies (Winding-up) Rules, r. 115.

(*i*) *Ibid.*, r. 116.

(*k*) *Ibid.*, r. 117.

(*l*) *Ibid.*, r. 118; see *ibid.*, Forms 21, 22.

(*m*) *Ibid.*, r. 119; as to sending to creditors and contributories a summary of the statement of affairs, see *ibid.*, r. 120; and p. 427, *ante*.

must record the matters which are required to be entered by the liquidator when appointed (*n*), and also a "cash book" in the prescribed form, in which day-to-day entries of receipts and payments must be made (*o*). When another person is appointed liquidator, he has thenceforth to keep the record and cash books, which he receives from the official receiver (*p*), and when he resigns, or is released or removed from office, he must deliver to the official receiver, if no new liquidator is appointed, all books kept by him and all other books, papers and accounts relating to his office (*q*).

Where a liquidator is appointed by the court the official receiver must account to him; and if the liquidator is dissatisfied with the account, or any part of it, he may report the matter to the Board of Trade, which is to take such action (if any) thereon as it may deem expedient (*r*). If the Board refuses to interfere, he may apply to the court for directions (*s*). It is the official receiver's duty to communicate to the liquidator all such information respecting the estate and affairs of the company as may be necessary or conducive to the due discharge of the liquidator's duties (*a*).

When the official receiver is liquidator, the provisions of the rules as to liquidators and their accounts do not apply to him, but he is to account in such manner as the Board of Trade from time to time directs (*b*).

(vii.) *Further Report to the Court and Public Examination.*

716. After the official receiver has submitted his preliminary report to the court (*c*), he may also, if he thinks fit, make a further report, or further reports (*d*), stating the manner in which the company was formed, and whether in his opinion any fraud has been committed by any person in its promotion or formation, or by any director or other officer of the company in relation to the company since the formation thereof, and any other matters which in his opinion it is desirable to bring to the notice of the court (*e*).

It is on this report, and not the preliminary report, that a public examination may be ordered (*f*). The official receiver must state in effect that in his judgment fraud has been committed by the

(*n*) Companies (Winding-up) Rules, r. 166; see p. 451, *post*.

(*o*) *Ibid.*, r. 167 (1); and see p. 451, *post*.

(*p*) *Ibid.*, rr. 166, 167 (1).

(*q*) *Ibid.*, r. 175 (1).

(*r*) *Ibid.*, r. 204 (1), (2). As to giving possession to the liquidator, see p. 444, *post*.

(*s*) *Re Smith, Ex parte Fox* (1886), 17 Q. B. D. 4.

(*a*) Companies (Winding-up) Rules, r. 161 (3). But the official receiver must not, except under special circumstances, pass on notes and documents obtained when the statement of affairs is being prepared (*Re Lake George Mines, Ltd.*, [1904] 1 Ch. 803).

(*b*) Companies (Winding-up) Rules, r. 204 (3).

(*c*) See p. 427, *ante*.

(*d*) Facts elicited at the public examination of one person may justify a second report as to another person; see *Ex parte Barnes*, [1896] A. C. 146, 157.

(*e*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 148 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 8 (2)].

(*f*) *Re Great Kruger Gold Mining Co., Ex parte Barnard*, [1892] 3 Ch. 307.

SECT. 16. Winding up by the Court.

Accounting to liquidator.

Official receiver's further report.

SECT. 16. persons he names in the promotion of the company or in relation to the company since its formation (g); and the report must set out the facts, showing a *prima facie* case (h).

The further report must state, in a narrative form, the facts and matters which the official receiver desires to bring to the notice of the court, and his opinion as required by the Act (i). The making of the report is a function which the official receiver performs as an officer of the court, and therefore the report is absolutely privileged as regards libel proceedings by persons therein named (k).

The official receiver may apply to the court to fix a day for the consideration of the report, and on such application the court appoints a day on which the report is to be considered (l).

Consideration of report.

The consideration of the report must be before the judge of the court personally in chambers; the official receiver must personally, or by counsel or solicitor, attend the consideration of the report, and give the court any further information or explanation with reference to the matters stated in the report which the court may require (m).

Order for public examination.

717. When the official receiver has made his further report, stating that in his opinion a fraud has been committed by any person in the promotion or formation of the company, or by any director or other officer of the company in relation to the company since its formation (n), the court may, after consideration of the report, direct that any person who has taken any part in the promotion or formation of the company, or has been a director or officer of the company, shall attend before the court on a day appointed by the court for that purpose and be publicly examined as to the promotion or formation, or the conduct of the business of the company, or as to his conduct and dealings as director or officer thereof (o).

The application for an order for public examination may be

C. A.; *Ex parte Barnes*, [1896] A. C. 146; *Re Civil, Naval, and Military Outfitters, Ltd.*, [1899] 1 Ch. 215, C. A.

(g) *Ex parte Barnes*, *supra*; compare *Re Trust and Investment Corporation of South Africa, Re Bertram Luipaard's Vlei Gold Mining Co.*, [1892] 3 Ch. 332, C. A.; *Re Laxon & Co.* (3), [1893] 1 Ch. 210; *Re Birkdale Steam Laundry and Carpet Beating Co.*, [1893] 2 Q. B. 386; *Re General Phosphate Corporation, Re Northern Transvaal Gold Mining Co., Re Delhi Steamship Co.*, [1895] 1 Ch. 3, C. A.

(h) *Re Civil, Naval, and Military Outfitters, Ltd.*, *supra*.

(i) Companies (Winding-up) Rules, r. 59.

(k) *Bottomley v. Brougham*, [1908] 1 K. B. 584; *Burr v. Smith*, [1909] 2 K. B. 306, C. A.; Practice Note, [1894] W. N. 44.

(l) Companies (Winding-up) Rules, r. 60.

(m) *Ibid.*, r. 61.

(n) The section does not apply where the only charges against the company are of having committed frauds in the course of its business with the outside world, and not connected with its promotion or formation (*Re Medical Battery Co.*, [1894] 1 Ch. 444, 447).

(o) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 175 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 8 (3)]. Oral evidence outside the report cannot be received (*Re Great Kruger Gold Mining Co., Ex parte Barnard*, [1892] 3 Ch. 307, 327, 331, C. A.).

made *ex parte* (p). The official receiver must act independently of the Board of Trade in respect of public examinations (q).

718. The person ordered to be examined can only apply to discharge the order for want of jurisdiction in making it (r); and notice of motion to discharge the order must be made within a reasonable time (s). The court will not, on an application to discharge, allow rebutting evidence on the question of fraud or otherwise to be adduced, or hold any half trial of the questions involved (t). Where the order is discharged the official receiver will be ordered to pay costs *simpliciter*, and not merely out of the assets of the company (a).

719. A public examination must be held before the judge. In the High Court, however, the judge may direct that the whole or any part of the examination shall be held before the registrar, or before any of the persons mentioned below (b). A public examination in the High Court generally takes place before the Registrar in Companies Winding-Up. If the court so directs, and subject to general rules, it may be held before any judge of county courts, or before any officer of the Supreme Court being an official referee, master, or registrar in bankruptcy, or before any district registrar of the High Court named for the purpose by the Lord Chancellor, or, in the case of companies being wound up by a palatine court, before a registrar of that court. The powers of the court as to the conduct of the examination, but not as to costs, may be exercised by the person before whom the examination is held (c).

The judge may, if he thinks fit, either in the order for examination or by any subsequent order, give directions as to the special matters on which any such person is to be examined (d).

720. On the order for public examination being made, the official receiver must apply for the appointment of a day on which the examination is to be held (e). A day and place are then appointed for holding the public examination; and notice of the day and place so appointed must be given by the official receiver to the person to be examined by sending such notice in a registered letter addressed to his usual or last known address (f).

The official receiver must also give notice of the time and place

(p) *Re Great Kruger Gold Mining Co., Ex parte Barnard*, [1892] 3 Ch. 307; *Re Trust and Investment Corporation of South Africa, Re Bertram Luipaard's Vlei Gold Mining Co.*, [1892] 3 Ch. 332.

(q) Practice Note, [1894] W. N. 44; *Re New Zealand Loan and Mercantile Agency Co.*, [1894] W. N. 200.

(r) *Re New Travellers' Chambers, Ltd.*, [1895] 1 Ch. 395.

(s) *Re Civil, Naval, and Military Outfitters, Ltd.*, [1899] 1 Ch. 215, C. A.; *Re National Stores, Ltd.*, [1900] 1 Ch. 27, C. A.

(t) *Re New Travellers' Chambers, Ltd., supra*; *Re National Stores, Ltd., supra*.  
(a) *Re Hounslow Brewery Co.*, [1896] W. N. 45.

(b) Companies (Winding-up) Rules, r. 62.

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 175 (9) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 8 (9)].

(d) Companies (Winding-up) Rules, r. 62 (b).

(e) *Ibid.*, r. 63.

(f) *Ibid.*, r. 64; and see *ibid.*, Forms 32, 33.

SECT. 16. Winding up by the Court.

Application to discharge order.

Before whom examination to be held.

Time and place of examination.

SECT. 16.  
Winding up  
by the  
Court.

appointed for the examination to the creditors and contributories by advertisement in such newspapers as the Board of Trade from time to time directs, or, in default of any such direction, as the official receiver thinks fit, and must also forward notice of the appointment to the Board to be gazetted (*g*).

Failure to  
attend  
examination.

**721.** If any person directed to attend for public examination fails to attend, and no good cause is shown by him for such failure, or if before the day appointed for the examination the official receiver satisfies the court that such person has absconded, or that there is reason for believing that he is about to abscond with the view of avoiding examination, the court may, upon its being proved to its satisfaction that notice of the order and of the time and place appointed for attendance was duly served, without any further notice issue a warrant for his arrest, or make such other order as the court thinks just (*h*). A warrant of arrest issued by the High Court is to be issued in the Central Office of the Supreme Court pursuant to an order of the court directing such issue (*i*).

Conduct  
of the  
examination.

**722.** A person ordered to be publicly examined is, at his own cost, before his examination, to be furnished with a copy of the official receiver's report. He may at his own cost employ a solicitor with or without counsel, who shall be at liberty to put to him such questions as the court may deem just for the purpose of enabling him to explain or qualify any answers given by him (*k*). He is to be examined on oath, and must answer all such questions as the court may put or allow to be put to him (*l*). The discretionary power of allowing a question to be put is in no way limited by the other provisions of the statute, but must be judicially and carefully exercised in all the circumstances of each particular case (*m*).

The official receiver is to take part in the examination, and for that purpose may, if specially authorised by the Board of Trade in that behalf, employ a solicitor with or without counsel (*n*). The liquidator, where the official receiver is not the liquidator, and any creditor or contributory, may also take part in the examination either personally or by solicitor or counsel (*o*); and the court may put such questions to the person examined as the court thinks fit (*p*).

Refusal to  
answer.

**723.** If a person examined before a registrar or other officer of the court, who has no power to commit for contempt of court,

- (*g*) Companies (Winding-up) Rules, r. 65 (1).  
 (*h*) *Ibid.*, r. 66 (1); and see Form 40.  
 (*i*) *Ibid.*, r. 66 (2).  
 (*k*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 175 (6) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 8 (7)].  
 (*l*) *Ibid.*, s. 175 (5) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 8 (7)].  
 (*m*) *Re London and Globe Finance Co.* (1902), 50 W. R. 253.  
 (*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 175 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 8 (4)].  
 (*o*) *Ibid.*, s. 175 (3) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 8 (5)].  
 (*p*) *Ibid.*, s. 175 (4) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 8 (6)].

SECT. 16.  
Winding up  
by the  
Court.

refuses to answer to the satisfaction of such officer any question which he may allow to be put, the officer is to report the refusal to the judge. The person in default is thereupon in the same position, and is to be dealt with in the same manner, as if he had made default in answering before the judge (*q*). Such report is to be in writing, but without affidavit, and must set forth the question put, and the answer (if any) given by the person examined (*r*). The registrar or other officer must, before the conclusion of the examination at which the default is made, name the time when and the place where the default will be reported to the judge. Upon receiving the report the judge may take such action thereon as he thinks fit. If the judge is sitting at the time when the default is made, it may be reported immediately (*s*).

**724.** Notes of the examination are to be taken down in writing, and must be read over to or by, and signed by, the person examined. They may thereafter be used in evidence against him (*t*), and are to be open to the inspection of any creditor or contributory at all reasonable times (*u*).

Notes of  
examination.

If the court, or the officer of the court before whom the examination is directed to be held, is, in any case and at any stage, of opinion that it is desirable to appoint a person (other than the person before whom an examination is taken) to take down the evidence of any person examined, in shorthand or otherwise, the court or officer aforesaid may make such appointment. The person at whose instance the examination is taken nominates a person for the purpose, and the person nominated is to be appointed, unless the court or officer appointed otherwise orders. Every person so appointed is to be paid a sum not exceeding one guinea a day, and a sum not exceeding 8*d.* per folio of ninety words for any transcript of the evidence that may be required, and such sums are to be paid by the party at whose instance the appointment is made, or out of the assets of the company, as may be directed by the court (*a*).

The notes of every public examination must, after being signed, be filed with the registrar (*b*).

**725.** The court may, if it thinks fit, adjourn the examination from time to time (*c*). The registrar, or other person taking the examination, may adjourn the examination of any person, or any part of the examination, to be held before the judge, where he is of opinion that the examination held before him is being unduly protracted, or for any other sufficient cause (*d*).

## Adjournment.

- (*g*) Companies (Winding-up) Rules, r. 72 (1).  
 (*r*) *Ibid.*, r. 72 (2); for form of report see *ibid.*, Form 38.  
 (*s*) *Ibid.*, r. 72 (3).  
 (*t*) See *ibid.*, r. 70; and p. 484, *post*.  
 (*u*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 175 (7) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 8 (7)].  
 (*a*) Companies (Winding up) Rules, r. 71.  
 (*b*) *Ibid.*, r. 67; and see *ibid.*, Forms 36, 37.  
 (*c*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 175 (8) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 8 (8)].  
 (*d*) Companies (Winding-up) Rules, r. 62 (c).



**SECT. 16.** **Winding up by the Court.** Where an adjournment of the public examination has been directed, notice of the adjournment is not, unless otherwise directed by the court, to be advertised in any newspaper; it is sufficient to publish in the *London Gazette* a notice of the time and place fixed for the adjourned examination (e).

**Costs of examination.** **726.** If any person personally examined is, in the opinion of the court, exculpated from any charges made or suggested against him, the court may allow him such costs as in its discretion it may think fit (f).

(viii.) *Remuneration and Costs.*

**Remuneration.** **727.** Where the official receiver acts as provisional liquidator or liquidator, he is paid the fees prescribed (g), and for them he is accountable as the Treasury directs (h). Some of these fees are in respect of realising the assets, and others in respect of remuneration (i). Where another person is appointed as liquidator, he must pay the official receiver any balance due to him for fees, costs, and charges properly incurred, and for them the official receiver has a lien on the assets (k).

**Liability for costs.** **728.** The official receiver is in no case personally liable for the costs of or in relation to an application to vary the list of contributories (l), or an appeal from his decision rejecting any proof wholly or in part (m). He may, however, be ordered to pay the costs when an order obtained by him for public examination has been reversed. When he is also liquidator he is subject to the rules as to costs affecting other liquidators (n).

SUB-SECT. 6.—*Board of Trade.*

**Appointment of officers.** **729.** The Board of Trade, as a State department (o), has many statutory powers and duties with respect to the winding up of

(e) Companies (Winding-up) Rules, r. 65 (2).

(f) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 175 (6) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 8 (7)]. As to the practice on public examinations, see also title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 71—74.

(g) See Order of December 2nd, 1903, Table B; *Re A. B. & Co.* (No. 2), [1900] 2 Q. B. 429, C. A.

(h) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 237 (3). As to the power of the Board of Trade to fix the remuneration of its officers, see p. 435, *post*.

(i) As to the priority of them on distributing the assets of the company, see Companies (Winding-up) Rules, r. 187 (1).

(k) *Ibid.*, r. 161; see p. 444, *post*.

(l) *Ibid.*, r. 81 (2).

(m) *Ibid.*, r. 114.

(n) See p. 450, *post*. When the official receiver and liquidator took out a misfeasance summons, he was ordered to pay the costs in the winding-up court and the Court of Appeal of the ultimately successful application of the respondent to stay the proceedings (*Re Western Counties Steam Bakeries and Milling Co.*, [1897] 1 Ch. 617, C. A.; see *Re Powell (W.) & Sons*, [1896] 1 Ch. 681; *Re Hounslow Brewery Co.*, [1896] W. N. 45). The official receiver should only allow his name to be used in proceedings under an indemnity as to costs in a clear case, or where authorised by the committee of inspection (*Re Anglo-Sardinian Antimony Co.*, [1894] W. N. 156, 166).

(o) See title CONSTITUTIONAL LAW, Vol. VII., pp. 102, 103.

companies. The concurrence of its President is required to the making of general rules as to winding up (p). The Board appoints, removes, defines the duties of, and fixes the salaries of officers who are concerned in the winding up of companies, such as the official receivers (q) and the Registrar of Joint Stock Companies (r).

The Board of Trade may, with the approval of the Treasury, appoint and remove such additional officers as may be required by the Board for the execution of the winding-up provisions of the Act of 1908; and it may with the like concurrence direct whether any and what remuneration is to be allowed to any officer of, or person attached to, the Board performing any duties under such winding-up provisions. And the Lord Chancellor, with the like concurrence, is to direct whether any, and what, remuneration is to be allowed to any person (other than an officer of the Board) performing any duties in relation to winding up (a).

**730.** The Board of Trade has a general statutory surveillance of liquidators, of whom it may make inquiries to be answered on oath, and whose books and vouchers it may locally investigate (b). A liquidator must notify his appointment to the Board, and must give security to its satisfaction (c). The Board must keep with the Bank of England an account, called the Companies Liquidation Account, of moneys received by the Board in respect of winding-up proceedings (d), as well as an account of the receipts and payments in each winding up (e). The Board prescribes how the liquidator is to pay his money into the Companies Liquidation Account; it may authorise him to have a special banking account (f), and, in case of irregularities in his payments, may disallow his remuneration, and even remove him from office (g). The Board inspects and audits his accounts (h), and takes care that he complies with the statutory requirements as to information concerning pending liquidations (i). It prescribes how moneys payable by him are to be paid, and provides him with the necessary cheques (j), and, finally grants him his release (k). The Board may even prescribe the form of notice of a voluntary liquidator's appointment (l), besides having surveillance of the disposition of assets in a voluntary winding up (m).

(p) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 237.

(q) *Ibid.* ss. 146, 233, 289; see p. 423, *ante*.

(r) *Ibid.* ss. 243, 289; see p. 59, *ante*.

(a) *Ibid.*, s. 233 [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 27].

(b) *Ibid.* s. 159.

(c) *Ibid.* s. 149 (3) (c); see p. 440, *post*.

(d) *Ibid.* s. 229; see p. 459, *post*.

(e) *Ibid.*, s. 231; see p. 436, *post*.

(f) See p. 460, *post*.

(g) *Ibid.*, s. 154; see pp. 449, 461, *post*.

(h) *Ibid.*, s. 155; see p. 452, *post*.

(i) *Ibid.*, s. 224; see p. 455, *post*.

(j) Companies (Winding-up) Rules, r. 164; Board of Trade Regulations, 1909, r. 6; see p. 460, *post*.

(k) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69) s. 157; see p. 463, *post*.

(l) *Ibid.*, s. 187; see p. 573, *post*.

(m) *Ibid.*, s. 224; see p. 457, *post*.

**SECT. 16.** **Winding up by the Court.**

**Surveillance of liquidators.**

SECT. 16. All special managers appointed by the court have to give security to the satisfaction of the Board of Trade (n).

Where there is no committee of inspection, the Board performs the functions of that body (o).

The Board has also an active voice as to the investment of funds in the Companies Liquidation Account generally, or in respect of any particular company, and as to the realisation of the securities (p).

The official receiver requires the Board's special authority to employ solicitors or counsel at a public examination (q) or to incur any expense in relation to the winding up of a company which has no available assets (r).

The officers of the winding-up courts have to make to the Board returns of business, and from those returns the Board causes books to be prepared, which, under its regulations, are open for public information and searches (s).

Separate accounts for each winding up.

731. An account is to be kept by the Board of Trade of the receipts and payments in each winding up. When the cash balance standing to the credit of the account of any company is in excess of the amount which, in the opinion of the committee of inspection, is required for the time being to answer demands in respect of that company's estate, the Board is, on the request of the committee, to invest the amount not so required in Government securities for the benefit of the company (a). For this purpose the committee must sign a certificate and request, and the liquidator must transmit the certificate and request to the Board (b).

The dividends on the investments are to be paid to the credit of the company (c).

When the balance at the credit of any company's account exceeds £2,000, and the liquidator gives notice to the Board that the excess is not required for the purposes of the liquidation, the company is entitled to interest on the excess at the rate of 2 per cent. per annum (d).

When any part of the money so invested is, in the opinion of the committee of inspection, required to answer any demands in respect of the estate of the company, the Board is, on the request of the committee, to raise such sum as may be required by the sale of

(n) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 161 (2); Companies (Winding-up) Rules, r. 57; see p. 422, ante.

(o) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 160 (9); see p. 464, post.

(p) *Ibid.*, ss. 230, 231; see p. 458, post.

(q) *Ibid.*, s. 175 (2); see p. 432, ante.

(r) Companies (Winding-up) Rules, r. 203.

(s) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 235 [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 29 (1)].

(a) *Ibid.*, s. 231 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 17 (1)].

(b) Companies (Winding-up) Rules, r. 168 (1). For form of certificate and request, see *ibid.*, Form 84.

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 231 (3) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 17 (3)].

(d) *Ibid.*, s. 231 (4) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63) s. 18].

part of the securities (e). For this purpose the committee must sign a certificate and request to that effect, and the liquidator must transmit such certificate and request to the Board of Trade (f). Where in a winding up by the court in which there is no committee of inspection a case has in the opinion of the liquidator arisen for an investment of funds or a sale of securities, the liquidator must sign and transmit to the Board a certificate and a request (g).

732. All documents purporting to be orders or certificates made or issued by the Board of Trade for the purposes of the Act of 1908, and to be sealed with the Board's seal, or to be signed by a secretary or assistant secretary of the Board, or any person authorised in that behalf by its President, must be received in evidence and deemed to be such orders or certificates without further proof unless the contrary is shown; and a certificate signed by the President that any order made, certificate issued, or act done is the order, certificate, or act of the Board, is conclusive evidence of the fact so certified (h).

733. The Treasury may issue to the Board of Trade in aid of the votes of Parliament, out of the receipts arising in respect of the winding up of companies from fees, fee stamps, and dividends on investments by the Treasury under the Act, any sums necessary to meet the charges estimated by the Board in respect of salaries and expenses under the Act in relation to the winding up of companies (i).

734. The accounts of the Board of Trade in relation to the winding up of companies are audited by the Treasury (k). The Treasury is required to lay annually before Parliament an account of the receipts and expenditure in respect of proceedings under the Act in relation to the winding up of companies (l).

735. The Board of Trade must also cause a general annual report of matters within the Act of 1908 to be prepared and laid before Parliament (m). An action of libel does not lie against an officer of the Board in respect of statements contained in a report prepared by him for and delivered to the Board in the performance of his duties, on winding-up matters, for the purpose of its being laid before Parliament as part of the Board's general annual report (n).

(e) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 231 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 17 (2)].

(f) Companies (Winding-up) Rules, r. 168 (2).

(g) *Ibid.*, r. 168 (3).

(h) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 236 [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 30].

(i) *Ibid.*, s. 232 [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 19].

(k) *Ibid.*, s. 234 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 28 (2)].

(l) *Ibid.*, s. 234 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 28 (1)].

(m) *Ibid.*, s. 283 [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 29 (2); Companies Act, 1907 (7 Edw. 7, c. 50), s. 47].

(n) *Burr v. Smith*, 1909 2 K. B. 306 C. A.

SECT. 16. Winding up by the Court.

Authentication of Board of Trade's documents.

Treasury allowances to Board of Trade.

Audit of account.

Annual report of Board of Trade.

SECT. 16.  
Winding up  
by the  
Court.

Different  
kinds of  
liquidators.

Purpose of  
liquidator's  
appointment.

First  
meetings to  
nominate  
liquidator.

Application  
to court  
to make  
appointments.

SUB-SECT. 7.—*Liquidators and Committee of Inspection.*

(i.) *Different Kinds of Liquidators.*

**736.** There are three kinds of liquidators in a winding up by order of the court, namely, (1) an interim provisional liquidator, who may be appointed at any time after the winding-up petition has been presented (o); (2) the official receiver acting as provisional liquidator *ex officio* from the time when the winding-up order is made until he is displaced by the appointment of some other person as permanent liquidator, or himself becomes permanent liquidator by reason that no other person is appointed (p); and (3) the liquidator proper, or permanent liquidator, who may be the official receiver himself or some other person appointed by the court after the first meetings of the creditors and contributories have been held and the result of their views on the question who is to be the liquidator has been reported to, and brought before, the court (q).

(ii.) *Appointment of Liquidator and Committee of Inspection.*

**737.** The court appoints a liquidator for the purpose of conducting the proceedings in winding up a company which the court has ordered to be wound up by the court and performing such duties in reference thereto as the court may impose (r).

**738.** When a winding-up order has been made by the court, the official receiver must summon separate first meetings of the creditors and contributories of the company for the purpose of (1) determining whether or not an application is to be made to the court for appointing a liquidator in the place of the official receiver; and (2) determining whether or not an application is to be made to the court for the appointment of a committee of inspection to act with the liquidator, and who are to be the members of the committee if appointed (s).

As soon as possible after the first meetings of creditors and contributories have been held, the official receiver or the chairman of the meeting, as the case may be, must report the result of each meeting to the court (t).

**739.** On the result of the first meetings of creditors and contributories being so reported, the court may, if the meeting of creditors and the meeting of contributories have each passed the same resolutions, or if the resolutions passed at the two meetings are identical in effect, upon the application of the official receiver

(o) See p. 420, *ante*.

(p) See p. 422, *ante*, and p. 439, *post*.

(q) See pp. 439, *post*. This sub-section only deals with liquidators proper or permanent.

(r) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 149 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 94]. As to the official receiver acting as liquidator, see p. 424, *ante*.

(s) *Ibid.*, s. 152 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 6 (1)]. As to the summoning and holding of the meeting, see p. 428, *ante*, and p. 466, *post*.

(t) Companies (Winding-up) Rules, r. 55 (1); and see *ibid.*, Form 27.

SECT. 16.  
Winding up  
by the  
Court.

Proceedings  
on appoint-  
ment of  
liquidator.

forthwith make any appointment (u) or order necessary for giving effect to such resolutions (a).

In any other case, the court must, on the application of the official receiver, fix a time and place for considering the resolutions and determinations (if any) of the meetings, deciding differences (if any), and making such order as shall be necessary (b). The time and place so fixed must be advertised by the official receiver in such manner as the court directs; but the first or only advertisement must be published not less than seven days before the time so fixed (c).

On the consideration of the resolutions and determinations of the meetings, the court is to hear the official receiver and any creditor or contributory (d); and if there is a difference between the determinations of the meetings of the creditors and contributories in respect of any of the matters above mentioned in the section, the court is to decide the difference (e).

If no other person is appointed liquidator, the official receiver is liquidator (f).

**740.** If a liquidator is appointed, a copy of the order appointing him must be transmitted to the Board of Trade by the official receiver (g).

If more than one liquidator is appointed by the court, the court is to declare whether any act which, by the Act of 1908, is required or authorised to be done by the liquidator is to be done by all or any one or more of the persons appointed (h).

(u) As a general rule a shareholder should not be appointed (*Re Northumberland and Durham District Banking Co.* (1858), 2 De G. & J. 508, C. A.). As to appointments in the case of amalgamated companies, see *Re Western Life Assurance Society, Ex parte Willett* (1870), 5 Ch. App. 396; *Re British Nation Life Assurance Association* (1872), L. R. 14 Eq. 492.

(a) Companies (Winding-up) Rules, r. 55 (2); Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 152 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 6 (1)]. Apparently the court can disregard even identical resolutions (*Re Land Development Association*, [1892] W. N. 23; *Re Johannesburg Land and Gold Trust Co.*, [1892] 1 Ch. 583; *Re Bloxwich Iron and Steel Co.*, [1894] W. N. 111; *Re Bank of South Australia* (No. 2) (1895), 2 Mans. 148); and the court can direct further meetings to be held if necessary (*Re Reynolds (Charles) & Co.*, [1895] W. N. 31; *Re Radford and Bright, Ltd.*, [1901] 1 Ch. 272; *Re Radford and Bright, Ltd.* (No. 2), [1901] 1 Ch. 735). It has been held that an appointment cannot be made until after meetings have been held (*Re Reid (John) & Sons, Ltd.*, [1900] 2 Q. B. 634; compare *North Wales Gunpowder Co.*, [1892] 2 Q. B. 220, 224, C. A.).

(b) Companies (Winding-up) Rules, r. 55 (2).

(c) *Ibid.*, r. 55 (3).

(d) *Ibid.*, r. 55 (4).

(e) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 152 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 6 (1)]. There is no "difference" now where the resolutions of both meetings are the same, or identical in effect; compare *Re Johannesburg Land and Gold Trust Co.*, *supra* (decided on rules couched in different language from those now in force).

(f) Companies Consolidation Act, 1908 (8 Edw. 7, c. 69), s. 152 (3).

(g) Companies (Winding-up) Rules, r. 55 (5). For the form of order appointing a liquidator, see *ibid.*, Form 28. As to gazetting and advertising the appointment, see p. 440, *post*.

(h) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 149 (4) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 92]. The court can give the conduct of any particular matter or matters arising in a liquidation, whether it be compulsory or under supervision, to one or more of several liquidators (*Re Midland Land*

## SECT. 16.

Winding up  
by the  
Court.Liquidator's  
security.(iii.) *Security of Liquidator.*

**741.** A liquidator other than the official receiver cannot act until he has notified his appointment to the Registrar of Joint Stock Companies, and has given security in the prescribed manner to the satisfaction of the Board of Trade (*i*). The following provisions as to security apply (*j*), namely: (1) the security must be given to such officers or persons and in such manner as the Board may from time to time direct; (2) the security need not be given in each separate winding up, but may be given either specially in a particular winding up, or generally, to be available for any winding up in which the person giving security may be appointed either as liquidator or special manager; (3) the Board is to fix the amount and nature of such security, and may from time to time, as it thinks fit, either increase or diminish the amount of special or general security which any person has given; (4) the certificate of the Board (*k*) that a liquidator has given security to its satisfaction is to be filed with the registrar; (5) the cost of furnishing the required security by a liquidator, including any premiums which he may pay to a guarantee society, must be borne by him personally, and not charged against the assets of the company as an expense incurred in the winding up (*l*).

Failure to  
give security.

**742.** If a liquidator fails to give the required security within the time stated for that purpose in the order appointing him, or any extension thereof, the official receiver must report such failure to the court. The court may thereupon rescind the order appointing the liquidator (*m*), and direct that another liquidator is to be appointed. The same meetings must then be summoned and the same proceedings taken as in the case of a first appointment of a liquidator (*n*).

(iv.) *Gazetting and Advertising Appointments.*Gazetting and  
advertising  
appoint-  
ments.

**743.** As soon as the liquidator has given security, the Board of Trade must cause notice of the appointment (*o*) to be gazetted. The expense of gazetting the notice must be paid by the liquidator, but may be charged by him on the assets of the company (*p*).

Every appointment of a liquidator or committee of inspection

and Investment Corporation, [1887] W. N. 58). As to the powers and duties of several joint liquidators in a voluntary winding up, see *Re London and Mediterranean Bank, Ex parte Birmingham Banking Co.* (1868), 3 Ch. App. 651; *Re London and Mediterranean Bank, Ex parte Agra and Masterman's Bank* (1871), 6 Ch. App. 206.

(*i*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 149 (3) (c) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 4 (3)].

(*j*) These provisions also apply in the case of a special manager; see p. 422, *ante*.

(*k*) See Companies (Winding-up) Rules, Form 29.

(*l*) *Ibid.*, r. 57. The security may be fixed before the winding-up order (*Re Mercantile Bank of Australia*, [1892] 2 Ch. 204). As to the rights of a surety in regard to the accounts, see *Re Birmingham Brewing, Maltting and Distilling Co.* (1883), 52 L. J. (Ch.) 358.

(*m*) Companies (Winding-up) Rules, r. 58 (1).

(*n*) *Ibid.*, r. 58 (3); and see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 149.

(*o*) See Companies (Winding-up) Rules, Form 103 (7).

(*p*) *Ibid.*, r. 55 (5); see *ibid.*, FORMS 28, 103 (7).

must be advertised by the liquidator in such manner as the court directs, immediately after the appointment has been made and the liquidator has given the required security (*q*).

SECT. 16.  
Winding up  
by the  
Court.(v.) *Position of Liquidator.*

**744.** The acts of a liquidator are valid notwithstanding any defects that may afterwards be discovered in his appointment or qualification (*r*).

Validity of  
liquidator's  
acts.

**745.** In a winding up where a person other than the official receiver is liquidator, he is to be described by the style of the liquidator of the particular company in respect of which he is appointed, and not by his individual name (*s*).

Style of  
liquidator.

**746.** The liquidator, whether he is the official receiver or some other person, is an officer of the court (*t*), at any rate for some purposes (*a*). He is the receiver and manager of the company's assets, and also fills the character of an accountant to make up the books and accounts, so as to ascertain each contributory's or member's share of liability, and of surplus, if any (*b*). In receiving calls the liquidator receives them as a statutory trustee (*c*).

Status of  
liquidator.

Since, in a winding up, the assets of the company are to be collected and applied in discharge of its liabilities, its property is in the nature of trust property, affected with an obligation to be dealt with by the liquidator in a particular way, and this *quasi-trust* is constituted for the benefit of all the creditors (*d*). But the liquidator is not a trustee for each creditor or contributory of the company, and in a strict sense he is not a trustee at all (*e*).

**747.** A liquidator stands in a fiduciary position towards the company. Thus, where he has sold its property nominally to another company, but really to himself, he is accountable as a trustee for the company for the secret profit (*f*). His fiduciary position is recognised by rules, which are practically copied from those which

Fiduciary  
position of  
liquidator.

(*q*) Companies (Winding-up) Rules, r. 55 (6), and Form 30.

(*r*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 149 (10) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 67].

(*s*) *Ibid.*, s. 149 (9) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 94]; Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 4 (3).

(*t*) See p. 423, *ante*; *Gooch's Case* (1872), 7 Ch. App. 207, 211; *Re Opera, Ltd.*, [1891] 2 Ch. 154; reversed on other grounds, [1891] 3 Ch. 260, C. A.

(*a*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 173; Companies (Winding-up) Rules, rr. 75 (1), 83; *Re Hill's Waterfall Estate and Gold Mining Co.*, [1896] 1 Ch. 947, 954.

(*b*) *Gooch's Case, supra*; and as to the liquidator being a receiver, see Companies (Winding-up) Rules, r. 75 (2); and p. 445, *post*.

(*c*) *Black & Co.'s Case* (1872), 8 Ch. App. 254, 262.

(*d*) *Re Oriental Inland Steam Co., Ex parte Scinde Rail. Co.* (1874), 9 Ch. App. 557, 559, 560.

(*e*) *Knowles v. Scott*, [1891] 1 Ch. 717, 722, 723; compare *Re London and Caledonian Marine Insurance Co.* (1879), 11 Ch. D. 140, 144, C. A.

(*f*) *Silkstone and Haigh Moor Coal Co. v. Edey*, [1900] 1 Ch. 167. But on winding up the property affected "has ceased to be beneficially the property of the company" (*Re Oriental Inland Steam Co., Ex parte Scinde Rail Co., supra*).

SECT. 16.  
Winding up  
by the  
Court.

already affected a trustee in bankruptcy (*g*). Except where specially provided he is not in any circumstances whatever to make any arrangement for, or accept from any person connected with, the company, or with its winding up, any gift, remuneration, or benefit whatever beyond the remuneration to which, under the Act and the rules, he is entitled as liquidator, nor is he to make any arrangement for giving up or to give up any part of such remuneration to any such person (*h*). Nor must he, while acting as liquidator, except by leave of the court, either directly or indirectly, by himself or any partner or agent, purchase any part of the company's assets (*i*). Any such purchase without leave may be set aside on the application of the Board of Trade or any creditor or contributory, and the court may make such order as to costs as it thinks fit (*j*). Where the liquidator carries on the business of the company, he is not, without the express sanction of the court, to purchase goods for the carrying on of such business from any person whose connection with the liquidator is of such a nature as would result in his obtaining any portion of the profit (if any) arising out of the transaction (*k*).

The cost of obtaining such sanction must be borne by the person in whose interest it is obtained, and is not payable out of the company's assets (*l*).

(vi.) Duties of Liquidator.

General duty  
of liquidator.

**748.** The liquidator must, as an officer of the court, maintain an even and impartial hand between all the individuals whose interests are involved in the winding up. It is his duty to the whole body of creditors, the whole body of shareholders, and to the court to make himself thoroughly acquainted with the affairs of the company, and to suppress or conceal nothing coming to his knowledge in the course of his investigation which is material to ascertain the exact truth in every case before the court; and it is for the judge to see that he does his duty in this respect (*m*).

Right of  
inspection.

After a winding-up order, creditors and contributories have no right to inspect the books and papers of the company except under an order of the court (*n*). As regards a person who is not a creditor or contributory, however much he may be interested, the liquidator is not even under such obligations as to allowing inspection as attach to the officers of a company before it is in liquidation (*o*).

Where a person is entitled to see books or papers the liquidator

(*g*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 127.

(*h*) Companies (Winding-up) Rules, r. 155.

(*i*) Compare the similar provision relating to members of the committee of inspection; see p. 465, *post*.

(*j*) *Ibid.*, r. 156; compare *Sillstone and Haigh Moor Coal Co. v. Edey*, [1900] 1 Ch. 167.

(*k*) Companies (Winding-up) Rules, r. 157; as to goods supplied by a member of the committee of inspection to the liquidator, see *ibid.*, r. 158; and p. 465, *post*.

(*l*) *Ibid.*, r. 159.

(*m*) *Gooch's Case* (1872), 7 Ch. App. 207.

(*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 221 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 156]; see p. 465, *post*.

(*o*) *Re Kent Coalfields Syndicate*, [1898] 1 Q. B. 754, C. A.

must give him not only access to them, but every assistance and facility in finding out what relevant books and papers he requires, placing any information already obtained at his service. He is not, however, obliged, at the instance of every person interested in every question arising, to make such fresh and careful investigation of books and documents in his possession as would be requisite to enable him to make the ordinary affidavit required from a party called on to make discovery (*p*).

The court will not encourage a liquidator in resisting, especially on technical grounds as to procedure, claims to which there is manifestly no defence (*q*). The court will also insist on the liquidator, as its officer, acting in an upright manner even to the company's opponent, but he must not be generous at other persons' expense (*a*).

**749.** Subject to the provisions of the Act of 1908, the liquidator must, in the administration of the company's assets and in the distribution thereof among its creditors, have regard to any directions that may be given by resolution of the creditors or contributories at any general meeting, or by the committee of inspection, directions by the creditors or contributories in general meeting being, in case of conflict, deemed to override any directions of the committee of inspection (*b*). He may, however, apply to the

(*p*) *Gooch's Case* (1872), 7 Ch. App. 207.

(*q*) *General Share and Trust Co. v. Welley Brick and Pottery Co.* (1882), 20 Ch. D. 260, C. A.

(*a*) *Re Condon, Ex parte James* (1874), 9 Ch. App. 609; *Re Opera, Ltd.*, [1891] 2 Ch. 154; [1891] 3 Ch. 260, C. A. This principle applies both as regards the liquidator and a trustee in bankruptcy. In *Re Condon, Ex parte James, supra*, followed and perhaps extended in *Re Carnac, Ex parte Simmonds* (1885), 16 Q. B. D. 308, C. A., an execution creditor had paid money to a trustee believing that the latter was legally entitled to it, but the court relieved the former against his mistake in law, and ordered the trustee as its officer to repay him the money, as "the Court of Bankruptcy ought to be as honest as other people"; and see *Re Brown, Dixon v. Brown* (1886), 32 Ch. D. 597; *Re Temple Fire and Accident Assurance Co.* (1910), 129 L. T. Jo. 115. The court will not relieve where money has been paid, not to the trustee, but to creditors of a person, on and with a view to accept a composition, and with knowledge that an act of bankruptcy has been committed, where bankruptcy subsequently ensues (*Re Hall, Ex parte Official Receiver*, [1907] 1 K. B. 875, C. A.). The principle of *Re Condon, Ex parte James, supra*, is, however, not confined to cases of money paid to a liquidator, trustee, or other officer of the court under a mistake of law, but applies to every case in which it would be contrary to fair dealing to allow the officer to retain money for distribution among the creditors; thus, premiums which kept alive a policy will be repaid (*Re Tyler, Ex parte Official Receiver*, [1907] 1 K. B. 865, C. A.). As to satisfying obligations to landlords, see *Balfe v. Blake* (1850), 1 I. Ch. R. 365; *Neate v. Pink* (1851), 3 Mac. & G. 476; *Jacobs v. Van Boelen, Ex parte Roberts* (1889) 34 Sol. Jo. 97; as to recouping a person who has paid rent, see *Re Humphreys, Ex parte Kennard* (1870), 21 L. T. 684. But the honour of the court, by insisting on its officer acting generously, cannot be satisfied at the expense of someone else who is not in law or equity bound to satisfy it out of his means, as, for instance, debenture-holders (*Re Regent's Canal Ironworks Co., Ex parte Grissell* (1875), 3 Ch. D. 411, 419, C. A.; *Re Opera, Ltd., supra*); and see *Hand v. Blow*, [1901] 2 Ch. 721, C. A., where the court disallowed the claim for rent of the head lessor against a receiver appointed by the court at the instance of a mortgagee by sub-demise, who had been in possession.

(*b*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 158 (1), (4) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 23]. As to the

SECT. 16.  
Winding up  
by the  
Court.

Court's  
control of  
liquidator.

Control of  
liquidator by  
committee of  
inspection  
etc.

SECT. 16.  
Winding up  
by the  
Court.

court in the manner prescribed for directions in relation to any particular matter arising under the winding up. Subject to the provisions of the Act, he must use his own discretion in the management of the estate and its distribution among the creditors (b). Any person aggrieved by his act or decision may apply to the court, which may confirm, reverse, or modify the act or decision complained of (c).

Control by  
Board of  
Trade.

750. The liquidator, even if not the official receiver and therefore not its officer, is also subject to the surveillance of the Board of Trade. If he does not faithfully perform his duties and duly observe all the requirements imposed on him by statute, rules, or otherwise with respect to the performance thereof, or if complaint is made to the Board by any creditor or contributory in regard thereto, the Board is to inquire into the matter, and take such action thereon as it thinks expedient. At any time it may require the liquidator to answer any inquiry in relation to the winding up, and may, if it thinks fit, apply to the court to examine him or any other person on oath concerning the winding up. The Board may also direct a local investigation to be made of his books and vouchers (d).

An application by the Board to the court to examine on oath the liquidator or any other person is to be made *ex parte*, and to be supported by a report to the court, filed with the registrar, stating the circumstances in which the application is made, and signed by any person duly authorised to sign documents on behalf of the Board. For the purposes of such application the report will be *prima facie* evidence of the statements therein contained (e).

Liquidator's  
possession of  
assets.

751. In a winding up by the court the liquidator must take into his custody, or under his control, all the property and things in action to which the company is or appears to be entitled (f). When he has notified his appointment to the Registrar of Joint Stock Companies, and given security, the official receiver must forthwith put him into possession of all property of the company of which the official receiver has custody. The liquidator must, however, before the assets are handed over to him, have discharged any balance due to the official receiver on account of fees, costs, and charges properly

committee of inspection, see p. 464, *post*; and as to the meetings of creditors and contributories, see p. 466, *post*.

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 158 (5) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 24].

(d) *Ibid.*, s. 159 [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 25].

(e) Companies (Winding-up) Rules, r. 207.

(f) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 150 (1). A liquidator is entitled to the possession of the register of shareholders and the minute book of the company; and the company's former solicitor has no lien on them, nor has he a lien on documents which came into his hands after the commencement of the winding up, but he may have on documents, such as letters of application, which came into his hands before such commencement, and, if he acquires such a lien, the liquidator is not entitled to the possession of the documents thereby covered by the lien, but can obtain such production of the documents as may be necessary for the purposes of the liquidation (*Re Capital Fire Insurance Association* (1883), 24 Ch. D. 408, 420, C. A.; *Re Anglo-Maltese Hydraulic Dock Co.* (1885), 54 L. J. (CH.) 730).

SECT. 16.  
Winding up  
by the  
Court.

incurred by him, and on account of any advances properly made by him in respect of the company, together with interest on such advances at the rate of £4 per cent. per annum. He must also pay all fees, costs, and charges of the official receiver which may not have been discharged by the liquidator before being put into possession of the property of the company, whether incurred before or after he has been put into such possession (g). Until such balance has been paid and the other liabilities have been discharged the official receiver has a lien on the company's assets (h).

As soon as may be after making a winding-up order the court is to cause the assets of the company to be collected and applied in discharge of its liabilities (i). The duties thus imposed on the court must be discharged by the liquidator as an officer of the court subject to its control (j). For the purpose of the discharge by the liquidator of those duties he is, for the purpose of acquiring or retaining possession of the property of the company, in the same position as if he were a receiver of the property appointed by the High Court; and the court may, on his application, enforce such acquisition or retention accordingly (k).

The court or the liquidator may in certain cases require property, to which the company is *prima facie* entitled, to be delivered to the liquidator (l).

Collection  
and applica-  
tion of assets  
by liquidator.

Delivery of  
assets to  
liquidator.

752. It is the duty of the official receiver, if so requested by the liquidator, to communicate to him all such information respecting the estate and affairs of the company as may be necessary or conducive to the due discharge of the liquidator's duties (m). The liquidator must give the official receiver such information and such access to and facilities for inspecting the books and documents of the company, and generally such aid, as may be requisite for enabling that officer to perform his duties (n).

Information  
by and to  
liquidator and  
official  
receiver.

(g) Companies (Winding-up) Rules, r. 161 (1).

(h) *Ibid.*, r. 161 (2).

(i) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 163 (1) [Companies Act, 1862, s. 98].

(j) Companies (Winding-up) Rules, r. 75 (1).

(k) *Ibid.*, r. 75 (2). The possession of a receiver appointed by the court is the possession of the court, and the court will not allow it to be disturbed without its own leave (*Angel v. Smith* (1804), 9 Ves. 335; *Ames v. Birkenhead Docks (Trustees)* (1855), 20 Beav. 332, 350; *Russell v. East Anglian Rail. Co.* (1850), 3 Mac. & G. 104). Even a person with a paramount title must apply to the court for liberty to assert it (*Evelyn v. Lewis* (1844), 3 Hare, 472; *Re Mead, Ex parte Cochrane* (1875), L. R. 20 Eq. 282). Disturbance of a liquidator's possession is a contempt of court (*Re Pound (Henry), Son, and Hutchins* (1889), 42 Ch. D. 402, 411, C. A.; *Re Stubbs (Joshua), Ltd., Barney v. Stubbs (Joshua), Ltd.*, [1891] 1 Ch. 475, C. A.); and the court will protect its officer by injunction (*Dixon v. Dixon*, [1904] 1 Ch. 161, 163). If the liquidator finds another receiver in possession he ought not to bring proceedings to oust him without the court's leave (*Ward v. Swift* (1848), 6 Hare, 309, 312); and see title CONTEMPT OF COURT, Vol. VII., pp. 289, 290.

(l) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 164 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 100]; see p. 473, *post*.

(m) Companies (Winding-up) Rules, r. 161 (3).

(n) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 153 [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 4 (3)].



## SECT. 16.

Winding up  
by the  
Court.(1) Powers  
exercisable  
without  
sanction.

## (vii.) Powers of Liquidator.

**753.** The liquidator has (without the sanction either of the court or the committee of inspection) the following powers, namely: (1) to sell the real and personal property and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels (*o*); (2) to do all acts and to execute, in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose to use, when necessary, the company's seal; (3) to prove, rank, and claim in the bankruptcy, insolvency, or sequestration of any contributory, for any balance against his estate, and to receive dividends in the bankruptcy, insolvency, or sequestration in respect of that balance, as a separate debt due from the bankrupt or insolvent, and rateably with the other separate creditors (*p*); (4) to draw, accept, make, and indorse any bill of exchange or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if the bill or note had been drawn, accepted, made, or indorsed by or on behalf of the company in the course of its business (*q*); (5) to raise on the security of the assets of the company any money requisite (*r*); (6) to take out in his official name 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 company (*s*); (7) to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets, except the things mentioned below which require the sanction of the court or the committee of inspection (*t*).

(2) Powers  
exercisable  
with sanction.

**754.** With the sanction either of the court or of the committee of inspection, the liquidator has power (1) to bring or defend any action or other legal proceeding in the name and on behalf of the company; (2) to carry on the business of the company, so far as may be necessary for the beneficial winding up thereof; (3) to employ a solicitor or other agent to take any proceedings or do any business which the liquidator is unable to take or do himself; but the sanction in this case must be obtained before the employment, except in

(o) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 151 (2) (a).

(p) As to set-off in case of bankruptcy of contributories, see *Grissell's Case* (1866), 1 Ch. App. 528; *Gill's Case* (1879), 12 Ch. D. 755; *Re Duckworth* (1867), 2 Ch. App. 578; *Re G. E. B.*, [1903] 2 K. B. 340, C. A. And see *Re West Coast Gold Fields, Ltd., Rowe's Trustee's Claim*, [1906] 1 Ch. 1, C. A.(q) See *Smith, Fleming & Co.'s Case and Gledstan's Case* (1866), 1 Ch. App. 538; *Re Contract Corporation, Claim of Ebbw Vale Co.* (1869), L. R. 8 Eq. 14.(r) The power to raise and secure money cannot be exercised to the prejudice of debenture-holders (*Re Regent's Canal Ironworks Co., Ex parte Grissell* (1875), 3 Ch. D. 411, C. A.). As to the position of a liquidator who advances his own money to the company, see *Re Bushell, Ex parte Izard* (No. 1) (1883), 23 Ch. D. 75, 80, C. A.

(s) The money due is, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, to be deemed to be due to the liquidator himself (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 151 (2) [Companies Act, 1862 (25 &amp; 26 Vict. c. 89), s. 95, as amended by Companies (Winding up) Act, 1890 (53 &amp; 54 Vict. c. 63), s. 12 (2)]).

(t) *Ibid.*, s. 151 (2) (b), (c), (d), (e), (f), (g).SECT. 16.  
Winding up  
by the  
Court.

cases of urgency, and it must then be shown that no undue delay took place in obtaining the sanction (*u*); (5) to pay any classes of creditors in full, and make certain compromises and arrangements (*v*).

The exercise by the liquidator of the above powers (whether with or without the sanction of the court or the committee of inspection) is subject to the control of the court, and any creditor or contributory may apply to the court with respect to any exercise or proposed exercise of any of those powers (*w*).

An order in general terms giving the liquidator power to do all acts without the previous sanction or interference of the court may be made (*x*).

**755.** The sanction to bringing or defending legal proceedings should be obtained before they are initiated, although there is power to give the sanction subsequently; and the sanction does not dispense with the necessity of obtaining express sanction to the employment of a particular solicitor (*y*). Proceedings in the name of the company or of the liquidator, or of the official receiver, are in some cases allowed to be taken by other persons (*z*). A liquidator may, without obtaining the sanction either of the court or the committee of inspection, bring or defend proceedings in the winding up (*a*); this includes the service of a bankruptcy notice, which, if served by the liquidator, must be made out in the name of the company, and not in his own name (*b*).

There is no such office as that of solicitor to the liquidator (*c*). The appointment of the partner of the liquidator as solicitor will not be sanctioned, unless he consents to act without remuneration (*d*).

Litigation by  
liquidator.Employment  
of solicitors.(u) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 151 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 95, as amended by Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 12 (1), (4)]. As to carrying on business, see p. 506, *post*.(v) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 214; and see p. 602, *post*.(w) *Ibid.*, s. 151 (3) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 12 (3)].(x) *Re Rochdale Property and General Finance Co.* (1879), 12 Ch. D. 775; compare the limited order in *Re Watson & Sons, Ltd.*, [1891] 2 Ch. 55; *Re London Quays and Warehouses Co.* (1868), 3 Ch. App. 394; and see *Re Britannia Permanent Benefit Building Society*, [1890] W. N. 170.(y) *Re London Metallurgical Co.*, [1897] 2 Ch. 262. As to the form of authority, see *Re Vavasour*, [1900] 2 K. B. 309.(z) *Re Bank of Gibraltar and Malta* (1865), 1 Ch. App. 69; *Re Imperial Bank of China, India and Japan* (1866), 1 Ch. App. 339; *Cape Breton Co. v. Fenn* (1881), 17 Ch. D. 198, C. A.; *Re Cape Breton Co.* (1881), 19 Ch. D. 77, C. A.; *Re Anglo-Sardinian Antimony Co.*, [1894] W. N. 156; Practice Note, [1894] W. N. 166; *Re New Zealand Loan and Mercantile Agency Co.*, [1894] W. N. 200.(a) *Re Silver Valley Mines* (1882), 21 Ch. D. 381, 387, C. A.(b) *Re Winterbottom, Ex parte Winterbottom* (1886), 18 Q. B. D. 446; *Re Nance, Ex parte Ashmead*, [1893] 1 Q. B. 590, C. A.; *Re Shirley, Ex parte Mackay* (1888), 58 L. T. 237; unless the judgment makes the money payable to him (*Re Bassett, Ex parte Lewis* (1895), 43 W. R. 427); and see *Re Murietta* (1896), 3 Mans. 35.(c) *Ibid.* As to the taxation of costs, see p. 565, *post*. As to priority of costs in the distribution of assets, see pp. 523 *et seq.*, *post*. As to contributories applying that the solicitor should be changed, see *Re Coopers, Ltd.* (1897), 14 T. L. R. 144, C. A.(d) *Re Universal Private Telegraph Co.* (1870), 19 W. R. 297.

**SECT. 16.**  
**Winding up by the Court.**

Where the managing clerk of a solicitor is a member of the committee, the appointment of the solicitor as solicitor to the liquidator is improper, and will be set aside (*e*). If the solicitor gives notice that he elects not to be remunerated by the scale charge, the liquidator should apply to the judge for directions (*f*). The solicitor acting for him in a winding up, whether by the court or in a voluntary liquidation, even where the appointment has been sanctioned by the court, has no personal claim against the liquidator for the costs, although the liquidator has obtained an order that the costs shall be taxed and paid by him to the solicitor (*g*). Where the attendance of the solicitor is required on any proceeding in court or chambers, the liquidator need only appear in person when the court directs him to do so (*h*). The solicitor's retainer is not revoked by the removal of the liquidator who retained him (*i*).

Rules governing exercise of powers.

**756.** General rules have been made for enabling or requiring the liquidator as an officer of the court, and subject to the control of the court, to exercise or perform all or any of the powers and duties conferred and imposed on the court in respect of the matters following, namely: (1) holding and conducting meetings to ascertain the wishes of creditors and contributories (*k*); (2) settling lists of contributories and rectifying the register of members where required, and collecting and applying the assets (*l*); (3) requiring delivery of property or documents to the liquidator (*m*); (4) making calls (*n*); (5) fixing a time within which debts and claims must be proved (*o*). But the liquidator is not, without the special leave of the court, to rectify the register of members, or to make any call without either the special leave of the court or the sanction of the committee of inspection (*p*).

(viii.) *Remuneration and Costs of Liquidator.*

Remuneration of outside liquidator.

**757.** Where a person other than the official receiver is appointed liquidator, he receives such salary or remuneration by way of percentage or otherwise as the court directs; and if more such persons than one are appointed liquidators, their remuneration is distributed among them in such proportions as the court directs (*a*).

(*e*) *Re Gallard, Ex parte Gallard*, [1896] 1 Q. B. 68, C. A.

(*f*) *Re United Kingdom Land and Building Association* (1888), 40 Ch. D. 471.

(*g*) *Re Anglo-Moravian Hungarian Junction Rail. Co., Ex parte Walkin* (1875), 1 Ch. D. 130, C. A.; *Re Trueman's Estate, Hooke v. Piper* (1872), L. R. 14 Eq. 278. As to the solicitor's lien, see *Re Capital Fire Insurance Association* (1883), 24 Ch. D. 408, C. A.; *Re Union Cement and Brick Co., Ex parte Pulbrook* (1869), 4 Ch. App. 627.

(*h*) Companies (Winding-up) Rules, r. 153.

(*i*) *R. v. London (Lord Mayor), Ex parte Boaler*, [1893] 2 Q. B. 146.

(*k*) See pp. 466 *et seq.*, *post*.

(*l*) See pp. 487 *et seq.*, *post*.

(*m*) See p. 474, *post*.

(*n*) See p. 500, *post*.

(*o*) See p. 507, *post*.

(*p*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 173 [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 13].

(*a*) *Ibid.*, s. 149 (8) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 93]. The Court of Appeal has suggested that the remuneration ought to be apportioned

**SECT. 16.**  
**Winding up by the Court.**

Unless the court otherwise orders, the liquidator's remuneration is to be fixed by the committee of inspection, and must be in the nature of a commission or percentage of which one part is payable on the amount realised, after deducting the sums (if any) paid to secured creditors (other than debenture-holders) out of the proceeds of their securities, and the other part on the amount distributed in dividend (*b*). If the Board of Trade is of opinion that the remuneration of a liquidator as fixed by the committee of inspection is unnecessarily large, the Board may apply to the court to fix the amount (*c*). If there is no committee of inspection the remuneration of the liquidator must, unless the court otherwise orders, be fixed by the scale of fees and percentages for the time being payable on realisations and distributions by the official receiver as liquidator (*d*).

Where a liquidator or special manager in a winding up by the court receives remuneration for his services as such, no payment is allowed on his accounts in respect of the performance by any other person of the ordinary duties which are required by statute or rules to be performed by himself (*e*). Where a liquidator is a solicitor he may contract that the remuneration for his services as liquidator shall include all professional services (*f*).

A liquidator is liable to be disallowed all or part of his remuneration if he retains, without proper explanation, for more than ten days the sum he is allowed to retain, instead of paying the same into the Companies Liquidation Account (*g*).

Disallowance of remuneration.

**758.** As regards costs, where a winding-up order is discharged (as void) the liquidator under it is not entitled as against any person to any remuneration or costs (*h*). His only claim is as against the assets of the company, and then only so far as they exist without interfering with the rights of secured creditors (*i*). Where, however, the property is realised or preserved in the winding-up proceedings for their benefit the costs of realisation and preservation may be retained out of the fund in priority to

Where winding-up order invalid.

according to the work actually done by each of the liquidators (*Re Tawd Vale Colliery Co.* (unreported), June, 1903; and compare *Re Langham Hotel Co., Ex parte Liquidator* (1869), 20 L. T. 163). As to the order of priority in which the remuneration is payable, see Companies (Winding-up) Rules, 1909, r. 187; p. 526, *post*; and compare the cases as to voluntary liquidation at p. 581, *post*.

(*b*) Companies (Winding-up) Rules, r. 154 (1). As to the meaning of "realised," see *Re Christie, Ex parte Christie*, [1900] 1 Q. B. 5. As to secret profits by a liquidator, see p. 441, *ante*.

(*c*) Companies (Winding-up) Rules, r. 154 (2).

(*d*) *Ibid.*, r. 154 (3); and see Order of December 2nd, 1903; and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 125, 126.

(*e*) Companies (Winding-up) Rules, r. 186 (1).

(*f*) *Ibid.*, r. 186 (2).

(*g*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 154 (2).

(*h*) *Re Plumstead Water Co., Ex parte Harding* (1862), 11 W. R. 99, C. A.; *Re Allison, Johnson and Foster, Ltd., Ex parte Birkenshaw*, [1904] 2 K. B. 327.

(*i*) *Re Lloyd (David) & Co., Lloyd v. Lloyd (David) & Co.* (1877), 6 Ch. D. 339, C. A.; *Holroyd v. Marshall* (1862), 10 H. L. Cas. 191; *Re Oriental Hotels Co., Perry v. Oriental Hotels Co.* (1871), L. R. 12 Eq. 126, 133; *Re Anglo-Austrian Printing and Publishing Union, Brabourne v. Same*, [1895] 2 Ch. 891

SECT. 16. their claims (*k*), if the costs can be distinguished from the general Winding up by the Court. costs of the winding up (*l*).

**759.** Where a liquidator sues or defends actions or other proceedings in the name of the company he is not a party to the action, and cannot be ordered to pay the costs personally (*m*). An order for costs will be made against the liquidator personally, even if he is also the official receiver, when he is a party to proceedings as liquidator (*n*); but the order will be without prejudice, if the proceedings are not then in the winding up, to any application he may make to have the costs allowed out of the estate (*o*). Where the proceedings are actually in the winding up the court may order that he be repaid the costs out of the company's assets (*p*); or there may be a simple order to pay the costs (*q*). The liquidator is, as a general rule, entitled to his costs of litigation out of the estate. He may, however, be deprived of them for making a mistake, or where the proceedings are improperly taken by him, although with the sanction of the committee of inspection (*r*); but the order is subject to appeal (*s*). In proceedings with reference to the settlement of persons on the list of contributories, successful applicants to have their names removed from the list have only been allowed costs out of the assets (*t*).

A liquidator who is unsuccessful on appeal, whether he is appellent or respondent, may be ordered to pay the costs (*a*).

(*k*) *Re Regent's Canal Ironworks Co., Ex parte Grissell* (1875), 3 Ch. D. 411, 427, C. A.; *Ford v. Chesterfield (Earl)* (1856), 21 Beav. 426; *Wright v. Kirby* (1857), 23 Beav. 463; *Re Marine Mansions* (1867), L. R. 4 Eq. 601, 611; *Re Oriental Hotels Co., Perry v. Oriental Hotels Co.* (1871), L. R. 12 Eq. 126, 133; *Re Johnson, Ex parte Royle* (1875), L. R. 20 Eq. 780; *Re Wrexham, Mold and Connah's Quay Railway*, [1900] 1 Ch. 261, C. A.

(*l*) *Re Professional Life Assurance Co.* (1867), 3 Ch. App. 167, 175.

(*m*) *Fraser v. Province of Brescia Steam Tramways Co.* (1887), 56 L. T. 771; compare *Freehold Land and Brickmaking Co. v. Spargo*, [1869] W. N. 160. As to the claims of the solicitor acting in the winding up against the liquidator, see p. 447, ante.

(*n*) *Re Powell (W.) & Sons*, [1896] 1 Ch. 681, followed by STIRLING, J., in chambers, in *Re Western Counties Steam Bakeries and Milling Co.* (1896), May 4 (unreported).

(*o*) *Sichell's Case* (1867), 3 Ch. App. 119; *Re City and County Investment Co.* (1879), 13 Ch. D. 475, C. A.; compare *Re Regent United Service Stores, Ex parte Bentley* (1879), 12 Ch. D. 850, 857.

(*p*) *Campbell's Case* (1876), 4 Ch. D. 470.

(*q*) *Re Hounslow Brewery Co.*, [1896] W. N. 45; *Re Western Counties Steam Bakeries and Milling Co.*, [1897] 1 Ch. 617, 632, C. A.

(*r*) *Re Smith, Ex parte Brown* (1886), 17 Q. B. D. 488, C. A.; *Re Silver Valley Mines* (1882), 21 Ch. D. 381, C. A.; and see *Clifton's Case* (1854), 5 De G. M. & G. 743, C. A.; *Re China Steamship and Labuan Coal Co., Drummond's Case* (1869), 21 L. T. 317.

(*s*) *Re Silver Valley Mines, supra*; *Re Raynes Park Golf Club, Ex parte Official Receiver*, [1899] 1 Q. B. 961.

(*t*) *Salisbury-Jones and Dale's Case*, [1895] 1 Ch. 333, C. A., overruling *Re Staffordshire Gas and Coke Co.*, [1893] 3 Ch. 523. The liquidator, however, in discharging the duties of the court as to settling the list of contributories is acting as the officer of the court; see Companies (Winding-up) Rules, r. 75 (1). And see *Smallpage's and Brandon's Cases* (1885), 30 Ch. D. 598 (creditor's successful claim); *Wescomb's Case* (1874), 9 Ch. App. 553.

(*a*) *Re Hickman, Ex parte Strawbridge* (1883), 25 Ch. D. 266, C. A.; *Ferrac's*

A successful litigant in proceedings, either with the liquidator, or with the company through its liquidators, or with the company after liquidation has begun, is *prima facie* entitled to be paid immediately the costs ordered to be paid to him, and to be paid in full. The onus is on the liquidator to show that immediate payment cannot be made, or that other persons have claims in priority or ranking *pari passu* (*b*).

A liquidator taking proceedings in his own name will not be ordered to give security for costs (*c*).

(ix.) *Books, Accounts, and Audit.*

**760.** Every liquidator of a company in winding up by the court must keep, in the manner prescribed, proper books in which he must cause to be made entries or minutes of proceedings at meetings, and of such other matters as may be prescribed. Any creditor or contributory may, subject to the control of the court, personally or by his agent inspect any such books (*d*).

After a liquidator has been appointed by the court, he must keep a book called the "record book," in which he is to record all minutes, all proceedings had and resolutions passed at any meeting of creditors or contributories, or of the committee of inspection, and all such matters as may be necessary to give a correct view of his administration of the company's affairs. He is not bound, however, to insert in the record book any document of a confidential nature (such as the opinion of counsel on any matter affecting the interest of the creditors or contributories); nor need he exhibit such document to any person other than a member of the committee of inspection, or the official receiver, or the Board of Trade (*e*).

The official receiver, until a liquidator is appointed by the court, and thereafter the liquidator, must keep a book to be called the "cash book" (which is to be in such form as the Board of Trade may from time to time direct), in which he must (subject to the

*Case* (1874), 9 Ch. App. 355; *Re City and County Investment Co.* (1879), 13 Ch. D. 475, C. A.; *Re Western Counties Steam Bakeries and Milling Co.*, [1897] 1 Ch. 617, 632, C. A. The question whether he is to get them out of the estate is left to the judge controlling the winding up (*Re Trent and Humber Co., Ex parte Cambrian Steam Packet Co.* (1868), 4 Ch. App. 112, 117; *Wescomb's Case* (1874), 9 Ch. App. 553; *Re Silver Valley Mines* (1882), 21 Ch. D. 381, 387, 392, C. A.).

(*b*) *Re London Metallurgical Co.*, [1895] 1 Ch. 758; *Re Home Investment Co.* (1880), 14 Ch. D. 167; *Re Dominion of Canada Plumbago Co.* (1884), 27 Ch. D. 33, C. A.; compare *Re Marlborough Club Co., Ex parte Percival* (1868), L. R. 6 Eq. 519; *Re Dronfield Silkstone Coal Co. (No. 2)* (1883), 23 Ch. D. 511; *Re National Building and Land Co., Ex parte Ollivero* (1885), 15 L. R. Ir. 47. The order of priority mentioned in the Rules does not affect the matter (*ibid.*). As to the priority of costs out of the assets, see Companies (Winding-up) Rules, r. 187. Costs of outside litigation are not mentioned in the priorities there referred to, but are covered by the words "subject to any order of the court" (*Re London Metallurgical Co., supra*). As to costs, see further, p. 526, post.

(*c*) *Re Powell (W.) & Sons*, [1896] 1 Ch. 681; compare *Re Angerstein, Ex parte Angerstein* (1874), 9 Ch. App. 479.

(*d*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69) s. 156 [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 21].

(*e*) Companies (Winding-up) Rules, r. 166. As to inspection of the record book, see *Re Solomons, Ex parte Solomons*, [1904] 2 K. B. 917 (a bankruptcy case).

SECT. 16. Winding up by the Court.

Security for costs by liquidator.

Liquidator's duty to keep books.

Record book.

Cash book.

SECT. 16. rules as to trading accounts) enter from day to day the receipts and payments made by him (*f*).  
**Winding up by the Court.**

Submission and audit of books.

Where he carries on the business of the company, the total weekly amount of the receipts and payments on the distinct trading account which he is required to keep must be incorporated in the cash book (*g*).

**761.** The liquidator must submit the cash book, together with the record book and any other requisite books and vouchers, to the committee of inspection (if any) when required, and not less than once every three months (*h*).

The committee of inspection must, not less than once every three months, audit the liquidator's cash book and certify therein under their hands the day on which it was audited (*i*).

If the committee of inspection fail to attend the meeting called for audit, a memorandum to that effect should be inserted in the cash book, and the accounts should be forwarded without delay (*k*).

Official receiver's account to liquidator.

**762.** Where a liquidator is appointed in a winding up by the court, the official receiver is to account to the liquidator (*l*). If the liquidator is dissatisfied with the account or any part thereof, he may report the matter to the Board of Trade, which is to take such action (if any) thereon as it may deem expedient (*m*).

Transmission of books to Board of Trade.

**763.** The liquidator must, at the expiration of six months from the date of the winding-up order, and at the expiration of every succeeding six months thereafter until his release, transmit to the Board of Trade a copy of the cash book for such period in duplicate, together with the necessary vouchers and copies of the certificates of audit by the committee of inspection (*n*).

For the purpose of audit he must furnish the Board with such vouchers and information as may be required by the Board, which may at any time require the production of and inspect any books or accounts kept by him (*o*).

Summary of liquidator's accounts.

**764.** With his first accounts, and the copy cash book in duplicate, the necessary vouchers, and the copy of the committee

(*f*) Companies (Winding-up) Rules, r. 167 (1). As to the books to be kept by the official receiver, see p. 428, *ante*.

(*g*) *Ibid.*, r. 171 (1).

(*h*) *Ibid.*, r. 167 (2).

(*i*) *Ibid.*, r. 169. For the form of certificate of audit, see *ibid.*, Form 86.

(*k*) Board of Trade Audit Directions.

(*l*) The provisions of the rules as to liquidators and their accounts do not apply to the official receiver when he is liquidator, but he accounts in such manner as the Board of Trade from time to time directs (Companies (Winding-up) Rules, r. 204 (1) (2)).

(*m*) *Ibid.*, r. 204 (3).

(*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69) s. 155 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 20 (1) (2)]; Companies (Winding-up) Rules, r. 170 (1). As to the summary of the statement of affairs which is to accompany the copy cash book, see p. 453, *post*; and as to the summary of his accounts which is to accompany them, see *ibid.*, r. 173 (1); and p. 453, *post*.

(*o*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 155 (3) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 20 (3)].

of inspection's certificate of audit (*p*), the liquidator must forward to the Board of Trade a summary of the company's statement of affairs, showing thereon in red ink the amounts realised, and explaining the cause of the non-realisation of such assets as may be unrealised (*q*). At the end of every six months he must also forward to the Board, with his accounts, a report upon the position of the liquidation of the company in such form as the Board directs (*r*).

With his accounts he must also transmit to the Board a summary of them in such form as the Board may from time to time direct. On the approval of such summary by the Board, he must transmit to the Board as many printed copies, duly stamped for transmission by post, and addressed to the creditors and contributories, as may be required for transmitting such summary to each creditor and contributory. The cost of printing and posting such copies is to be a charge upon the assets of the company (*s*).

**765.** The first and other accounts of the liquidator sent by the liquidator to the Board of Trade must be verified by him by affidavit (*t*). Where he has not since the date of his appointment or since the last audit of his accounts by the Board, as the case may be, received or paid any sum of money on account of the assets of the company, he must, at the time when he is required to transmit his accounts to the Board, forward to the Board an affidavit of no receipts or payments (*a*).

**766.** An *ad valorem* fee is payable at audit, according to the scale (*b*), on the gross amount of assets realised and brought to credit. There is a prescribed form of request to the Board of Trade to charge this account against the company and credit it to the Board of Trade fees account. This fee is payable in money, and a transfer of the amount payable will be made from the funds standing to the credit of the matter in the Companies Liquidation Account. If there are no funds or insufficient funds to the credit of such account, a special remittance must be made to meet the fee. The fee must be charged in the cash book as a payment and as withdrawn from bank on the date on which the request is forwarded (*c*).

The prescribed practice as to the liquidator's account is as follows:—In the liquidator's account as sent in, each payment appearing therein must be numbered; the periods covered by payments for rates, taxes, and wages must be clearly stated; the

(*p*) See p. 452, *ante*.

(*q*) Companies (Winding-up) Rules, r. 170 (1).

(*r*) *Ibid.* The form prescribed is printed in copyable ink, so that a press copy may be taken.

(*s*) *Ibid.*, r. 173. The summary is to be sent in draft for approval (Board of Trade Audit Directions (r. 1)).

(*t*) Companies (Winding-up) Rules, r. 170 (3). For the form of affidavit, see *ibid.*, Form 87. The terms of the affidavit render it imperative that moneys received by a liquidator's solicitor or other agent (and for which the liquidator is responsible) should be included in the account (Board of Trade Audit Directions).

(*a*) Companies (Winding-up) Rules, r. 174.

(*b*) The scale fixed by Order of December 2nd, 1903.

(*c*) Board of Trade Audit Directions.

SECT. 16. Winding up by the Court.

Verification of liquidator's accounts.

Audit fee.

Board of Trade audit.

SECT. 16.  
Winding up  
by the  
Court.

following are required at each audit, namely, vouchers for all payments charged in the account, which must be arranged in the order in which the payments are entered; the record book entered up to date; allocators for all taxable charges; the auctioneer's sale accounts, if any; the trading account and special manager's account (if any), together with vouchers for payments charged therein; detailed accounts of incidental expenses charged in the account where not set out in detail in the account itself; the report in the prescribed form; the bank pass book, where a special bank account has been authorised, with a certificate by the bankers as to the amount standing to the credit of the account on the date to which the account submitted for audit is made up.

At the first audit the liquidator must furnish an office copy of the front sheet and of lists B, C, F and H of the statement of affairs, showing thereon, in red ink, the amounts realised, and explaining the cause of the non-realisation of such assets as may be unrealised, and two copies of the cash book from the date of the winding-up order, including the receipts and payments of the official receiver. One copy must be a complete copy of the cash book, including the analysis of the receipts and payments, and must be verified by affidavit. The other copy for filing must be on foolscap sheets and must not include the analysis columns. At subsequent audits the balance must be brought forward and the account continued from the date to which the previous account was made up. The original cash book need not be forwarded unless specially asked for (d).

Board of  
Trade certifi-  
cate of audit.

767. The Board of Trade is to cause the account to be audited (e); and when the account has been audited the Board is to certify the fact upon the account. One copy thereupon is to be filed and kept by the Board, and the duplicate copy, bearing a like certificate, is filed with the court. Each copy is to be open to the inspection of any creditor, or of any person interested (f).

The Board is to cause the account, when audited, or a summary thereof, to be printed, and send a printed copy of the account or summary by post to every creditor and contributory (g).

Enforcing  
Board of  
Trade audit.

768. There is ample power in the court, if the requirements as to audit are not complied with, to enforce compliance with such requirements on the application of the Board of Trade, which may take such action as it may think expedient (h).

Local  
investigation.

The Board may also direct a local investigation to be made of the liquidator's books and vouchers (i).

(d) Board of Trade Audit Directions.

(e) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 155 (3) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63)], s. 20 (3).

(f) Companies (Winding-up) Rules, r. 172; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 155 (4) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63)], s. 20 (4).

(g) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 155 (5) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63)], s. 20 (5).

(h) *Ibid.*, s. 159 (1).

(i) *Ibid.*, s. 159 (3). And the Board may at any time require the liquidator to answer any inquiry in relation to any winding up in which he is engaged, and may apply to the court to examine him or any other person on oath concerning the winding up (*ibid.*, s. 159 (2)).

769. When the assets of the company have been fully realised and distributed, the liquidator must forthwith send in his accounts to the Board of Trade, although the six months (j) have not expired (k).

SECT. 16.  
Winding up  
by the  
Court.

770. Upon a liquidator resigning, or being released or removed from his office, he must deliver over to the official receiver, or, as the case may be, to the new liquidator, all books kept by him, and all other books, documents, papers, and accounts in his possession relating to the office of liquidator, and until such delivery his release does not take effect (l).

Delivery up  
of books and  
papers.

771. The Board of Trade may, at any time during the progress of the liquidation, on the application of the liquidator or the official receiver, direct that such of the books, papers, and documents of the company or of the liquidator as are no longer required for the purpose of the liquidation may be sold, destroyed, or otherwise disposed of (m).

Destruction  
of books etc.

(x.) Information as to Pending Liquidation.

772. Where a company is being wound up, whether by the court or voluntarily or under supervision (n), if the winding up is not concluded (o) within one year after its commencement (p), the liquidator must send to the Registrar of Joint Stock Companies statements with respect to the proceedings in and position of the liquidation (q).

Half-yearly  
statements by  
liquidator.

The statements must be sent twice in every year as follows:—The first statement, commencing at the date when a liquidator was first appointed and brought down to the end of twelve months from the commencement of the winding up, must be sent within thirty days from the expiration of such twelve months, or within such extended period as the Board of Trade may sanction, and the subsequent statements must be sent at intervals of half a year, each statement being brought down to the end of the half-year for

(j) See p. 452, *ante*.

(k) Companies (Winding-up) Rules, r. 170 (2).

(l) *Ibid.*, r. 175 (1).

(m) *Ibid.*, r. 175 (2).

(n) *Re Stock and Share Auction and Banking Co., Re Spiral Wood Cutting Co., Re Hull Land and Property Investment Co.*, [1894] 1 Ch. 736.

(o) The winding up is, for the purposes of this enactment, deemed to be concluded—(1) in the case of a company wound up by order of the court, at the date on which the order dissolving the company has been reported by the liquidator to the Registrar of Joint Stock Companies, or at the date of the order of the Board of Trade releasing the liquidator; (2) in the case of a company wound up voluntarily, or under the supervision of the court, at the date of the dissolution of the company, unless at such date any of its funds or assets remain unclaimed or undistributed in the hands or under the control of the liquidator, or any person who has acted as liquidator, in which case the winding up is not deemed to be concluded until such funds or assets have either been distributed or paid into the Companies Liquidation Account (Companies (Winding-up) Rules, r. 188).

(p) As to the commencement of the winding up, see p. 419, *ante*.

(q) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 224 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63)], s. 15 (1)]. Creditors and contributories have the right of inspecting the statements on payment of a fee (*ibid.*, s. 224 (2)).

SECT. 16.  
Winding up  
by the  
Court.

Contents of  
liquidator's  
statements.

which it is sent. The prescribed form (*r*), with such variations as circumstances may require, must be used (*s*).

773. Every statement must contain a detailed account of all the liquidator's realisations and disbursements in respect of the company, not including payments into the Companies Liquidation Account (other than unclaimed dividends), or payments into or out of bank, or temporary investments by the liquidator, or the proceeds of such investments when realised, which must be shown by means of the bank pass book and by a separate statement. When the liquidator carries on a business, a trading account must be forwarded as a distinct account, and the totals of receipts and payments on the trading account must alone be set out in the statement (*a*). When dividends or instalments of compositions are paid to creditors, or a return of surplus assets is made to contributories, the total amount of each dividend, instalment, or return must be entered in the statement of disbursements; and the liquidator must forward separate accounts showing the amount of the claim of, and of dividend payable to, each creditor, and of surplus assets payable to each contributory (*b*). Every statement must be sent in duplicate, and must be verified by an affidavit in the prescribed form, with such variations as circumstances require (*c*).

The statement must be sent even where a liquidator has not during any period for which a statement has to be sent received or paid any money on account of the company, but in such case with such statement he must also send an affidavit of no receipts or payments in the prescribed form (*d*).

(xi.) Unclaimed or Undistributed Assets.

774. If it appears from any such statement of the liquidator or otherwise that he has in his hands or under his control (*e*) any money representing unclaimed or undistributed assets of the company which have remained unclaimed or undistributed for six months after the date of their receipt, the liquidator must forthwith pay the same to the Companies Liquidation Account at the Bank of

(*r*) Companies (Winding-up) Rules, Form 92.

(*s*) *Ibid.*, r. 189.

(*a*) For the form of this account, see *ibid.*, Form 94.

(*b*) *Ibid.*, Form 92.

(*c*) *Ibid.*, r. 189; and for the form of affidavit, see *ibid.*, Form 93. If a liquidator fails to comply with the requirements of s. 224 of the Act he is liable to a fine not exceeding £50 for each day during which the default continues (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 224 (3) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 15 (2)]).

(*d*) Companies (Winding-up) Rules, r. 190; as to the statement and as to the affidavit, see *ibid.*, Forms 92, 93.

(*e*) Money invested or deposited at interest by a liquidator is deemed to be money under his control, and when such money forms part of the minimum balance payable into the Companies Liquidation Account pursuant to *ibid.*, r. 191 (2), it must be realised or withdrawn and the proceeds paid into the Companies Liquidation Account; but Government securities may, with the permission of the Board of Trade, be transferred to the control of the Board to be realised as and when required (*ibid.*, r. 191 (6)).

Payment in  
of unclaimed  
or undistri-  
buted assets.

England. He is then entitled to the prescribed certificate of receipt for the money so paid, and that certificate is an effectual discharge to him in respect thereof (*f*).

As regards unclaimed dividends, the whole amount must be paid in (*g*). As regards money representing other unclaimed or undistributed assets, the minimum balance of such money which the liquidator has had in his hands or under his control (*h*) during the six months immediately preceding the date to which the statement of receipts and payments is brought down, less such part (if any) thereof as the Board of Trade may authorise him to retain for the immediate purposes of the liquidation, must be paid in within fourteen days from the date to which the statement is brought down (*i*).

Money at the credit of the account of the official liquidator of a company with the Bank of England is deemed to be money under his control. When such money has remained unclaimed or undistributed for six months after the date of receipt, it must be transferred to the Companies Liquidation Account, by cheque or order of the official liquidator and master attached to the judge in whose chambers the winding up is proceeding. An application to the Board for payment out of moneys so transferred must be signed by the official liquidator and counter-signed by the master (*j*).

All moneys representing unclaimed or undistributed assets or dividends in the hands of the liquidator at the date of the dissolution of the company must forthwith be paid by him into the Companies Liquidation Account (*k*).

All payments in by a liquidator of undistributed assets must be made under a paying-in order of the Board (*l*).

775. Every person who has acted as liquidator of any company, whether the liquidation has been concluded or not, must furnish to the Board of Trade particulars of any money in his hands or under his control representing unclaimed or undistributed assets of the company and such other particulars as the Board may require for the purpose of ascertaining or getting in any money payable into the Companies Liquidation Account at the Bank of England; and the Board may require such particulars to be verified by affidavit (*m*). The Board may at any time order any such person to submit to

(*f*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 224 (4) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 15 (3)]. As to what are undistributed assets in the case of a scheme of arrangement, see *Re Land Mortgage Bank of Florida*, [1898] 1 Ch. 444. As to payment out to shareholders, see *Elkins v. Capital Guarantee Society* (1900), 16 T. L. R. 423, C. A. Money paid in under the above provision cannot be attached by a garnishee order (*Spence v. Coleman*, [1901] 2 K. B. 199, C. A.).

(*g*) See p. 456.

(*h*) Companies (Winding-up) Rules, r. 191 (1).

(*i*) *Ibid.*, r. 191 (2).

(*j*) *Ibid.*, r. 191 (5). There is not in any winding up commenced since 1890 any official known as the official liquidator, and the rule seems to apply to cases where the winding up was by order of the court and commenced before January 1st, 1891.

(*k*) *Ibid.*, r. 191 (3).

(*l*) *Ibid.*, r. 191 (4).

(*m*) *Ibid.*, r. 192. For the form of affidavit, see *ibid.*, Form 97.

SECT. 16.  
Winding up  
by the  
Court.

Amount to be  
paid in.

Particulars of  
unclaimed or  
undistributed  
assets.



**SECT. 16.**  
**Winding up**  
**by the**  
**Court.**

Court's power  
as to discovery  
etc.

Payment out  
of assets.

Liquidator's  
payment into  
Companies  
Liquidation  
Account.

it an account verified by affidavit of the sums received and paid by him as liquidator of the company, and may direct and enforce an audit of the account (*n*).

For the purposes of ascertaining and getting in any money so payable into the Bank of England, the court has, and at the instance of the Board may exercise, all the powers which may be exercised with respect to the discovery and realisation of the property of a debtor (*o*). An application by the Board for this purpose must be made by motion (*p*).

**776.** Any person claiming to be entitled to any money so paid into the Bank of England may apply to the Board of Trade for payment of the same, and the Board, on a certificate by the liquidator that the person claiming is entitled, may make an order for the payment to that person of the sum due (*q*). The application must be made in the prescribed form and manner, and must, unless the Board otherwise directs, be accompanied by the certificate of the liquidator that the person claiming is entitled, and such further evidence as the Board directs (*r*). Any person dissatisfied with the decision of the Board in respect of any such claim may appeal to the High Court (*s*).

A liquidator who requires to make payments out of money paid into the Bank of England in pursuance of the above-mentioned statutory provision, either by way of distribution or in respect of the cost of the proceedings, must apply in such form and manner as the Board may direct, and the Board may thereupon either make an order for payment to the liquidator of the sum required, or may direct cheques to be issued to the liquidator for transmission to the persons to whom the payments are to be made (*t*).

(xii.) *Banking Accounts and Investment of Funds.*

**777.** A liquidator of a company which is being wound up by the court must not pay any sums received by him as liquidator into his private banking account (*a*). Except where the Board of Trade has authorised a special bank account (*b*), he must in such manner and at such times as the Board, with the concurrence of the Treasury, directs, pay the money received by him to

- (*n*) Companies (Winding-up) Rules, r. 193 (1); and see *ibid.*, Forms 92, 93.  
 (*o*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 224 (5) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 15 (4)]; Companies (Winding-up) Rules, r. 193 (2); and see Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 27, 102 (5), 162; and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 105, 125, 239, 240, 241, 325.  
 (*p*) Companies (Winding-up) Rules, r. 194.  
 (*q*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 224 (6) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 15 (5)].  
 (*r*) Companies (Winding-up) Rules, r. 195.  
 (*s*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 224 (7) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 15 (5)].  
 (*t*) Companies (Winding-up) Rules, r. 196.  
 (*a*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 154 (3) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 11 (6)].  
 (*b*) See p. 460, *post*.

the Companies Liquidation Account at the Bank of England (*c*), which is an account kept at that Bank by the Board, and to which all moneys received by the Board in respect of proceedings under the Act of 1908, in connection with the winding up of companies in England, must be paid (*d*).

All moneys received by the liquidator are required to be paid without deduction. Remittances are to be made once a week, or forthwith if a sum of £200 or more has been received. The remittances (which must not include half-pence) may be made direct to the Bank of England, Law Courts Branch, London, by cheque crossed "Bank of England, credit of Companies Liquidation Account" (*e*). They must be accompanied by a receivable order (*f*); and by the same post the counterpart or advice letter must be transmitted to the Accountant-General to the Board (*g*). All current bills of exchange must also be remitted to the Companies Liquidation Account (*h*). The Board is to furnish the liquidator with a certificate of receipt of the money so paid in (*i*).

**778.** All payments out of moneys standing to the credit of the Board of Trade in the Companies Liquidation Account are to be made by the Bank of England in such manner as the Board

(*c*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 154 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 11 (2), (3)]. If the liquidator at any time retains for more than ten days a sum exceeding £50 or such other amount as the Board of Trade in any particular case authorises him to retain, then, unless he explains the retention to the satisfaction of the Board, he must pay interest on the amount so retained in excess at the rate of 20 per cent. per annum, and is liable to disallowance of all or such part of his remuneration as the Board thinks just, and to be removed from his office by the Board; he is also liable to pay any expenses occasioned by reason of his default (*ibid.*, s. 154 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 11 (4)]). The penal interest belongs to the estate, and not to the Treasury (*Re Sims, Ex parte Official Receiver*, [1907] 2 K. B. 36 (a bankruptcy case)).

(*d*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 229 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 11 (1)]. Whenever the cash balance standing to the credit of the Companies Liquidation Account is in excess of the amount which the Board of Trade requires for the time being to answer demands in respect of companies' estates, the Board is to notify the excess to the Treasury, and pay over the whole or any part of it as the Treasury requires to the Treasury, to such account as the Treasury directs, and the Treasury may invest the sums paid over, or any part thereof, in Government securities, to be placed to the credit of the said account; and when any part of the money so invested is, in the opinion of the Board, required to answer any demands in respect of companies' estates, the Board is to notify to the Treasury the amount so required, and the Treasury is thereupon to repay to the Board such sum as may be required to the credit of the Companies Liquidation Account, and for that purpose may direct the sale of such part of the securities as may be necessary. The dividends on the investments are to be paid to such account as the Treasury directs, and regard is to be had to the amount thus derived in fixing the fees payable in respect of winding-up proceedings in England (*ibid.*, s. 230 [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 16]).

(*e*) Board of Trade Regulations, 1909, r. 1.

(*f*) Which is known as Form C, No. 7. These forms are supplied on application to the Comptroller of the Companies Department, Board of Trade, Great George Street, Westminster, S.W.

(*g*) Board of Trade Regulations, 1909, r. 2.

(*h*) *Ibid.*

(*i*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 154 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 11 (2)].

**SECT. 16.**  
**Winding up**  
**by the**  
**Court.**

Mode of  
payment in.

Payments  
out of  
Company's  
Liquidation  
Account.

**SECT. 16.**  
**Winding up**  
**by the**  
**Court.**

of Trade may from time to time direct (*k*). The Board has directed that cheques to the order of the payee for sums which become payable on account of the company may be obtained by the liquidator, on application by him on the prescribed form (*l*), for delivery by him to the parties entitled (*m*). In no circumstances does the Board hold itself responsible for payments made on the requisition of the liquidator (*n*). The Board has further directed that the comptroller is to be prepared to certify the balance standing to the credit of a company in the Companies Liquidation Account, on receiving from the liquidator a statement of the balance shown by the bank columns of the cash book (*o*). Moneys withdrawn from the bank must not be treated as receipts from realisations, but must appear only in the "drawn from bank" column of the cash book, the application of the money being entered in the "payments" column. Payments into the bank must appear only in the "paid into bank" column in the cash book (*p*); and all applications for the cancellation of cheques and money orders must be addressed to the comptroller and state the grounds upon which the cancellation is required (*q*).

**Liquidator's**  
**special bank**  
**account.**

**779.** If the committee of inspection satisfy the Board of Trade that, for the purpose of carrying on the business of the company or of obtaining advances, or for any other reason, it is for the advantage of the creditors or contributories that the liquidator should have a special bank account other than the Companies Liquidation Account, the Board, on the application of the committee of inspection, is to authorise the liquidator to make his payments into and out of such other bank as the committee may select, and thereupon those payments must be made in the prescribed manner (*r*). The Board may grant such authorisation for such time and on such terms as it thinks fit, and may at any time order the account to be closed if it is of opinion that the account is no longer required for the purposes mentioned in the application (*s*).

Where the liquidator is authorised to have a special bank account, he must forthwith pay all moneys received by him into that account at the appointed bank to the credit of the liquidator of the company; and the pass book with the special bank must be forwarded at each audit (*t*). All payments out of the special bank must be made by cheque payable to order, having marked or

(*k*) Companies (Winding-up) Rules, r. 164; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 229 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 15 (5)].

(*l*) This form is called Form C, No. 6.

(*m*) Board of Trade Regulations, 1909, r. 6.

(*n*) *Ibid.*, r. 7.

(*o*) *Ibid.*, r. 8.

(*p*) *Ibid.*, r. 9.

(*q*) *Ibid.*, r. 10. As to the payment of dividends to creditors, see *ibid.*, r. 11, and p. 527, *post*. As to the payment of any surplus to contributories, see *ibid.*, r. 12; and p. 529, *post*.

(*r*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 154 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 11 (3)]. For form of application, see Companies (Winding-up) Rules, Form 82.

(*s*) Companies (Winding-up) Rules, r. 165 (2). For form of order authorising special bank account, see *ibid.*, Form 83.

(*t*) *Ibid.*, r. 165 (1); Board of Trade Regulations, 1909, r. 4.

written on the face of it the name of the company. Every cheque must be signed by the liquidator and countersigned by at least one member of the committee of inspection, and by such other person, if any, as the committee may appoint (*a*).

(xiii.) *Resignation or Removal of Liquidator.*

**780.** A liquidator appointed by the court may resign his office (*b*). If he desires to resign he must summon separate meetings of the creditors and contributories of the company to decide whether or not the resignation shall be accepted. If the creditors and contributories by ordinary resolutions both agree to accept his resignation, he must file with the Registrar in Companies Winding-Up a memorandum of his resignation, and send notice to the official receiver, upon which the resignation takes effect. In any other case the liquidator must report to the court the result of the meetings and send a report to the official receiver. The court may, on the application of the liquidator or the official receiver, then determine whether or not the resignation is to be accepted, and may give such directions and make such orders as in the opinion of the court are necessary (*c*).

**781.** The liquidator vacates his office if a receiving order in bankruptcy is made against him (*d*).

He is liable to be removed from his office by the Board of Trade if he retains in his hands for more than ten days money which ought within that period to have been paid into the Companies Liquidation Account (*e*).

He may be removed by the court, on the official receiver's report, for failing to keep up his security. The court may make such order as to costs as it thinks fit (*f*), and it may direct that another liquidator is to be appointed (*g*).

He may also be removed by the court on cause shown (*h*). Thus, he may be removed whenever the court is satisfied that it is for the general advantage of those interested in the assets of the company that he should be removed (*i*). Though the court may not have a

(*a*) Companies (Winding-up) Rules, r. 165 (1). As to the payment of dividends to creditors, see Board of Trade Regulations, 1909, r. 11; and p. 527, *post*. As to payment of any surplus to contributories, see *ibid.*, r. 12; and p. 529, *post*.

(*b*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 149 (6) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 93]. As to the effect of his release, see p. 463, *post*. As to the official receiver acting during a vacancy, see p. 423, *ante*.

(*c*) Companies (Winding-up) Rules, r. 162.

(*d*) *Ibid.*, r. 163. For the purposes of the Act and Rules he is deemed to have been removed (*ibid.*); and see p. 462, *post*. If the receiving order is rescinded, he is deemed not to have vacated his office (*Re Newman, Ex parte, Official Receiver*, [1899] 2 Q. B. 587).

(*e*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 151 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 62), s. 11 (4)].

(*f*) Companies (Winding-up) Rules, r. 58 (2).

(*g*) *Ibid.*, r. 58 (3). As to the mode of appointment, see p. 438, *ante*.

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 149 (6) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 93, where the words were "on due cause shown"].

(*i*) *Re Eytton (Adam), Ltd., Ex parte Charlesworth* (1887), 36 Ch. D. 299, C. A.; compare *Re Tavistock Iron Works Co.* (1871), 19 W. R. 672, where proceedings were continued contrary to the wishes of the creditors; *Re Scotch Granite Co.* (1867), 17 L. T. 533.

**SECT. 16.**  
**Winding up**  
**by the**  
**Court.**

**Resignation**  
**of liquidator.**

**Removal.**

SECT. 16.  
Winding up  
by the  
Court.

general discretion, its jurisdiction is not confined to cases where there is personal unfitness in the liquidator (*k*), but extends to cases where the unfitness is occasioned by his connection with other parties, or by the circumstances of the particular case (*l*). In considering whether a liquidator should be removed, importance is attached to such factors as, for instance, that the majority of the company's creditors will be paid off by a large creditor if his nominee is appointed (*m*), or that the majority is dissatisfied with the existing liquidator, especially if some of them are willing to act without remuneration (*n*).

A contributory in arrear as to his calls cannot apply for a liquidator's removal (*o*).

A liquidator may appeal from an order for his removal (*p*).

Vacancy in  
office of  
liquidator.

782. A vacancy in the office of a liquidator appointed by the court must be filled by the court (*q*). When a liquidator dies or resigns, or is removed, another liquidator may be appointed in his place in the same manner as in the case of a first appointment (*r*). On the request of not less than one-tenth in value of the creditors or contributories, the official receiver is to summon meetings for the purpose of determining whether or not the vacancy shall be filled (*s*).

(*k*) See the cases cited in note (*t*), p. 461, *ante*.

(*l*) *Re Sir John Moore Gold Mining Co.* (1879), 12 Ch. D. 325, C. A.; *Re Charterland Gold Fields, Ltd.* (1909), 26 T. L. R. 132.

(*m*) *Re Eytton (Adam), Ltd., Ex parte Charlesworth* (1887), 36 Ch. D. 299, C. A.

(*n*) *Re Oxford Building and Investment Co.* (1883), 49 L. T. 495; *Re Association of Land Financiers* (1878), 10 Ch. D. 269; compare *Re Civil Service and General Stores*, [1884] W. N. 158. Not only must the court in winding-up matters generally regard the wishes of creditors and contributories (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 89), s. 145), but it may do so especially as regards the appointment of liquidators (*ibid.*, s. 201). The mode of appointing liquidators after considering the resolutions of the first meetings shows that the tendency now is for the court to rely more on the wishes of those interested than on its own discretion. The words "on cause shown" were used also in s. 83 (4) of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71); see *Ex parte Hewitt* (1884), 14 Q. B. D. 147; *Re Pooley, Ex parte Sheard* (No. 1) (1880), 16 Ch. D. 107, 109, C. A.; *Re Old Wheel Neptune Mining Co., Ex parte Pulbrook, Ex parte Rawlings* (1864), 2 De G. J. & Sm. 348; *Re Marseilles Extension Railway and Land Co.* (1867), L. R. 4 Eq. 692; *Re British Nation Life Assurance Association* (1872), L. R. 14 Eq. 492.

(*o*) *Re Norwich Provident Insurance Society*, [1879] W. N. 216. As to circular sent by an applicant shareholder to other shareholders, see *Re New Gold Coast Exploration Co.*, [1901] 1 Ch. 860, disapproving *Re Crown Bank, Re O'Malley* (1890), 44 Ch. D. 649, and *Coats (J. & P.) v. Chadwick*, [1894] 1 Ch. 347.

(*p*) *Re Eytton (Adam), Ltd., Ex parte Charlesworth, supra*.

(*q*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 149 (7) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 93].

(*r*) See p. 438, *ante*.

(*s*) Companies (Winding-up) Rules, r. 55 (7). The rule proceeds as follows: "But none of the provisions of this rule shall apply where the liquidator is released under s. 157 of the Act, in which case the official receiver shall remain liquidator." Under the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 157, a release may be granted, not only where the liquidator has fully realised and distributed the assets and made his final return (in which case it would be absurd to appoint a new outside liquidator), but also if the liquidator has resigned or been removed from his office. Either of these events may happen shortly after the liquidator's appointment. On its happening the official receiver becomes liquidator. The effect of this proviso, if read literally, would be that if a release is granted to the resigning or removed liquidator, then no other outsider is to be appointed liquidator, but

(xiv.) Release of Liquidator.

783. When the liquidator has realised all the property of the company, or so much thereof as can, in his opinion, be realised, without needlessly protracting the liquidation, and has distributed a final dividend, if any, to the creditors, and has adjusted the rights of the contributories amongst themselves, and made a final return, if any, to the contributories (*t*), or has resigned, or has been removed from his office (*a*), he may apply to the Board of Trade for his release (*b*). Before making the application he must give notice of his intention so to do to all the creditors who have proved their debts, and to all the contributories, and with the notice must send a summary of his receipts and payments as liquidator (*c*).

On the application being made the Board causes a report on his accounts to be prepared. This report, on his complying with all the Board's requirements, is taken into consideration, together with any objection which may be urged by any creditor, or contributory, or person interested, against the release; and the release is either granted or withheld, subject to an appeal to the High Court (*d*).

784. The Board of Trade's order releasing the liquidator discharges him from all liability in respect of any act done or default made by him in the administration of the affairs of the company, or otherwise in relation to his conduct as liquidator. The order may, however, be revoked on proof that it was obtained by fraud or by suppression or concealment of any material fact (*e*).

Where the liquidator has not previously resigned or been removed, his release operates as a removal of him from his office (*f*).

When the Board has granted the release, a notice of the order granting it must be gazetted (*g*).

the official receiver is to remain liquidator. The rule would appear to be in direct conflict with s. 149 (7) of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69). But it will be noticed that by *ibid.*, s. 157 (4), the release of a liquidator who has not previously resigned or been removed (i.e., a liquidator who has made his final return) operates as his removal (see *infra*), and the above proviso is probably intended to apply only to that case.

(*t*) See pp. 500, 527 *et seq.*

(*a*) See p. 462, *ante*.

(*b*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 157 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 22 (1)]; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 112, 113; *Re Prager, Ex parte Société Cockerill* (1876), 3 Ch. D. 115; *Re Ware, Ex parte Carter* (1878), 8 Ch. D. 731, C. A.

(*c*) Companies (Winding-up) Rules, r. 197 (1). For form of notice to creditors and contributories, see *ibid.*, Form 98; for form of summary, *ibid.*, Form 100; and for form of application to the Board, *ibid.*, Form 99.

(*d*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 157 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 22 (1)]. As to appeals, see Companies (Winding-up) Rules, r. 206. As to his duty to hand over books etc., see p. 455, *ante*.

(*e*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 157 (3) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 69), s. 22 (3)]; and see *Re Harrie, Ex parte Hasluck*, [1899] 2 Q. B. 93; and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 112, 113, *ante*.

(*f*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 157 (4) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 22 (4)].

(*g*) Companies (Winding-up) Rules, r. 197 (2). The liquidator must provide the requisite stamp fee for the *Gazette*, which he may charge against the company's assets (*ibid.*).

SECT. 16.  
Winding up  
by the  
Court.

Liquidator's  
application  
for release.

Effect of  
release.

Gazetting  
release.

SECT. 16.  
Winding up  
by the  
Court.

**785.** Where the release is withheld, the court may, on the application of any creditor, or contributory, or person interested, make such order as it thinks just, charging the liquidator with the consequences of any act or default which he may have done or made contrary to his duty (*h*).

## (xv.) Committee of Inspection.

Constitution  
of committee  
of inspection.

**786.** The committee of inspection (*i*) consists of creditors and contributories of the company, or persons holding general powers of attorney from creditors or contributories, in such proportions as may be agreed on by the meetings of creditors and contributories, or as, in case of difference, may be determined by the court (*k*). If there is no committee of inspection, the Board of Trade may act as such on the application of the liquidator (*l*). The functions of the committee may, subject to the directions of the Board, be then exercised by the official receiver (*m*). The liquidator cannot, however, make a call, when there is no committee of inspection, without obtaining the leave of the court (*n*).

Amending  
constitution  
of committee.

Where any creditors or contributories with a substantial interest, whether as individuals or as a class, are, through no fault of their own, unrepresented on the committee of inspection, the court may direct the liquidator to summon a meeting of the creditors or contributories to consider whether a representative of the aggrieved person or class should be substituted for an existing member of the committee; or it may order fresh first meetings to be summoned to determine whether a committee should be appointed and who should be its members (*o*).

Powers and  
duties of  
committee.

**787.** The committee of inspection has powers and duties with reference to the liquidator's remuneration (*p*); the employment by the liquidator of a solicitor or agent (*q*); litigation by the liquidator in the company's name (*r*); the carrying on of the company's business by the liquidator (*s*); the opening by the liquidator of a special banking account (*t*); the liquidator's record book and cash book

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 157 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 22 (2)]; see *Re Hill's Waterfall Estate and Gold Mining Co.*, [1896] 1 Ch. 947.

(*i*) As to the mode of appointment, see p. 438, *ante*.

(*k*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 160 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 9 (1)]. No defect or irregularity in the appointment or election of a member of the committee vitiates any act done by him in good faith (Companies (Winding-up) Rules, r. 217 (2)).

(*l*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 160 (9) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 9 (9)].

(*m*) Companies (Winding-up) Rules, r. 205.

(*n*) *Ibid.*, r. 83 (5).

(*o*) *Re Radford and Bright, Ltd.*, [1901] 1 Ch. 272; *Re Radford and Bright* (No. 2), [1901] 1 Ch. 735.

(*p*) See p. 449, *ante*.

(*q*) See p. 446, *ante*.

(*r*) See p. 446, *ante*.

(*s*) See p. 506, *ante*.

(*t*) See p. 460, *ante*.

SECT. 16.  
Winding up  
by the  
Court.

and the audit thereof (*a*); the making of calls (*b*); the investment of the company's moneys and the realisation of the investments (*c*); the giving of directions as to the administration and distribution of the company's assets (*d*); compromises and general schemes of liquidation (*e*).

Meeting of  
committee.

**788.** The committee of inspection is to meet at such times as it from time to time appoints, and, failing such appointment, at least once a month. The liquidator or any member of the committee may also call a meeting of the committee whenever he thinks necessary (*f*). The committee may act by a majority of its members present at a meeting, but must not act unless a majority of the committee are present (*g*).

Resignation,  
removal and  
filling up  
vacancies.

**789.** Any member may resign by notice in writing signed by him and delivered to the liquidator (*h*). If a member becomes bankrupt, or compounds or arranges with his creditors, or is absent from five consecutive meetings of the committee without the leave of those members who together with himself represent the creditors or contributories, as the case may be, his office becomes vacant (*i*). Any member may be removed by an ordinary resolution at a meeting of creditors (if he represents creditors), or of contributories (if he represents contributories), of which seven days' notice has been given, stating the object of the meeting (*k*). On a vacancy occurring the liquidator must forthwith summon a meeting of creditors or of contributories, as the case may require, to fill it, and the meeting may, by resolution, reappoint the same or appoint another creditor or contributory to fill the vacancy (*l*). Notwithstanding any vacancy in the committee (*m*), the continuing members, if not less than two, may act.

**790.** A member of the committee of inspection, like a liquidator, is forbidden to purchase assets of the company without the court's leave (*n*). No member of the committee is, except under

Purchase  
etc. by  
committee-  
men.

(*a*) See p. 452, *post*.

(*b*) See p. 500, *ante*.

(*c*) See p. 458, *post*.

(*d*) See pp. 443, 446, *ante*.

(*e*) See pp. 602 *et seq.*, *post*.

(*f*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 160 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 9 (2)].

(*g*) *Ibid.*, s. 160 (3) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 9 (3)].

(*h*) *Ibid.*, s. 160 (4) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 9 (4)].

(*i*) *Ibid.*, s. 160 (5) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 9 (5)].

(*k*) *Ibid.*, s. 160 (6) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 9 (6)].

(*l*) *Ibid.*, s. 160 (7) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 9 (7)]; and see the similar provisions of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 22; and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 113—117.

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 160 (8) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 9 (8)].

(*n*) See Companies (Winding-up) Rules, r. 156; p. 442, *ante*; and title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 116.

SECT. 16.  
Winding up  
by the  
Court.

and with the sanction of the court, directly or indirectly, by himself, or any employer, partner, clerk, agent, or servant, entitled to derive any profit from any transaction arising out of the winding up, or to receive out of the assets any payment for services rendered by him in connection with the administration of the assets, or for any goods supplied by him to the liquidator for or on account of the company. If it appears to the Board of Trade that any such profit or payment, without such sanction, has been made, it may disallow such payment or recover such profit, as the case may be, on the audit of the liquidator's accounts (o). The cost of obtaining such sanction must be borne by the person in whose interest it is obtained, and is not to be payable out of the company's assets (p). Where the sanction of the court to a payment to a member of the committee for services rendered by him in connection with the administration of the company's assets is obtained, the order of the court must specify the nature of the services, and the sanction is only to be given where the service performed is of a special nature (q).

These provisions do not apply to actual out-of-pocket expenses necessarily incurred by the committee of inspection, which are payable out of the company's assets, subject to the approval of the Board of Trade (r).

SUB-SECT. 8.—Meetings of Creditors and Contributories.

(i.) First Meetings.

Summoning  
first meetings

**791.** What are called first meetings of creditors and contributories are to be summoned by the official receiver to determine whether application is to be made for appointing a liquidator in his place, and for the appointment of a committee of inspection, and who are to be the members of the committee (a). Rules have been made having special reference to these first meetings (b).

(ii.) Court Meetings.

Meetings  
ordered by  
the court.

**792.** Where the court is authorised to regard the wishes of creditors or contributories, as proved to it by any sufficient evidence (c), it may, if it thinks fit, for the purpose of ascertaining

(o) Companies (Winding-up) Rules, r. 158. The sanction must be obtained before the business is undertaken (*Re Gallard, Ex parte Harris* (1888), 21 Q. B. D. 38).

(p) Companies (Winding-up) Rules, r. 159.

(q) *Ibid.*, r. 160. The Lord Chancellor, with the concurrence of the Treasury, has power to direct whether any, and if so what, remuneration is to be allowed to persons (other than Board of Trade officers) performing duties in relation to a winding up (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 233 (3)).

(r) See Companies (Winding-up) Rules, r. 187 (1).

(a) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 152 (1).

(b) See Companies (Winding-up) Rules, rr. 115—119. As to summoning such meetings, see p. 428, *ante*. As to voting at such meetings, see pp. 468 *et seq.*, *post*; as to proxies, see pp. 468 *et seq.*, *post*. As to the general rules which are to some extent applicable to such meetings, see p. 467, *post*.

(c) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 145, 201; see p. 413, *ante*.

those wishes, direct meetings of the creditors or contributories to be held, and may appoint a person to act as chairman and to report the result of the meeting to the court. At such meetings, in the case of creditors, regard is to be had to the value of each creditor's debt, and in the case of contributories to the number of votes conferred on each contributory by the articles (d).

SECT. 16.  
Winding up  
by the  
Court.

(iii.) Liquidators' Meetings.

**793.** The third class of meetings comprises those which are summoned by the liquidator apart from any direction by the court. In administering the assets of the company and distributing them among its creditors, the liquidator must have regard to any directions that may be given by resolution of the creditors or contributories at any general meeting. Any such directions are, in case of conflict, deemed to override any directions given by the committee of inspection (e).

Meetings  
called by the  
liquidator.

The liquidator may summon general meetings of the creditors or contributories for the purpose of ascertaining their wishes, and it is his duty to summon meetings at such times as the creditors or contributories, by resolution, either at the meeting appointing the liquidator or otherwise, may direct, or whenever requested in writing to do so by one-tenth in value of the creditors or contributories, as the case may be (f).

(iv.) General Rules as to Meetings.

**794.** The costs of summoning a meeting of creditors or contributories at the instance of any person other than the official receiver or liquidator must be paid by the person at whose instance it is summoned. Before the meeting is summoned he must deposit with the official receiver or liquidator (as the case may be) such sum as may be required by him as security for the payment of such costs. Such costs are to be repaid out of the assets of the company if the court so orders or the creditors or contributories, as the case may be, by resolution so direct (g).

Costs of  
summoning  
meetings.

(d) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 219 [Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 91, 149]. These meetings are called "court meetings," and, subject to any express directions of the court, Companies (Winding-up) Rules, rr. 123—149, as to which see *infra*, apply to such meetings, so far as practicable (*ibid.*, r. 122; compare s. 173 (a) of the Act of 1908).

(e) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 158 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 23 (1)].

(f) *Ibid.*, s. 158 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 23 (2)]; Companies (Winding-up) Rules, r. 122; and see s. 173 of the Act of 1908. The Companies (Winding-up) Rules, rr. 123—149, apply so far as practicable (*ibid.*, r. 122), as to which see *infra*.

(g) Companies (Winding-up) Rules, r. 126. The costs of summoning a meeting, including all disbursements for printing, stationery, postage and the hire of room, are to be calculated at the following rate for each creditor or contributory, to whom notice is required to be sent, namely, 2s. per creditor or contributory for the first twenty creditors or contributories, 1s. per creditor or contributory for the next thirty creditors or contributories, 6d. per creditor or contributory for any number of creditors or contributories after the first fifty (*ibid.*).

SECT. 16.  
Winding up  
by the  
Court.

Mode of  
summoning  
meeting.

**795.** The official receiver or liquidator is to summon all meetings of creditors and contributories by giving not less than seven days' notice of the time and place in the *London Gazette* and in a local paper. Not less than seven days before the day appointed for the meeting, he is to send by post to every person appearing by the company's books to be a creditor of the company notice of the meeting of creditors, and to every person appearing by the company's books or otherwise to be a contributory of the company notice of the meeting of contributories. The notice to each creditor must be sent to the address given in his proof, or if he has not proved, to the address given in the statement of affairs, or to such other address as may be known to the person summoning the meeting. The notice to each contributory must be sent to the address mentioned in the company's books as the address of such contributory, or to such other address as may be known to the person summoning the meeting (*h*).

Where a meeting of creditors or contributories is summoned by notice, the proceedings and resolution at the meeting are, unless the court otherwise orders, to be valid notwithstanding that some creditors or contributories may not have received the notice (*i*).

Evidence as  
to notice  
being sent.

A certificate by the official receiver or other officer of the court, or by his clerk, or an affidavit by the liquidator, or his solicitor, or the clerk of either, that the notice of any meeting has been duly posted is sufficient evidence of such notice having been duly sent to the person to whom the same was addressed (*a*).

Proxies at  
meetings.

Forms to be  
sent with  
notice.

**796.** A creditor or contributory may vote by proxy (*b*); and rules have been made regulating the use of proxies (*c*).

General and special forms of proxy must be sent to the creditors and contributories with the notice summoning the meeting. Neither the name nor description of the official receiver or liquidator or any other person is to be printed or inserted in the body of any instrument of proxy before it is so sent (*d*).

Every instrument of proxy must be in accordance with the forms (*e*). The written part must be in the handwriting of the person giving the proxy, or of some manager or clerk or other person in his regular employment, or of a commissioner of oaths (*f*).

Proxy of  
blind or  
incapable  
creditor.

The proxy of a creditor blind or incapable of writing may be accepted, if he has attached his signature or mark to it in the presence of a witness, who adds to his signature his description and residence. All insertions in the proxy must, however, be in the handwriting of the witness; and the witness must certify at the

- (*h*) Companies (Winding-up) Rules, r. 123.  
(*i*) *Ibid.*, r. 130.  
(*a*) *Ibid.*, r. 124; and see *ibid.*, Forms 76, 77.  
(*b*) *Ibid.*, r. 139. The provisions as to proxies do not, unless directed by the court, apply to a court meeting of creditors or contributories prior to the first meeting (*ibid.*). As to proxies, and the stamps on them, see pp. 258, 259, *ante*.  
(*c*) *Ibid.*, rr. 140–149.  
(*d*) *Ibid.*, r. 141.  
(*e*) See *ibid.*, Forms 80 and 81.  
(*f*) *Ibid.*, r. 140. The person appointed as proxy cannot act as attesting witness (*Re Parrott, Ex parte Cullen*, [1891] 2 Q. B. 151).

foot of the proxy that all such insertions have been made by him at the request of the creditor and in his presence before he attached his signature or mark (*g*).

**797.** A creditor or a contributory may give (1) to his manager or clerk or any other person in his regular employment a general proxy, which must state the relation in which the person to act under it stands to the creditor or contributory (*h*); or (2) to any person a special proxy to vote at any specified meeting or adjournment thereof for or against the appointment or continuance in office of any specified person as liquidator or member of the committee of inspection, and on all questions relating to any matter other than those above referred to and arising at the meeting or an adjournment thereof (*i*).

No person is to be appointed a general or special proxy who is a minor (*k*).

Where a limited company is a creditor, any person who is duly authorised under its seal to act generally on its behalf at meetings of creditors and contributories and to appoint himself or any other person to be its proxy may fill in and sign the form of proxy on its behalf, and appoint himself to be its proxy. A proxy so filled in and signed by him is to be received and dealt with as the proxy of the creditor company (*l*).

A creditor or a contributory may appoint the official receiver or liquidator to act as his general or special proxy (*m*). Where an official receiver who holds any proxies cannot attend the meeting for which they are given, he may, in writing, depute some person under his official control to use the proxies on his behalf, and in such manner as he may direct (*n*). Where it appears to the satisfaction of the court that any solicitation has been used by or on behalf of a liquidator in obtaining proxies or in procuring his appointment as liquidator except by the direction of a meeting of creditors or contributories, the court, if it thinks fit, may order that no remuneration be allowed to the person by whom or on whose behalf the solicitation was exercised, notwithstanding any resolution of the committee of inspection or of the creditors or contributories to the contrary (*o*).

**798.** A proxy intended to be used at the first meeting of creditors or contributories, or an adjournment thereof, must be lodged with the official receiver not later than the time mentioned for that purpose in the notice convening the meeting or the adjourned meeting, which time shall not be earlier than twelve o'clock at

- (*g*) Companies (Winding-up) Rules, r. 149; and see *ibid.*, r. 139.  
(*h*) *Ibid.*, r. 142. For the form of general proxy, see *ibid.*, Form 80. As to appointing the official receiver or liquidator, see *infra*.  
(*i*) *Ibid.*, r. 143. For the form of special proxy see *ibid.*, Form 81. Apart from the rules, proxies can only be given to members of the class (*Re Mvras Irrigation and Canal Co.*, [1881] W. N. 120).  
(*k*) Companies (Winding-up) Rules, r. 147 (3); and see *ibid.*, r. 133.  
(*l*) *Ibid.*, r. 147 (4).  
(*m*) *Ibid.*, r. 145.  
(*n*) *Ibid.*, r. 148.  
(*o*) *Ibid.*, r. 144.

SECT. 16.  
Winding up  
by the  
Court.

Persons who  
may be  
proxies.

Official  
receiver or  
liquidator  
as proxy.

Lodging of  
proxies.



**SECT. 16. Winding up by the Court.** noon of the day but one before, nor later than twelve o'clock at noon of the day before, the day appointed for such meeting, unless the court otherwise directs (*p*).

**Lodging of proxies.** Other proxies must be lodged with the official receiver or liquidator not later than four o'clock in the afternoon of the day before the meeting or adjourned meeting at which it is to be used (*q*).

**Conduct of meetings.** **799.** The meetings are to be held at such place as is, in the opinion of the official receiver or liquidator, most convenient for the majority of the creditors or contributories, or both. Different times or places, or both, may if thought expedient be named for the meetings of creditors and of contributories (*r*).

**Chairman.** Where a meeting is summoned by the official receiver or the liquidator, he, or someone nominated by him, is to be chairman of the meeting. At every other meeting of creditors and contributories the chairman is to be such person as the meeting by resolution appoints (*s*).

**Quorum.** A meeting may not act for any purpose, except the election of a chairman, the proving of debts and the adjournment of the meeting, unless there are present personally or by proxy at least three creditors entitled to vote, or three contributories. If the number of the creditors entitled to vote, or of the contributories, as the case may be, does not exceed three, all must be present (*t*). Unless a quorum of creditors or contributories is present within half an hour from the time appointed for the meeting, the meeting must be adjourned to the same day in the following week at the same time and place, or to such other day as the chairman may appoint, not being less than seven or more than twenty-one days (*u*).

**Adjournment.** The chairman may, with the consent of the meeting, adjourn it from time to time and from place to place; but the adjourned meeting must be held at the same place as the original place of meeting, unless in the resolution for adjournment another place is specified or unless the court otherwise orders (*a*).

**Restrictions on creditors' right to vote.** **800.** A person cannot vote as a creditor (1) in the case of a first meeting of creditors, or of an adjournment thereof, unless he has lodged with the official receiver, not later than the time mentioned in the notice convening the meeting, a proof of his debt; (2) in the case of a court meeting (not being one held prior to the first meeting of creditors), or liquidator's meeting of creditors, unless he has lodged with the official receiver or liquidator a proof of the debt which he claims to be due to him from the company, and such proof has been admitted, wholly or in part, before the date on which the meeting is held (*b*).

Except in the case of a court meeting of creditors held before the

- (*p*) Companies (Winding-up) Rules, r. 147 (1).  
 (*q*) *Ibid.*, r. 147 (2).  
 (*r*) *Ibid.*, r. 125.  
 (*s*) *Ibid.*, r. 127. For authority to a deputy to act as chairman and as proxy, see *ibid.*, Form 79.  
 (*t*) *Ibid.*, r. 132 (1).  
 (*u*) *Ibid.*, r. 132 (2).  
 (*a*) *Ibid.*, r. 131. For memorandum of adjournment, see *ibid.*, Form 73.  
 (*b*) *Ibid.*, r. 133.

first meeting, a secured creditor must, for the purpose of voting, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and he is entitled to vote only in respect of the balance (if any) due to him after deducting the value of his security. If he votes in respect of his whole debt, he is deemed to have surrendered his security, unless the court on application is satisfied that the omission to value the security has arisen from inadvertence (*c*). The official receiver or liquidator may, within twenty-eight days after a proof estimating the value of a security has been used in voting at a meeting, require the creditor to give up the security for the benefit of the creditors generally, on payment of the value so estimated, with an addition of 20 per cent. The creditor may, however, at any time before being required to give it up, correct the valuation by a new proof and deduct the new value from his debt. In that case the addition of 20 per cent. is not to be made if the security is required to be given up (*d*).

No person acting under either a general or a special proxy (*e*) is to vote in favour of any resolution which would directly or indirectly place himself, his partner or employer, in a position to receive any remuneration out of the estate of the company otherwise than as creditor rateably with the other creditors. Where, however, any person holds special proxies to vote for the application to the court in favour of the appointment of himself as liquidator, he may use the said proxies and vote accordingly (*f*).

A creditor cannot vote in respect of any unliquidated (*g*) or contingent debt, or any debt the value of which is not ascertained (*h*). In respect of any debt on or secured by a current bill of exchange or promissory note held by him, he cannot vote, except in the case of a court meeting of creditors held prior to the first meeting, unless he is willing to treat the liability to himself of the prior parties to the instrument (*i*), as a security in his hands. In this case the value must be estimated, and for the purposes of voting, but not for the purposes of dividend, deducted from his proof (*j*).

**801.** The chairman of the meeting has power, except in the case of a court meeting of creditors held prior to the first meeting, to admit or reject a proof for the purpose of voting; but his decision is subject to appeal to the court. If he is in doubt whether a proof should be admitted or rejected, he must mark it as objected to and allow the creditor to vote, subject to the vote being declared invalid in the event of the objection being sustained (*k*).

(*c*) Companies (Winding-up) Rules, r. 135; see p. 520, *post*.

(*d*) *Ibid.*, r. 136.

(*e*) As to who may vote by proxy, see p. 468, *ante*.

(*f*) Companies (Winding-up) Rules, r. 146.

(*g*) As to the meaning of "unliquidated," see *Re Canadian Pacific Colonisation Corporation*, [1891] W. N. 122; compare *Re Dummelow, Ex parte Ruffe* (1873), 8 Ch. App. 997.

(*h*) Companies (Winding-up) Rules, r. 133.

(*i*) This does not apply to any prior party against whom a receiving order has been made (*ibid.*, r. 134).

(*j*) *Ibid.*

(*k*) *Ibid.*, r. 137.

**SECT. 16. Winding up by the Court.**

**Secured creditors.**

**Holder of proxy.**

**Votes in respect of unliquidated and other claims.**

**Chairman's power as to proofs.**

SECT. 16.  
Winding up  
by the  
Court.

Resolutions  
at meetings.

Minutes of  
meeting.

Registration  
of resolutions.

**802.** A resolution is to be deemed to be passed at a meeting when a majority in number and value of the creditors or contributories, as the case may be, present personally or by proxy, and voting on the resolution, have voted in favour of it. In the case of the contributories their value is determined according to the number of votes conferred on each contributory by the regulations of the company (l).

The chairman must cause minutes of the proceedings at the meeting to be drawn up and fairly entered in a book kept for that purpose. The minutes must be signed by him or by the chairman of the next ensuing meeting (m).

The official receiver, or, as the case may be, the liquidator, is to file with the registrar a copy, certified by him, of every resolution of a meeting of creditors or contributories (n).

SUB-SECT. 9.—Property available for Distribution amongst Creditors and Contributories.

(i.) In General.

Assets in  
winding up.

**803.** Winding up is a proceeding by means of which the dissolution of a company is brought about and in the course of which its assets are collected and realised and applied in payment of its debts, and, when these are satisfied, in returning to its members the sums which they have contributed to the company, or paying them other moneys due to them in their character of members. The proceeding is not confined to cases where a company is insolvent, but may be adopted as a means of enabling the corporators or members to reincorporate with extended objects or further powers, or more efficient means of management.

The assets include all contributions which the liquidator is entitled to obtain from members, or persons who have been members within a certain time before the winding up commenced, and all assets which have been misappropriated as against creditors, and which a creditor has a right to have recouped (o). These contributions and assets, with the other property of the company, form a common fund to be applied in the manner directed by the Act (p), and after satisfying the claims of its secured creditors, who are not bound to avail themselves of the winding-up proceedings, but may pursue the remedies which they possessed before it commenced (q).

(l) Companies (Winding-up) Rules, r. 128. Where there was a majority in number one way and a majority in value the other, the court decided in favour of the majority in value (*Re Blorwich Iron and Steel Co.*, [1894] W. N. 111).

(m) Companies (Winding-up) Rules, r. 138.

(n) *Ibid.*, r. 129.

(o) *Stringer's Case* (1869), 4 Ch. App. 475.

(p) *Webb v. Whiffin* (1872), L. R. 5 H. L. 711, 720, 724; *Morris' Case* (1871), 7 Ch. App. 200, 204. As to the liquidator's duty to collect the assets, see p. 441, ante.

(q) *Re Lloyd (David) & Co., Lloyd v. Lloyd (David) & Co.* (1877), 6 Ch. D. 339; *Re Oriental Hotels Co., Perry v. Oriental Hotels Co.* (1871), L. R. 12 Eq. 126, 133; *Re Anglo-Austrian Printing and Publishing Union, Brabourne v. Same*, [1895] 2 Ch. 891; *Re Pound (Henry), Son and Hutchins* (1889), 42 Ch. D. 402, C. A.

Subject to the rights of the secured creditors, and to the rights of certain creditors to be paid in priority, the assets in winding up are subject to a trust for the benefit of all the creditors, and must be distributed upon the footing of equality (r).

**804.** Winding up differs from bankruptcy in this respect, that in bankruptcy the whole estate, both legal and equitable, is taken out of the bankrupt and is vested in his trustee; whereas on a winding up the estate, legal or equitable, then in the company still remains in it until its dissolution, unless disposed of in due course of winding up (s).

**805.** The court may, at any time after making a winding-up order, require any contributory for the time being settled on the list of contributories, and any trustee (a), receiver, banker, agent, or officer of the company, to deliver forthwith, or within such time as the court directs, to the liquidator, any money (b), property, or books and papers (c) in his hands to which the company is *primâ facie* entitled (d). These powers of the court are exercisable by the liquidator as an officer of the court by notice in writing (e).

The court may order any contributory, purchaser, or other person from whom money is due to the company to pay the same into the Bank of England or any of its branches to the account of the liquidator, instead of to the liquidator; and the order may be enforced in the same manner as if it had directed payment to the liquidator (f). All moneys and securities paid or delivered into the Bank of England, or any of its branches, in the event of a

(r) *Re Oriental Inland Steam Co., Ex parte Scinde Rail Co.* (1874), 9 Ch. App. 557; see *Re Smith, Knight & Co., Ex parte Ashbury* (1868), L. R. 5 Eq. 223. As to the priority of the Crown, etc., see p. 516, post.

(s) *Ibid.*; *Re Ebsworth v. Tidy's Contract* (1889), 42 Ch. D. 23, 49, 52. As to unregistered companies, see p. 653, post.

(a) The term "trustee" does not include a constructive trustee (*Re United English and Scottish Assurance Co., Ex parte Hawkins* (1868), 3 Ch. App. 787, where a creditor of the company had obtained payment by a garnishee order on the company's bank); compare *Re Direct London and Exeter Rail. Co., Hollingworth's Case* (1849), 3 De G. & Sm. 102; *Re Tring, Reading, and Basingstoke Rail. Co. Cox's Case* (1850), 3 De G. & Sm. 180.

(b) The money must be money belonging to the company (*Re Imperial Land Co. of Marseilles, Re National Bank* (1870), L. R. 10 Eq. 298; and see *Re Imperial Mercantile Credit Co.* (1867), L. R. 5 Eq. 264; *Re Ulster Land Co., Ltd.*, (1886), 17 L. R. Ir. 591).

(c) The liquidator is not entitled to the possession of books or papers on which the company's solicitor had before the winding up acquired a valid lien, but he can obtain inspection of such books and papers under s. 174 of the Act of 1908 (*Re Capital Fire Insurance Association* (1883), 24 Ch. D. 408, C. A.; *Engel v. South Metropolitan Brewing and Bottling Co.*, [1892] 1 Ch. 442; see p. 474, post).

(d) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 164 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 100].

(e) *Ibid.*, s. 173 [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 13]; Companies (Winding-up) Rules, r. 76; see *Re Oakwell Collieries Co.*, [1879] W. N. 65, where a director who had sold a colliery to the company was ordered to give possession. As to making the order *ex parte*, see *Re Commercial Union Wine Co.* (1865), 35 Beav. 35. As to proceedings against a contributory, see *Cardiff Preserved Coal and Coke Co. v. Norton* (1867), 2 Ch. App. 405.

(f) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 167 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 103]; see *Re Leeds Banking Co.* (1886), 1 Ch. App. 150.

SECT. 16.  
Winding up  
by the  
Court.

Non-vesting  
of assets in  
liquidator.

Delivery of  
assets and  
documents to  
liquidator.

Order to  
pay money  
into Bank of  
England.

Secr. 16. winding up by the court are subject in all respects to the orders of the court (g).

Winding up by the Court.

Power of court to order private examination.

(ii.) *Discovery of Property.*

806. The court may, after it has made a winding-up order, summon before it any officer of the company or any person known or suspected to have in his possession any of its property or supposed to be indebted to the company, or any person whom the court deems capable of giving information concerning the trade, dealings, affairs, or property of the company (h), and require him to produce any books and papers in his custody or power relating to the company; but the production is to be without prejudice to any lien claimed by him on books or papers produced (i).

Procedure to obtain order.

807. The attendance of a witness for examination (k) or the production of documents (l) must be procured by summons, and not by subpoena, the summons being obtained on the application of the liquidator or of a creditor or contributory (m). It is usual to intrust the examination to the liquidator; but if he declines to interfere, or the application is for his examination (n), the judge may intrust the examination to some creditor or contributory (o). An application by the liquidator is made *ex parte* and is not supported by an affidavit, a written statement being submitted to the registrar (p). Where the application is not by the liquidator, notice of it must be given to him, and it must be supported by an affidavit (q). The court may of its own motion, and without any application, order an examination (r). The court has a discretion as to ordering production of documents with which the Court of Appeal will not readily interfere (s). Orders may be made for the examination of a stockbroker who has acted for transferors or

(g) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 167 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 104].

(h) *Ibid.*, s. 174 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 115]; see *Re Overend, Gurney & Co., Ex parte Musgrave* (1867), 16 L. T. 378. As to limiting the scope of the examination, see *Re Penysyflog Mining Co.* (1874), 30 L. T. 861.

(i) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 174 (3) [Companies Act, 1862, s. 115]. The court has jurisdiction in the winding up to determine all questions relating to the lien (*ibid.*); and see, generally, title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 140—143.

(k) *Re Westmoreland Green and Blue Slate Co.* (1891), 66 L. T. 52; *Re English Joint Stock Bank* (1866), L. R. 3 Eq. 203.

(l) *Credit Co. v. Webster* (1885), 53 L. T. 419.

(m) *Whitworth's Case* (1881), 19 Ch. D. 118. It may be issued by a registrar (*Re Nowgong Tea Co.* (1867), 16 L. T. 47).

(n) *Re Sir John Moore Gold Mining Co.* (1877), 37 L. T. 242; *Re Imperial Continental Water Corporation* (1886), 33 Ch. D. 314, C. A.

(o) *Whitworth's Case*, *supra*; *Re Gold Co.* (1879), 12 Ch. D. 77, 83, C. A.

(p) *Re Gold Co.*, *supra*, at pp. 82, 83.

(q) See the cases cited in note (n), *supra*; and compare *Whitworth's Case*, *supra*, at p. 119.

(r) *Re Land Securities Co.*, [1894] W. N. 91. As to a mere creditor of the company, see *Re Accidental and Marine Insurance Corporation* (1867), L. R. 5 Eq. 22.

(s) *Re Gold Co.*, *supra*; *Re Hargreaves (Joseph), Ltd.*, [1900] 1 Ch. 347, C. A.; compare *Heiron's Case* (1880), 15 Ch. D. 139, C. A.

transferees of shares (t); of a contributory's relatives (u) or his bankers (w), or his debtor (x), or of shareholders in another company (y); but not of a mere creditor (z). An order will not be made when the object is not to assist the winding-up, but to obtain information to assist the applicant in other proceedings (a).

A person on whom the summons is served may apparently appeal against the order directing the summons to issue (b).

If a witness, after being tendered a reasonable sum for his expenses, refuses to come before the court at the time appointed, not having any lawful impediment (made known to the court at the time of its sitting, and allowed by it), the court may cause him to be apprehended and brought before it for examination (c).

808. The examination of witnesses may be held in court or in chambers, as the court directs (d). A witness is examined on oath concerning the matters above mentioned, either by word of mouth or on written interrogatories. The court may reduce his answers to writing and require him to sign them (e).

If the witness refuses to attend he may be ordered to pay the costs of compelling him to do so (f), and if on attending he refuses to answer proper questions, an order is made compelling him to attend

(t) *Re Imperial Mercantile Credit Association, Ex parte Clement* (1868), 18 L. T. 596; *Re Mexican and South American Co., Re Aston* (1859), 27 Beav. 474; *Re Mercantile Credit Association* (1868), 37 L. J. (CH.) 295; *Re Contract Corporation, Ex parte Carter* (1870), 40 L. J. (CH.) 15.

(u) *Fricker's Case* (1871), L. R. 13 Eq. 178; *Swan's Case* (1870), L. R. 10 Eq. 675.

(w) *Druitt's Case* (1872), L. R. 14 Eq. 6; *Re Smith, Knight & Co.* (1869), 4 Ch. App. 421; *Re Financial Insurance Co.*, (1867), 36 L. J. (CH.) 687.

(x) *Re Land Credit Co. of Ireland, Trower and Lawson's Case* (1872), L. R. 14 Eq. 8.

(y) *Re Contract Corporation* (1871), 6 Ch. App. 145.

(z) *Re Accidental and Marine Insurance Corporation* (1867), L. R. 5 Eq. 22; compare *Re English Joint Stock Bank* (1866), L. R. 3 Eq. 203, where the creditor had been agent. As to a surveyor of taxes, see *Re Hargreaves (Joseph), Ltd.*, [1900] 1 Ch. 347, C. A.

(a) *Re Imperial Continental Water Corporation* (1886), 33 Ch. D. 314, C. A.; *Re British Building Stone Co.*, [1908] 2 Ch. 450; compare *Archer's Case* (1902), 85 L. T. 698.

(b) *Re North Australian Territory Co.* (1890), 45 Ch. D. 87, C. A., dissenting from *dicta* in *Re Gold Co.* (1879), 12 Ch. D. 77, C. A., and *Whitworth's Case* (1881), 19 Ch. D. 118, C. A. See also *Heiron's Case* (1880), 15 Ch. D. 139, C. A.; *Re London and Lancashire Paper Mills Co.* (1888), 57 L. J. (CH.) 766; *Re Imperial Continental Water Corporation* (1886), 33 Ch. D. 314, C. A.

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 174 (4) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 115].

(d) Companies (Winding-up) Rules, r. 5 (2). Prior to the similar rule made in 1903 the examinations were always held in private, but in *Re New Zealand Loan and Mercantile Agency Co.* (1894), 10 T. L. R. 379, C. A., the examination was, by consent, ordered to be taken in court, and in two other cases a similar course was followed. If the examination is in chambers the public have no right to be present (*Re Western of Canada Oil, Lands and Works Co.* (1877), 6 Ch. D. 109; and see *Re Electric Telegraph Co. of Ireland, Ex parte Bunn* (1857), 3 Jur. (N. S.) 1013; *Re Nowgong Tea Co.* (1867), 16 L. T. 47).

(e) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 174 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 117].

(f) *Re Land Credit Co. of Ireland, Trower and Lawson's Case*, *supra*; *Re Lisbon Steam Tramways Co.* (1876), 2 Ch. D. 375, 583.

Secr. 16. Winding up by the Court.

Enforcing order.

Examination of witnesses.

SECT. 16.  
Winding up  
by the  
Court.

again at his own expense (*g*). The witness may refuse to answer matters in which he may incriminate himself, and matters involving professional confidence (*h*). If the question involves disclosure of matters with which the litigant parties have nothing to do, he may appeal to the judge to release him from answering, but the decision of the judge ought to be final (*i*). He must answer questions as to matters of hearsay (*j*), and cannot refuse to be examined because an action by the company is pending against him (*k*). He may, however, object to answer questions which are not put for the purposes of the winding up, but to aid the company or the applicant in an action against the witness or someone else (*l*), and cannot be examined touching the formation of the company (*m*).

Production  
of books.

Production of books in the custody of the company's solicitor may be ordered, although his lien may be thereby prejudiced (*n*). The secretary of a company has no lien on its books for money due to him (*o*).

Attendance  
and notes of  
counsel.

809. A witness is entitled to have counsel and solicitor, but no other person (*p*), present on his behalf during his examination, and to be re-examined in order to explain his examination-in-chief (*q*). By the registrar's leave contributories or creditors may attend and take part in the examination, subject to their entering an appearance (*r*), but they cannot attend as of right (*s*).

Notes taken by counsel or other persons allowed to attend (not being the actual depositions) should only be taken or used for the purpose of the examination or re-examination, and should then be destroyed (*t*). Where a witness is attended by a solicitor who also

(*g*) *Re Land Credit Co. of Ireland, Trower and Lawson's Case* (1872), L. R. 14 Eq. 8; *Swan's Case* (1870), L. R. 10 Eq. 675; *Re Lisbon Steam Tramways Co.* (1876), 2 Ch. D. 575. His refusal to answer may be reported to and dealt with by the judge as in the case of a public examination (Companies (Winding-up) Rules, r. 72); see p. 432, *ante*.

(*h*) See, generally, title EVIDENCE.

(*i*) See *Whitworth's Case* (1881), 19 Ch. D. 118, C. A.

(*j*) *Re Ottoman Co.* (1867), 15 W. R. 1069.

(*k*) *Re Contract Corporation, Ex parte Bateman* (1866), 15 W. R. 245; *Re Metropolitan (Brush) Electric Light and Power Co., Ex parte Leaver* (1884), 51 L. T. 817; *Massey v. Allen* (1878), 9 Ch. D. 164.

(*l*) *Heiron's Case* (1880), 15 Ch. D. 139, C. A.; *Re Imperial Continental Water Corporation* (1886), 33 Ch. D. 314, C. A.; *Re North Australian Territory Co.* (1890), 45 Ch. D. 87, C. A.; *Re London Gas Meter Co., Ex parte Webber* (1871), 41 L. J. (CH.) 145; see *Re Lisbon Steam Tramways Co., supra*; *Re London and Northern Bank, Archer's Case* (1902), 50 W. R. 262.

(*m*) *Re London and Lancashire Paper Mills Co., Scott's Case* (1888), 59 L. T. 362.

(*n*) *Re South Essex Estuary and Reclamation Co., Ex parte Paine and Layton* (1869), 4 Ch. App. 215; *Re Capital Fire Insurance Association* (1883), 24 Ch. D. 408, C. A.

(*o*) *Barnnton Hotel Co. v. Cook* (1899), 1 F. (Ct. of Sess.) 1190.

(*p*) *Re Western of Canada Oil, Lands, and Works Co.* (1877), 6 Ch. D. 109.

(*q*) *Re Breech-loading Armoury Co., Re Merchants' Co.* (1867), L. R. 4 Eq. 453; *Re Cambrian Mining Co.* (1881), 20 Ch. D. 376.

(*r*) *Re Greys Brewery Co.* (1883), 25 Ch. D. 400.

(*s*) *Re Norwich Equitable Fire Insurance Co.* (1884), 27 Ch. D. 515, C. A.

(*t*) *Re Heseltine (W.) & Son, Ltd.*, [1891] W. N. 25; and see *Re Breechloading*

represents as third party in litigation with the company, the registrar may exact from the solicitor, as a condition of being present, an undertaking not to disclose any information without the leave of the court (*a*).

The official receiver may attend in person, or by an assistant official receiver, any examination of a witness, on whosoever application the same has been ordered, and may take notes of the examination for his own use, and put such questions to the witness as the court may allow (*b*).

810. The court or officer of the court before whom any examination is directed to be held may in any case and at any stage of the proceedings appoint someone to take down the evidence of the witness, in shorthand or otherwise, as in the case of a public examination (*c*). The notes of the depositions of a person examined privately as above mentioned, or under any order of the court before the court, or before any officer of the court, or person appointed to take such an examination, are not to be filed, or to be open to the inspection of any creditor, contributory, or other person, except the official receiver or liquidator, unless and until the court so directs. The court may from time to time give such general or special directions as it thinks expedient as to the custody and inspection of such notes and the furnishing of copies of or extracts therefrom (*d*).

The depositions of the witness cannot be used as evidence (*e*) except against himself as admissions by him (*f*).

811. Where the witness is examined with a view to proceedings being taken against him, and the proceedings are taken and fail, the court may order the person who obtained leave to examine him to pay his costs of employing solicitor and counsel (*g*).

*Armoury Co., Re Merchants' Co., supra*; *Re Cambrian Mining Co.* (1881), 20 Ch. D. 376; *Re Greys Brewery Co.* (1883), 25 Ch. D. 400; and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 141, 142; *Re Walker, Ex parte Childe* (1909), 100 L. T. 860. It is a contempt of court to publish the proceedings prematurely (*Re American Exchange in Europe, American Exchange in Europe v. Gillig* (1889), 58 L. J. (CH.) 706). And see *Re Sir John Moore Gold Mining Co.* (1877), 37 L. T. 242.

(*a*) *Hadwick's Case, Hoyle's Case*, [1902] 2 Ch. 73, C. A.

(*b*) Companies (Winding-up) Rules, r. 73 (1). Clerks in the employ of the liquidator or his solicitor may be present (*Re Heseltine (W.) & Son, Ltd.*, [1891] W. N. 25).

(*c*) Companies (Winding-up) Rules, r. 71; and see p. 433, *ante*.

(*d*) *Ibid.*, r. 73 (2). Leave has been given to one of several defendants in an action by a company against them for misfeasance, after defence put in and before answering interrogatories, to inspect and take an office copy of his deposition (*Re Merchants' Fire Office*, [1899] 1 Ch. 432). As to the origin of the rule, see *Re Standard Gold Mining Co.*, [1895] 2 Ch. 545; *North Australian Territory Co. v. Goldborough, Mort & Co.*, [1893] 2 Ch. 381, C. A.

(*e*) *Re Great Western Forest of Dean Coal Consumers' Co., Crawshaw's and Carter's Case* (1885), 54 L. J. (CH.) 506; *North Australian Territory Co. v. Goldborough, Mort & Co., supra*, at p. 386; *Re Norwich Equitable Fire Insurance Co.* (1884), 27 Ch. D. 515, 521, C. A.

(*f*) *Pugh and Sharman's Case* (1872), L. R. 13 Eq. 566.

(*g*) *Re Appleton, French and Scrafton, Ltd.*, [1905] 1 Ch. 749.

SECT. 16.  
Winding up  
by the  
Court.

Official  
receiver's  
right to  
attend.

Shorthand  
notes of  
evidence.

Costs of  
abortive  
private  
examination

SECT. 16.  
Winding up  
by the  
Court.  
Liability for  
misfeasance.

(iii.) *Misfeasance Proceedings.*

**812.** Where in the course of winding up a company (*h*) it appears that any person who has taken part in the formation or promotion of the company (*i*), or any past or present director, manager, or liquidator, or any officer of the company, has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of the official receiver, or of the liquidator (*j*), or of any creditor or contributory (*k*), examine into his conduct, and compel him to repay or restore the money or property with interest at such rate as the court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance, or breach of trust as the court thinks just (*l*).

Who are  
officers of the  
company.

**813.** The following are officers of the company, namely, its secretary (*m*); its auditors (*n*), except a person casually employed by the directors to prepare a balance-sheet (*o*); a solicitor when remunerated by fixed salary (*p*), but not when employed in the

(*h*) The section applies whether the winding up is by the court or voluntary (whether under supervision or not) (*Rance's Case* (1870), 6 Ch. App. 104).

(*i*) As to promoters, see p. 47, *ante*. The court may make an order under the section upon any person who may have helped to promote or form the company, although not an officer of the company when formed (*Re Sale Hotel and Botanical Gardens Co.*, [1898] W. N. 40, C. A.).

(*j*) The liquidator has more extensive rights than the company had as a going concern (*Waterhouse v. Jamieson* (1870), L. R. 2 Sc. & Div. 29, 32; *Webb v. Whiffin* (1872), L. R. 5 H. L. 711; *Re National Funds Assurance Co.* (1878), 10 Ch. D. 118, 123, 125). Where there is any doubt the liquidator's application can be amended by adding a creditor's name (*ibid.*; *Re British Guardian Life Assurance Co.* (1880), 14 Ch. D. 335, 346).

(*k*) A fully-paid shareholder cannot take proceedings unless he shows that the breach of duty has resulted in loss to the company's assets, and that he has a direct pecuniary interest in the success of the applications (*Cavendish Bentinck v. Fenn* (1887), 12 App. Cas. 652). As to proceedings by a bankrupt contributory, see *Re Cape Breton Co.* (1881), 19 Ch. D. 77, C. A. If a contributory becomes bankrupt his trustee in bankruptcy represents him for all the purposes of the winding up and is a contributory accordingly (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 127); see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 137, 138.

(*l*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 215 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 10 (1)]. Interest is sometimes given at the rate of 4 per cent. (*Re Sharpe, Re Bennett, Masonic and General Life Assurance Co. v. Sharpe*, [1892] 1 Ch. 154, C. A.; *Re Oxford Benefit Building and Investment Society* (1886), 35 Ch. D. 502; *Gluckstein v. Burnes*, [1900] A. C. 240) from the date of the summons, but in some cases of misfeasance it is given at the rate of 5 per cent. (*Archer's Case*, [1892] 1 Ch. 322, C. A.; *Re Oxford Benefit Building and Investment Society, supra*; *Re National Bank of Wales, Ltd.*, [1899] 2 Ch. 629, 651, C. A.). Income tax is not allowed to be deducted (*Re National Bank of Wales, Ltd., supra*).

(*m*) *McKay's Case* (1875), 2 Ch. D. 1, C. A.; *Re Stapleford Colliery Co., Barrow's Case* (No. 2) (1880), 42 L. T. 12; *Re Mutual Aid Permanent Benefit Building Society, Ex parte James* (1883), 49 L. T. 530.

(*n*) *Re London and General Bank*, [1895] 2 Ch. 166, C. A.; *Leeds Estate Building and Investment Co. v. Shepherd* (1887), 36 Ch. D. 787; *Re Kingston Cotton Mill Co.*, [1896] 1 Ch. 6, C. A.

(*o*) *Re Western Counties Steam Bakeries and Milling Co.*, [1897] 1 Ch. 617, C. A.

(*p*) *Re Liberator Permanent Benefit Building Society* (1894), 71 L. T. 406.

ordinary way (*g*); and persons whose duty it is to invest moneys of the company and hold the investments (*r*), but not trustees of a debenture trust deed (*s*), or bankers (*t*). *De facto* directors or managers are liable if loss has resulted to the company through their acts of misfeasance (*u*). The executors of a deceased officer are not officers, and are therefore not liable to misfeasance proceedings (*a*); but the survivors of several directors are liable (*b*).

**814.** The statutory provision is to be liberally construed (*c*), and misfeasance proceedings may be taken under it in the winding-up of an unregistered company (*d*), or of an industrial and provident society (*e*). It does not, however, create any new liability or new right; it only provides a summary mode of enforcing rights which must otherwise have been enforced by the ordinary jurisdiction of the court (*f*).

**815.** Misfeasance includes a breach by an officer of his duty to the company, the direct consequence of which has been a misapplication or loss of its assets for which he could be made responsible in an action (*g*). A misfeasance summons, however, cannot be sustained even where nominal damages could be recovered in an action for the breach of duty alleged, unless the breach has resulted in loss to the company's funds and assets, and the applicant has a direct pecuniary interest in the success of the application (*h*). Nor can it be sustained in the case of non-feasance, even where it is a breach of trust, unless loss to the assets has resulted therefrom (*i*), although the court may order the respondents to a misfeasance summons, even where the liquidator establishes no money claim against them, to pay the costs (*k*). It is unnecessary to allege or prove fraud (*l*),

SECT. 16.  
Winding up  
by the  
Court.

Misfeasance  
proceedings  
only a  
summary  
method.

What  
amounts to  
misfeasance.

(*g*) *Re Great Wheal Polgooth Co.* (1883), 53 L. J. (CH.) 42; *Carter's Case* (1886), 31 Ch. D. 496; *Re Kingston Cotton Mill Co.* (No. 1), [1896] 1 Ch. 6, 14, C. A.

(*r*) *Re British Guardian Life Assurance Co.*, [1880] W. N. 63; compare *Cornell v. Hay* (1873), L. R. 8 Q. P. 328.

(*s*) *Astley v. New Tivoli, Ltd.*, [1899] 1 Ch. 151, 154.

(*t*) *Re Imperial Land Co. of Marseilles, Re National Bank* (1870), L. R. 10 Eq. 298.

(*u*) *Coventry and Dixon's Case* (1880), 14 Ch. D. 660, 670, C. A.; *Gibson v. Barton* (1875), L. R. 10 Q. B. 329.

(*a*) *Re British Guardian Life Assurance Co.* (1880), 14 Ch. D. 335.

(*b*) *Ibid.*; *Fellom's Executor's Case* (1865), L. R. 1 Eq. 219.

(*c*) *Stringer's Case* (1869), 4 Ch. App. 475.

(*d*) *Davies' Case* (1890), 45 Ch. D. 537.

(*e*) *Re Ferndale Industrial Co-operative Society*, [1894] 1 Q. B. 828.

(*f*) *Coventry and Dixon's Case, supra*.

(*g*) *Re Kingston Cotton Mill Co.* (No. 2), [1896] 2 Ch. 279, 283, C. A.; *Re Anglo-French Co-operative Society, Ex parte Pelly* (1882), 21 Ch. D. 492, C. A.; *Flicroff's Case* (1882), 21 Ch. D. 519, C. A.; *Re London and General Bank* (No. 2), [1895] 2 Ch. 673, 691, C. A.

(*h*) *Cavendish Bentinck v. Fenn* (1887), 12 App. Cas. 652.

(*i*) *Bute's (Marquis) Case*, [1892] 2 Ch. 100; *Re Liverpool Household Stores Association* (1890), 62 L. T. 873; *Re Forest of Dean Coal Mining Co.* (1878), 10 Ch. D. 450; *Re Montrotier Asphalte Co., Perry's Case* (1876), 34 L. T. 716; *Re Wedgwood Coal and Iron Co.* (1882), 31 W. R. 181.

(*k*) *Re Ireland & Co.*, [1905] 1 I. E. 133, C. A.

(*l*) *Re Sale Hotel and Botanical Gardens, Ltd., Ex parte Heskest* (1898), 78 L. T. 368, C. A. As to what is "money or property of the company," see *ibid.*

**SECT. 16.**  
Winding up  
by the  
Court.

and it is immaterial that the offence is one for which the offender may be criminally responsible (*m*).

A transaction cannot be impeached in misfeasance proceedings where the object is not to obtain an undue advantage against the company, but to obtain an undue advantage in the stock market as against persons likely to purchase shares of the company there (*n*).

Where the company has been dissolved, the remedy by misfeasance application no longer exists (*o*).

Promoters  
and directors.

**816.** A misfeasance summons may be properly brought against promoters in respect of undisclosed profits received by them (*p*). Such a summons may be brought against directors where they have received money from promoters in pursuance of an agreement to indemnify them against loss on qualification shares (*q*); or where they have received money from vendors to the company to pay for qualification shares (*r*). They may be made liable in respect of qualification shares received from an underwriter of an increase of capital who nominates the recipient as a director (*s*), and in respect of debentures or qualification or other shares received from or paid for by a promoter (*t*). They are also liable for presents, or remuneration improperly received out of the assets of the company (*a*), or for shares purchased from promoters at less than par

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 215 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 10 (2)].

(*n*) *Re Ambrose Lake Tin and Copper Mining Co., Ex parte Taylor, Ex parte Moss* (1880), 14 Ch. D. 390.

(*o*) *Pulsford v. Devenish*, [1903] 2 Ch. 625, 633.

(*p*) *Gluckstein v. Barnes*, [1900] A. C. 240; *Re Sale Hotel and Botanical Gardens Co., Ltd., Ex parte Hesketh* (1898), 78 L. T. 368, C. A.; *Re Leeds and Hanley Theatres of Varieties, Ltd.*, [1902] 2 Ch. 809, C. A.; *Lydney and Wigpool Iron Ore Co. v. Bird* (1886), 33 Ch. D. 85, C. A.; see also p. 52, *ante*; and *Re Innes & Co., Ltd.*, [1903] 2 Ch. 254, C. A.; *Re Sunlight Incandescent Gas Lamp Co.* (1900), 16 T. L. R. 535; *Re Lady Forrest (Murchison) Gold Mine, Ltd.*, [1901] 1 Ch. 582.

(*q*) *Archer's Case*, [1892] 1 Ch. 322, C. A.

(*r*) *Hay's Case* (1875), 10 Ch. App. 593; *Carling, Hespeler and Walsh's Cases* (1875), 1 Ch. D. 115, C. A.; *Brown's Case* (1873), 9 Ch. App. 102; *Re Postage Stamp Automatic Delivery Co.*, [1892] 3 Ch. 566, C. A.

(*s*) *De Ruwigne's Case* (1877), 5 Ch. D. 306, C. A.

(*t*) *Re Anglo-French Co-operative Society, Ex parte Pelly* (1882), 21 Ch. D. 492, C. A.; *Pearson's Case* (1877), 5 Ch. D. 336, C. A.; *Re Carriage Co-operative Supply Association* (1884), 27 Ch. D. 322, which case deals also with the joint and several liability of directors when all take with knowledge. As to the measure of damages in case of shares improperly received, see *Carling, Hespeler and Walsh's Cases, supra*; *McKay's Case* (1875), 2 Ch. D. 1, C. A.; *De Ruwigne's Case, supra*; *Pearson's Case, supra*; *Weston's Case* (1879), 10 Ch. D. 579, C. A.; *Mitcalfe's Case* (1879), 13 Ch. D. 169, C. A.; *Nant-y-Glo and Blaina Ironworks Co. v. Grave* (1878), 12 Ch. D. 738; *Eden v. Ridsdals Railway Lamp and Lighting Co.* (1889), 23 Q. B. D. 368, C. A.; *Re Caerphilly Colliery Co., Ormerod's Case* (1877), 37 L. T. 244; *Shaw v. Holland*, [1900] 2 Ch. 305, C. A., where only the market value was given; and see p. 49, *ante*.

(*a*) *Re Newman (George) & Co.*, [1895] 1 Ch. 674, C. A.; *Re Eskern Slate and Slab Quarries Co., Clarke and Helden's Cases* (1877), 37 L. T. 222; *Re London Gigantic Wheel Co.* (1908), 24 T. L. R. 618, C. A.; *Merchants' Fire Office v. Armstrong* (1901), 17 T. L. R. 709, C. A.; and see p. 226, *ante*. As to travelling expenses, see *Young v. Naval, Military and Civil Service Co-operative Society of*

**SECT. 16.**  
Winding up  
by the  
Court.

When liable.

value (*b*). Directors who do not disclose the fact that they are vendors of property to the company are guilty of a breach of duty, and the company has a remedy against them (*c*).

A misfeasance summons is the proper mode of procedure where shares or debentures have been improperly issued to directors at a discount or undervalue (*d*); or where directors have improperly paid dividends out of capital (*e*); or where they have knowingly allotted snares to infants (*f*); or where they have improperly received directors' fees (*g*); or where they have generally acted *ultra vires* (*h*), or improperly invested or paid away the company's

*South Africa*, [1905], 1 K. B. 687; *Marmor, Ltd. v. Alexander*, [1908] S. C. 78. As to fees paid under a mistake of fact, see *Re Bodega Co., Ltd.*, [1904] 1 Ch. 276.

(*b*) *Weston's Case* (1879), 10 Ch. D. 579, C. A.

(*c*) *Re Lady Forrest (Murchison) Gold Mine, Ltd.*, [1901] 1 Ch. 582, where it was said that the remedy was by rescission and not by misfeasance proceedings; and see *Cavendish Bentinck v. Fenn* (1887), 12 App. Cas. 652; *Re Cape Breton Co.* (1885), 29 Ch. D. 795, C. A.; *Ladywell Mining Co. v. Brookes* (1887), 35 Ch. D. 400, C. A.; *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218, 1233; *Burland v. Earle*, [1902] A. C. 83, P. C.; and p. 230, *ante*. But it has since been held that the director can, on a misfeasance summons, be made to pay damages (*Re Leeds and Hanley Theatres of Varieties, Ltd.*, [1902] 2 Ch. 809, C. A.).

(*d*) *Campbell's Case* (1876), 4 Ch. D. 470; *Re London and Colonial Finance Corporation* (1897), 13 T. L. R. 576, C. A.; *Hirsche v. Sims*, [1894] A. C. 654, P. C.

(*e*) *Dovey v. Cory*, [1901] A. C. 477; *Re National Funds Assurance Co.* (1878), 10 Ch. D. 118; *Re Kingston Cotton Mill Co.* (No. 2), [1896] 2 Ch. 279, 331, C. A.; *Stringer's Case* (1869), 4 Ch. App. 475; *Rance's Case* (1870), 6 Ch. App. 104. The liability is joint and several (*Re National Funds Assurance Co., supra*; *Flitcroft's Case* (1882), 21 Ch. D. 519, C. A.; *Re Oxford Benefit Building and Investment Society* (1886), 35 Ch. D. 502; *Leeds Estate Building and Investment Co. v. Shepherd* (1887), 36 Ch. D. 787). It is said that the liquidator may recover against the directors although all the creditors have been paid off (*Re National Bank of Wales, Ltd.*, [1899] 2 Ch. 629, C. A., affirmed *sub nom. Dovey v. Cory, supra*). But when in such a case there is enough in hand to pay the costs of winding up and the liquidator, the court may refuse, even on the liquidator's application, to order directors to pay what has been paid as dividend out of capital where the result would be that the money would go to those who had received the illegal dividend (*Re Tilling (G. J.) & Sons, Ltd.* (1906), *Times*, May 16). As to paying dividends out of capital, see further, p. 272, *ante*.

(*f*) *Re Crenver and Wheel Abraham United Mining Co., Ex parte Wilson* (1872), 8 Ch. App. 45.

(*g*) *Re Public Supply Association*, [1880] W. N. 106.

(*h*) Where the misfeasance is an act which is not *ultra vires* or dishonest, directors are not liable unless it is shown that they did not really exercise their judgment (*Re New Mashonaland Exploration Co.*, [1892] 3 Ch. 577, 585). If they act within their powers with such care as is reasonably to be expected from them having regard to their knowledge and experience, and honestly for the benefit of the company, they are not liable (*Re National Bank of Wales, Ltd., supra*, at p. 671; *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392, 435, 466, C. A.; *Re Denham & Co.* (1883), 25 Ch. D. 752). Where, however, the act is *ultra vires*, the directors, although they have acted quite honestly, are liable to replace the moneys which have been misapplied (*Re Sharpe, Re Bennett, Masonic and General Life Assurance Co. v. Sharpe*, [1892] 1 Ch. 154, C. A.); unless they act after making proper inquiry and exercising due care and on reasonable grounds, in which case they are not liable for paying dividends out of capital if it subsequently appears that in fact there were not sufficient profits (*Re Kingston Cotton Mill Co.* (No. 2), *supra*); see p. 272, *ante*.



SECT. 16.  
Winding up  
by the  
Court.

Auditors.

Liquidators.

Defences to  
misfeasance  
proceedings.

moneys (i); or where they have improperly received commissions (k), or where an act benefiting directors is a fraudulent preference (l).

**817.** A misfeasance summons is a proper remedy where an auditor by his neglect of duty has enabled property of the company to be improperly paid away, as, for instance, in dividends (m).

**818.** A liquidator can apparently only be brought to account on a misfeasance summons when he has misapplied or become liable or accountable for moneys of the company, or been guilty of misfeasance or breach of trust in relation to the company. He is not liable in such proceedings for a breach of trust or misfeasance in relation to a particular shareholder (n), except where the assets have been distributed without providing for the claim of a particular creditor, at any rate where that creditor is the Crown in respect of income tax (o).

**819.** Claims against the company cannot be set off against the amount ordered to be paid (p), nor can the liquidator set off the amount against an assignee of a dividend owing to the respondent as a creditor of the company (q).

In the case of retention of secret profit the respondent's discharge in bankruptcy will not release him (a).

Except where the claim is founded upon any fraud or fraudulent breach of trust, to which the respondent was party or privy, or is to recover trust property or the proceeds thereof still retained by the respondent, or previously received by him and converted to his use (b), the Statute of Limitations can be

(i) *Re Lands Allotment Co.*, [1894] 1 Ch. 616, C. A.; *Re Imperial Land Co. of Marseilles*, *Re National Bank* (1870), L. R. 10 Eq. 298; *Re Neagh Harbour Smelting and Rolling Works*, [1887] W. N. 87, 121.

(k) *Re Oxford Benefit Building and Investment Society* (1886), 35 Ch. D. 502.

(l) *Re Washington Diamond Mining Co.*, [1893] 3 Ch. 95, C. A.

(m) *Re London and General Bank* (No. 2), [1895] 2 Ch. 673, C. A.; *Re Kingston Cotton Mill Co.* (No. 2), [1896] 2 Ch. 279, C. A.; *Leeds Estate Building and Investment Co. v. Shepherd* (1887), 36 Ch. D. 787.

(n) *Re Hill's Waterfall Estate and Gold Mining Co.*, [1896] 1 Ch. 947, 953; compare *Cavendish Bentinck v. Fenn* (1887), 12 App. Cas. 652, 662.

(o) *Re New Zealand Joint Stock and General Corporation* (1907), 23 T. L. R. 238; *Re Watchmakers' Alliance and Ernest Goode's Stores, Ltd.* (1905), 6 Tax Cas. 117. Where assets have been distributed without regard to a creditor's claim, he may, even after dissolution of the company, obtain in an action damages against the liquidator for his breach of duty (*Pulsford v. Devenish*, [1903] 2 Ch. 625); and see *Silkstone and Haigh Moor Coal Co. v. Edey*, [1900] 1 Ch. 167.

(p) *Re Anglo-French Co-operative Society, Ex parte Pelly* (1882), 21 Ch. D. 492, C. A.; *Flitcroft's Case* (1882), 21 Ch. D. 519, C. A.; *Re Carriage Co-operative Supply Association* (1884), 27 Ch. D. 322.

(q) *Re Milan Tramways Co., Ex parte Theys* (1884), 25 Ch. D. 587, C. A.; *Re Goy & Co., Ltd., Farmer v. Goy & Co., Ltd.*, [1900] 2 Ch. 149; *Re Leeds and Hanley Theatres of Varieties, Ltd.*, [1904] 2 Ch. 45; compare *Re Palmer's Decoration and Furnishing Co.*, [1904] 2 Ch. 743.

(a) *Emma Silver Mining Co. v. Grant* (1880), 17 Ch. D. 122. And see title **BANKRUPTCY AND INSOLVENCY**, Vol. II., p. 260.

(b) *Re Lands Allotment Co.*, [1894] 1 Ch. 616, C. A.; *Re National Bank of Wales, Ltd.*, [1899] 2 Ch. 629, 663, C. A.; *Trustee Act, 1888* (51 & 52 Vict.

pleaded, as, for instance, where an auditor has merely neglected his duties (c).

**820.** If it appears to the court during the proceedings that a director, or person occupying the position of director, of a company who is charged with negligence or breach of trust is or may be liable in respect of the negligence or breach of trust, but has acted honestly and reasonably, and ought fairly to be excused for the negligence or breach of trust, the court may relieve him, either wholly or partly, from his liability on such terms as it may think proper (d).

**821.** Claims in respect of misfeasance being choses in action (e), which can be assigned by the liquidator in the name of the company, pass under an assignment of all its assets, property, and effects (f). They are comprised under a charge by debentures on the undertaking and property of the company, present and future, although subject to the liquidator's costs of any misfeasance proceedings actually taken (g). An order may be made in a debentureholder's action directing the receiver in the action to sell the misfeasance claims by auction (h).

**822.** In the High Court the application is by summons returnable in the first instance in chambers. The nature of the declaration or order for which application is made, and the grounds of the application, must be stated in the summons (i). Unless otherwise

c. 59), s. 8; *Thorne v. Heard*, [1894] 1 Ch. 599, C. A.; *Re Gurney, Mason v. Mercer*, [1893] 1 Ch. 590. A secret profit received by a promoter may be "fraudulent," even in the absence of moral fraud (*Re Sale Hotel and Botanical Gardens Co., Ex parte Hesketh* (1897), 77 L. T. 681, reversed without affecting this point (1898), 78 L. T. 368, C. A.).

(c) *Leeds Estates Building and Investment Co. v. Shepherd* (1887), 36 Ch. D. 787. As to the date from which the statute runs, see *ibid.*; *Metropolitan Bank v. Heiron* (1880), 5 Ex. D. 319, C. A.; *Re Cupe Breton Co.* (1865), 29 Ch. D. 795, 810, C. A.

(d) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 279 [Companies Act, 1907 (7 Edw. 7, c. 50), s. 32; Companies Act, 1900 (63 & 64 Vict. c. 48), s. 30]. This provision is taken from the Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 3, as to which see *Singlehurst v. Tapscott Steamship Co., Ltd.*, [1899] W. N. 133, C. A.; *Re Turner, Barker v. Ivimey*, [1897] 1 Ch. 536; *Re Stuart, Smith v. Stuart*, [1897] 2 Ch. 583; *Re De Clifford's (Lord) Estate, De Clifford (Lord) v. Quilter, De Clifford (Lord) v. Lansdowne (Marquis)*, [1900] 2 Ch. 707; *Davis v. Hutchings*, [1907] 1 Ch. 356; *Re Grindey, Clews v. Grindey*, [1898] 2 Ch. 593, C. A.; *Hardbottle v. Glew* (1900), 45 Sol. Jo. 151. Where, as is usually the case, a director is paid for his services, the court is not so likely to give him relief as it would be to give it to a person acting gratuitously (*National Trustees Co. of Australasia v. General Finance Co. of Australasia*, [1905] A. C. 373, 381, P. C.).

(e) See title **CHOSSES IN ACTION**, Vol. IV., p. 364.

(f) *Re Park Gate Waggon Works Co.* (1881), 17 Ch. D. 234, C. A.; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 151. As to the effect of a reconstruction scheme, see *Re Olympia, Ltd.* (1900), 16 T. L. R. 564.

(g) *Re Anglo-Austrian Printing and Publishing Union, Brabourne v. Same*, [1895] 2 Ch. 891.

(h) *Wood v. Woodhouse and Rawson United*, [1896] W. N. 4.

(i) The summons or notice of motion, or that and the accompanying affidavits (if any), should state the grounds on which it is suggested that the matters complained of constitute a wrongful act or misfeasance for which the respondents are responsible, fully and fairly stating the case which they have to meet; the proceedings are civil and not criminal, and while the respondents

SECT. 16.  
Winding up  
by the  
Court.

Relief to  
honest  
directors.

Misfeasance  
claims as  
assets.

Procedure.

SECT. 16.  
Winding up  
by the  
Court.

ordered by the court, the summons must be served in the same manner as an originating summons (*k*), on every person against whom an order is sought, not less than eight days before the day named in the summons for hearing the application (*l*). The court or a judge may direct any summons to be served on any party or person in a foreign country (*m*).

## Directions.

On the return of a summons in the High Court the court may give such directions as it thinks fit for the hearing of the summons before the judge in court, the taking of evidence wholly or in part by affidavit or orally, and the cross-examination, either before the judge on the hearing in court or in chambers, of any deponents to affidavits in support of or in opposition to the application (*n*).

In any court other than the High Court the application is by motion to the court (*o*). Notice of an intended motion must be served on every person against whom an order is sought, not less than eight days before the day named in the notice for hearing the motion (*p*).

## Evidence.

**823.** Where the application is made by the official receiver or liquidator, he may make a report to the court stating any facts and information on which he proceeds, which are verified by affidavit or derived from sworn evidence in the proceedings. Where the application is made by any other person it must be supported by affidavit to be filed by him (*q*). Where the application is by motion (in a court other than the High Court) a copy of every report and affidavit intended to be used in support of the motion must be served on every person to whom notice of motion is given not less than four days before the hearing of the motion (*r*).

Use of notes  
at public  
examination.

**824.** Where in a public examination it appears that the persons examined, or some of them, have misapplied or retained, or become liable or accountable for, moneys or property of the company, or

are not made responsible for conduct which is not made the subject of complaint, the summons or notice of motion is not to be so closely adhered to and narrowly construed as to compel the court to dismiss it because it somewhat overstates the case and cannot be proved up to the hilt; and it can always be amended, and as regards amendment there is no hard-and-fast technical rule (*Re New Mashonaland Exploration Co.*, [1892] 3 Ch. 577; *Re London and Colonial Finance Corporation* (1897), 13 T. L. R. 576, C. A.). The summons ought not to include a claim that the respondent is liable as a contributory (*Re Wragg (E. J.), Ltd.*, [1896] W. N. 166). As to costs at the hearing, see *Re Anglo-Austrian Printing and Publishing Union*, [1894] 2 Ch. 622.

(*k*) See title PRACTICE AND PROCEDURE.

(*l*) Companies (Winding-up) Rules, r. 68 (1).

(*m*) R. S. C., Ord. 11, r. 8 a. The procedure prescribed by Ord. 11, r. 8, applies to the service of a summons (*ibid.*). The court had formerly no jurisdiction to order the summons to be served out of the jurisdiction (*Re Anglo-African Steamship Co.* (1886), 32 Ch. D. 348; compare, however, *Re British Imperial Corporation* (1877), 5 Ch. D. 749; *Re Household Insurance Co.*, [1878] W. N. 26).

(*n*) Companies (Winding-up) Rules, r. 68 (2).

(*o*) *Ibid.*, r. 68 (1).

(*p*) *Ibid.*, r. 69. Service by a respondent of a notice claiming contribution from other persons cannot be allowed (*Re Land Securities Co.* (1895), 2 Mans. 127).

(*q*) Companies (Winding-up) Rules, r. 68 (1).

(*r*) *Ibid.*, r. 69.

SECT. 16.  
Winding up  
by the  
Court.

have been guilty of misfeasance or breach of trust in relation to the company, then, in any misfeasance proceedings subsequently instituted, the verified notes of the examination of each person who was publicly examined are admissible in evidence (*s*) against any of the persons against whom the application is made, provided that he was or had the opportunity of being present at and taking part in the examination. Before any such notes are used the person intending to use them must, not less than fifteen days before the day appointed for hearing the application, give notice of his intention to each person against whom it is intended to use the notes, or any of them, specifying the notes or parts of the notes which it is intended to read against him, and furnish him with copies of such notes, or parts of notes (except notes of the person's own depositions). Every person against whom the application is made is at liberty to cross-examine or re-examine (as the case may be) any person, the notes of whose examination are read, in all respects as if such person had made an affidavit on the misfeasance application (*t*).

**825.** If the official receiver or liquidator institutes proceedings for misfeasance, the court has jurisdiction to order him personally to pay the costs (*u*). A liquidator will not be ordered to give security for the costs of a misfeasance summons on the ground of poverty (*a*).

**826.** An order for payment of money made against any respondent to a misfeasance summons is deemed to be a final judgment within the meaning of the Bankruptcy Act, 1883 (*b*).

(iv.) Relation back of Liquidator's Title.

**827.** Although the property of the company does not vest, on winding up, in its liquidator, the effect of a compulsory winding-up order is to give him certain retrospective rights (*c*). Any proceeding for rescinding contracts to take shares, commenced between the

(*s*) Subject to any order or direction of the court as to the manner and extent in and to which the notes are to be used, and subject to all just exceptions to the admissibility in evidence against any particular person or persons of any of the statements contained in the notes of the examinations.

(*t*) Companies (Winding-up) Rules, r. 69; *Re London and General Bank* (1894), 63 L. J. (Ch.) 853. This rule is not *ultra vires*, but the notes are only evidence against the witness himself.

(*u*) *Re Powell (W.) & Sons*, [1896] 1 Ch. 681. But an appeal lies from an order against him to pay costs (*Re Raynes Park Golf Club, Ex parte Official Receiver*, [1899] 1 Q. B. 961). An official receiver ought not, in cases where he is indemnified against costs, to allow an application to be made unless he is satisfied of the propriety of the application (*Re Anglo-Sardinian Antimony Co.*, [1894] W. N. 156; and Practice Note, [1894] W. N. 166). As to applications by an official receiver to the court for leave to institute proceedings for misfeasance, see *Re New Zealand Loan and Mercantile Agency Co.*, [1894] W. N. 200.

(*a*) *Re Strand Wood Co., Ltd.*, [1904] 2 Ch. 1, C. A.; nor, apparently, in any other case (*Re Powell (W.) & Sons, supra*).

(*b*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 215 (3) [Companies (Winding-up) Act, 1893 (56 & 57 Vict. c. 58)]; see Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4 (1) (g); and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 25–32.

(*c*) As to when the winding up commences, see p. 419, *ante*. As to the effect of a winding-up order on executions, see p. 534, *ante*; and on the creation of a floating charge, see p. 388, *ante*.

Costs against  
official  
receiver or  
liquidator.

Effect of  
order.

Retrospective  
effect of  
winding-up  
order.

SECT. 16.  
Winding up  
by the  
Court.

dates of the presentation of the petition and the winding-up order, is defeated (*d*). Every disposition of the company's property (including choses in action), made after the presentation of the petition, is void unless the court otherwise orders (*e*). The court, in the exercise of its discretion, will not permit transactions *bonâ fide* entered into in the ordinary course of trade, and completed before the date of the winding-up order, to be annulled (*f*). The mere payment of debts will not, however, be sanctioned. A creditor who receives payment between the petition and the winding-up order is compelled to refund (*g*); and directors who make any improper payments out of the company's assets after the winding up commenced are themselves liable to the company for the moneys paid away (*h*). Where a creditor's petition for a winding up is adjourned on the terms of the company paying part of the debt and promising to pay the remainder, and, on failure to pay the remainder, the creditor brings on his petition and obtains a winding-up order, he is bound to repay the money already paid to him (*i*).

A debtor to the company may pay his debt after presentation of a petition and before the winding-up order, and the company can give a valid discharge for it (*k*).

Transfer of  
shares.

**828.** Every transfer of shares of a company, made after the presentation of the petition, whether after or before the winding-up order (*l*), is void unless the court otherwise orders (*m*). As between the parties to it, the validity of the transfer is not affected (*n*), although the court will not alter the register to give effect to it unless for strong reasons and for the benefit of the company and those interested in its assets (*o*).

Where a contract for transfer is made after the winding up commenced, both transferor and transferee being ignorant of the presentation of the petition, the court will not sanction the transfer and place the transferee on the register, because specific performance of the agreement would not be ordered (*p*).

(*d*) *Kent v. Freehold Land and Brick-making Co.* (1868), 3 Ch. App. 493.

(*e*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 205 (2).

(*f*) *Re Wiltshire Iron Co., Ex parte Pearson* (1868), 3 Ch. App. 443, 447. A charge on calls *bonâ fide* given by the directors in the interests of the company after the winding up commenced has been sanctioned and confirmed (*Gibbs and West's Case* (1870), L. R. 10 Eq. 312).

(*g*) *Re Civil Service and General Store, Ltd.* (1887), 58 L. T. 220; compare *Re Oriental Bank Corporation, Ex parte Guillemin* (1884), 28 Ch. D. 634. As to fraudulent preference, see p. 544, *post*.

(*h*) *Re Neath Harbour Smelting and Rolling Works* (1887), 56 L. T. 727.

(*i*) *Re Liverpool Civil Service Association, Ex parte Greenwood* (1874), 9 Ch. App. 511.

(*k*) *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App. Cas. 434, 440.

(*l*) See *Re Onward Building Society*, [1891] 2 Q. B. 463, 474, C. A.; *Walker's Case* (1866), L. R. 2 Eq. 554.

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 205 (2).

(*n*) *Re Onward Building Society, supra*; *Chapman v. Shepherd, Whitehead v. Izod* (1867), L. R. 2 C. P. 228; *Rudge v. Bowman* (1868), L. R. 3 Q. B. 689.

(*o*) *Re Onward Building Society, supra*, at p. 483; *Re Discoverers' Finance Corporation, Lindlar's Case*, [1910] 1 Ch. 312.

(*p*) *Emmerson's Case* (1866), 1 Ch. App. 433, 435. As to cases where the

A transfer of shares made after the presentation of the petition is not avoided unless or until a winding-up order is made (*q*).

Any alteration in the status of members made after the presentation of the petition other than that occasioned by a transfer sanctioned by the court (*r*) is also void, unless the court otherwise orders (*a*). Thus, an arrangement, after the petition is presented, by which the shareholders on whose shares a sum of £3 per share is unpaid are to pay £3 per share, and the payment is to be treated either as a loan to the company or as payment of the amount unpaid on the shares, according as the company is able to continue its business or is wound up, is void (*b*).

(*v.*) *Contributories.*

(*a*) *Who are Contributories.*

**829.** The term "contributory" means every person liable to contribute to the assets of a company in the event of its being wound up, including, in all proceedings for determining and also in all proceedings prior to the final determination of the persons who are to be deemed contributories, any person alleged to be a contributory (*c*). Every holder of fully paid up shares is a contributory (*d*), though he will not be placed on the list of contributories, except at his own desire, and he is not liable to make any contribution to the assets (*e*).

A person who is merely a debtor to the company (*f*), or who is liable to indemnify a trustee on the register (*g*), is not a contributory.

transfer is made before the winding up commenced, but is not registered, see *Fyfe's Case* (1869), 4 Ch. App. 768; *Ward and Garfit's Case* (1867), L. R. 4 Eq. 189; and the cases cited at p. 497, *post*.

(*q*) *Re Tumacacori Mining Co.* (1874), L. R. 17 Eq. 534, 537.

(*r*) *Taylor, Phillips and Rickards' Case*, [1897] 1 Ch. 298, 306, C. A.

(*a*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 205 (2).

(*b*) *Barge's Case* (1868), L. R. 5 Eq. 420.

(*c*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 124 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 74]. As to who are contributories in the case of a company registered under Part VII. of the Act, see p. 41, *ante*; of an unregistered company, see p. 651, *post*; as to persons holding shares as trustees, see p. 492, *post*; as to whether a person whose shares have been forfeited for non-payment of calls can be placed on the list of contributories, see *Ladies' Dress Association v. Pulbrook*, [1900] 2 Q. B. 376, C. A.; *Needham's Case* (1867), L. R. 4 Eq. 135; *Marshall v. Glamorgan Iron and Coal Co.* (1868), L. R. 7 Eq. 129. As to members of guarantee companies, see *Baird's Case*, [1899] 2 Ch. 593. As to persons who have ceased to be members of unincorporated companies, see *Irvine and Fullarton Property Investment Building Society (Liquidator) v. Cuthbertson* (1905), 8 F. (Ct. of Sess.) 1. As to the liability in the case of a society within the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), see *Re United Service Shares Purchase Society*, [1909] W. N. 169.

(*d*) *Re National Savings Bank Association* (1866), 1 Ch. App. 547; *Re Anglesea Colliery Co.* (1866), *ibid.*, 555; compare *Re Driffield Gas Light Co.*, [1898] 1 Ch. 451, 454. Where, by reason of default in complying with s. 25 of the Companies Act, 1867 (30 & 31 Vict. c. 131) (now repealed by Companies Act, 1900 (63 & 64 Vict. c. 48), s. 33), shares registered in a member's name are regarded as unpaid, it is still necessary for the liquidator, in order to distribute surplus assets, to treat the shares as unpaid although no call can be made in respect of the shares (*Re Bruton and Burney, Ltd.*, *Re Burney's New Cross Brewery Co., Ltd.*, [1901] 1 Ch. 637, C. A.).

(*e*) *Leifchild's Case* (1865), L. R. 1 Eq. 231; *Hastie's Case* (1868), L. R. 7 Eq. 3, 6.

(*f*) *Re European Society Arbitration Acts, Ex parte British Nation Life Assurance Association (Liquidators)* (1878), 8 Ch. D. 679, 708.

(*g*) *King's Case* (1871), 6 Ch. App. 196; *Williams' Case* (1875), 1 Ch. D.

SECT. 16.  
Winding up  
by the  
Court.

Alteration of  
members  
status.

Definition.

SECT. 16.  
Winding up  
by the  
Court.

Liability of  
members to  
contribute.

**830.** In the event of a company being wound up, every present and past member of it is, subject to the provisions referred to below, liable to contribute to its assets to an amount sufficient for (1) payment of its debts and liabilities; (2) payment of the costs, charges, and expenses of the winding up; and (3) the adjustment of the rights of the contributories among themselves (*h*). In the case of a company limited by shares his liability is limited to the extent of the amount unpaid on his shares, and in the case of a guarantee company only to the extent of his guarantee, and, if it has shares, the amount unpaid on them (*i*).

The expression "member" is not confined to the persons whose names were, when the winding up commenced, actually on the register as present or past members, but includes persons whose names ought to have been on the register at that date (*k*), and also persons to whom shares may have been validly transferred after the winding up commenced (*l*). It is immaterial whether the shares of a past member have been transferred or forfeited by him or his transferee within the year (*m*).

Liability of  
past  
members.

**831.** A past member is not liable to contribute (1) if he has ceased to be a member for one year or upwards before the commencement of the winding up; or (2) in respect of any debt or liability of the company contracted after he ceased to be a member; or (3) unless it appears to the court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of the Act of 1908 (*n*).

In most cases past members are not liable to contribute at all; for the present members are primarily liable to make all the contributions required, and it is only when they are unable to make such contributions that any past member is liable. In the case of a limited company, if the present members have contributed to the full extent of their limited liability, but their contributions are insufficient to discharge the company's liabilities, the past members are not liable to contribute, because the liability on the shares which they held has been discharged by the payments made by their present holders. To ascertain the

576; *Mitchell's Case* (1870), 11. R. 9 Eq. 363; *Re National Bank of Wales, Ltd., Massey and Giffin's Case*, [1907] 1 Ch. 582. It is different when the *cestui que trust* has contracted with the company to take the shares (*Pugh and Sharman's Case* (1872), L. R. 13 Eq. 566; *Richardson's Case* (1875), L. R. 19 Eq. 588; *Re Wheal Surety Mining Co., Cox's Case* (1863), 4 De G. J. & Sm. 53, C. A.).

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 123 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 38]. As to insurance companies under stat. (1844) 8 Vict. c. 110, repealed by Companies Act, 1862 (25 & 26 Vict. c. 89), s. 205, compulsorily registering under the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 209, see *Ramsay's Case* (1876), 3 Ch. D. 388, C. A.; and see p. 529, *post*.

(*i*) See pp. 492, 493, *post*.

(*k*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 163; and p. 494, *post*.

(*l*) *Taylor, Phillips and Rickards' Case*, [1897] 1 Ch. 298, C. A.

(*m*) *Creyke's Case* (1869), 5 Ch. App. 63; *Bridger's Case* and *Neill's Case* (1869), 4 Ch. App. 266; *Marshall v. Glamorgan Iron and Coal Co.* (1868), L. R. 7 Eq. 129.

(*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 123 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 38].

extent of the liability of a past member the amount of the contributions of the present members must first be ascertained and applied in payment of the company's debts, without regard to the date when the debts were contracted. Any debts then remaining unsatisfied must be classified in accordance with the dates at which they were severally contracted, in order to ascertain the liability of each past member. When the liability of past members has been so ascertained, their contributions form part of the general assets of the company, and must not be applied exclusively in payment of debts contracted before they retired, but must be applied in payment of all debts without regard to the dates at which these were contracted (*o*). If, before a past member has contributed to the assets, the debts in respect of which he is liable are in any way paid off or released, so that there remains no debt or liability contracted before he ceased to be a member, his liability to contribute is extinguished (*p*). A past member is not, in any circumstances, liable to contribute for the adjustment of the rights of the contributories *inter se*, but he may be liable to contribute towards the costs incurred in ascertaining and recovering the amount of their contributions (*q*).

**832.** The liability of a married woman (*r*) who is placed on the list of contributories as a holder of shares belonging to her as her separate property is limited to that part of her separate estate to which no restraint on anticipation is attached (*s*).

The husband of a female contributory married before January 1st, 1883, is, during the continuance of the marriage, liable, as respects any liability attaching to any shares acquired by her before that date, to contribute to the assets of the company the same sum as she would have been liable to contribute if she had not married, and he is a contributory accordingly (*t*).

(*o*) *Weston's Case* (1868), L. R. 6 Eq. 17; *Brett's Case* (1871), 6 Ch. App. 800; *Morris' Case* (1871), 7 Ch. App. 200; *Re Barned's Bank, Helbert v. Banner* (1871), L. R. 5 H. L. 28; *Webb v. Whiffin* (1872), L. R. 5 H. L. 711; *Brett's Case, Morris' Case* (1873), 8 Ch. App. 800; and see *Hudson's Case* (1871), L. R. 12 Eq. 1; *Nevill's Case* (1870), 6 Ch. App. 43; *Roberts v. Crowe* (1872), L. R. 7 C. P. 629. The relation between the A. contributory and the B. contributory is not that of principal and surety, but a statutory liability, from which the B. contributory is not released by a compromise entered into with the court's sanction between the liquidator and the A. contributory liable in respect of the same shares (*Re Barned's Bank, Helbert v. Banner, supra*).

(*p*) *Brett's Case, Morris' Case, supra*.

(*q*) *Marsh's Case* (1871), L. R. 13 Eq. 388, 391.

(*r*) As to a married woman being a shareholder, see p. 147, *ante*.

(*s*) *Belcher's Case*, [1883] W. N. 94; *Matthewman's (Mrs.) Case* (1866), L. R. 3 Eq. 781.

(*t*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 128 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 78]; see also *ibid.*, s. 128 (2). On the marriage of a female contributory before 1883, the names of both husband and wife were placed on the list of contributories (*Re North of England Joint Stock Banking Co., Burlinson's Case* (1849), 3 De G. & Sm. 18); her name alone could not be placed on the list (*Bell's Case* (1879), 4 App. Cas. 547, 550), and her husband was liable as a contributory in his own right (*Re West of England Bank, Ex parte Hatcher* (1879), 12 Ch. D. 284; *Married Women's Property Act, 1882* (45 & 46 Vict. c. 75), ss. 6, 7; *Re West of England Bank, Ex parte Hatcher, supra*). See title HUSBAND AND WIFE.

SECT. 16.  
Winding up  
by the  
Court.

Extent of  
liability.

Married  
women.

SECT. 16.  
Winding up  
by the  
Court.  
Bankrupt.

**833.** If a contributory becomes bankrupt, either before or after he has been placed on the list of contributories, his trustee in bankruptcy represents him for all the purposes of the winding up, and is a contributory accordingly. He may be called on to admit to proof against the estate of the bankrupt, or otherwise to allow to be paid out of his assets in due course of law any money due from the bankrupt in respect of his liability to contribute to the assets of the company. The estimated value of the bankrupt's liability to future calls as well as calls already made may be proved against his estate (a). If he becomes bankrupt after he has been placed on the list, his name remains on it, but he is represented by his trustee (b).

Disclaimer.

If, however, adjudication takes place before the winding up commences, he cannot be placed on the list, nor can his trustee if he has disclaimed the shares (c). If the shares are disclaimed the liquidator can prove in the bankruptcy not only for all calls made before the disclaimer, but also for the damages caused by the disclaimer. Where it is probable that the whole amount unpaid on the disclaimed shares will have to be called up to liquidate the company's liabilities, and the shares are of no value, the measure of damages is the amount unpaid on the shares, and a proof can be brought in for that amount (d).

Set-off.

There is a right of set-off, under the bankruptcy law, in the case of a bankrupt contributory, whether the claim is made in bankruptcy or in winding up, and the assignee of the debt owing by the company, before the bankruptcy of the contributory, or after the bankruptcy, if the assignment is not for value (e), stands in the same position (f).

Death of  
contributory.

**834.** If a contributory dies either before or after he has been placed on the list of contributories, his personal representatives and his heirs and devisees are liable in a due course of administration (g) to contribute to the assets of the company in discharge of

(a) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 127 [Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 77, 75].

(b) *Re Cape Breton Co.* (1881), 19 Ch. D. 77, C. A. As to the case of a past member who becomes bankrupt, see *McEwen's Case* (1871), 6 Ch. App. 582. As to the effect of proof and payment of dividend in respect of uncalled liability, see *Re West Coast Gold Fields, Ltd., Rowe's Trustee's Claim*, [1906] 1 Ch. 1, C. A. As to effect, before the passing of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 37, where there was no disclaimer, and an order of discharge had been granted, see *Re Pickering, Ex parte Pickering* (1868), 4 Ch. App. 58; *Hastie's Case* (1869), 4 Ch. App. 274; *Re Waddington, Ex parte Marshall* (1872), 7 Ch. App. 324; *Re Mercantile Mutual Marine Insurance Association* (1883), 25 Ch. D. 415.

(c) *Re West of England Bank, Ex parte Budden and Roberts* (1879), 12 Ch. D. 288. As to disclaimer of shares, see *Re Hooley, Ex parte United Ordnance and Engineering Co.*, [1899] 2 Q. B. 579; and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 191, 196.

(d) *Re Hallett, Ex parte National Insurance Co.*, [1894] W. N. 156.

(e) *Re Anglo-Greek Steam Navigation and Trading Co., Carralli and Haggard's Claim* (1867), 4 Ch. App. 174.

(f) *Re Duckworth* (1867), 2 Ch. App. 578; *Re Universal Banking Corporation, Ex parte Strang* (1870), 5 Ch. App. 492. A bankruptcy notice issued by a liquidator who has obtained judgment for unpaid calls is not bad by reason of the debt being extinguished by set-off, if bankruptcy follows (*Re G. E. B.*, [1903] 2 K. B. 340, 352, C. A.).

(g) As to the right of retainer, see *Re Hubbard, International Marine Hydrographic Co. v. Hawes* (1885), 29 Ch. D. 934, 942, C. A.

SECT. 16.  
Winding up  
by the  
Court.

his liability, and are contributories accordingly (h). A deceased member, or his estate, remains a member for the purpose of the articles of association so long as his name remains on the register without notice to the company of his death (i). If shares are registered in joint names, and one of the shareholders dies before winding up, his estate is not liable (k).

Personal representatives registered with their consent as holders of shares belonging to a deceased member are personally liable and are placed on the list in their own right, although described as executors in the register (a). A notification by a person that he is an executor does not authorise the placing of his name on the register so as to make him personally liable (b).

Liability of  
executors.

Where the personal representatives are placed on the list of contributories, the heirs or devisees need not be added, but, with certain exceptions, they may be added as and when the court thinks fit (c).

If the personal representatives make default in paying any money ordered to be paid by them, proceedings may be taken for administering the personal and real estates of the deceased contributory, or either of them, and of compelling payment thereof of the money due (d).

The liability of personal representatives placed on the list in their representative capacity is limited to the assets in their hands properly administered (e). If, without availing themselves of the protection afforded by statute (f), they pay a legacy without providing

(h) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 126 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 76].

(i) *New Zealand Gold Extraction Co. (Newbury-Vautin Process) v. Peacock* [1894] 1 Q. B. 622, 632, C. A.

(k) *Hill's Case* (1875), L. R. 20 Eq. 585, 595.

(a) *Duff's Executors' Case* (1886), 32 Ch. D. 301, C. A.

(b) *Buchan's Case* (1879), 4 App. Cas. 589.

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 126 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 99]. As to the exceptions, see Land Transfer Act, 1897 (60 & 61 Vict. c. 65), ss. 1, 2, which make real estate, with some exceptions, assets in the hands of personal representatives for the payment of debts; and title EXECUTORS AND ADMINISTRATORS. The Act of 1897 is to be construed (see s. 26) with the Land Transfer Act, 1875 (38 & 39 Vict. c. 87). As regards the real estate which is excepted, it would seem that the heir or devisee should not be placed on the list. As to s. 99 of the Companies Act, 1862 (25 & 26 Vict. c. 89), see *Hamer's Devises' Case* (1852), 2 De G. M. & G. 366.

(d) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 126 (3) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 105]; *Price v. Mayo* (1874), 43 L. J. (CH.) 402. As to the effect of a balance order obtained against the representatives of a deceased contributory, see *Re Hubbard, International Marine Hydrographic Co. v. Hawes* (1885), 29 Ch. D. 934, C. A. In the administration of the estate of a deceased insolvent contributory, the estimated value of his liability to future calls, as well as the amount of calls already made, may be proved for (*Re McMahon, Fuller v. McMahon*, [1900] 1 Ch. 173; *Re Muggerridge, Muggerridge v. Sharp, Ex parte Bank of London and National Provincial Insurance Association* (1870), L. R. 10 Eq. 443). The real estate of the deceased is liable for calls (Administration of Estates Act, 1833 (3 & 4 Will. 4, c. 104); *Turquand v. Kirby* (1867), L. R. 4 Eq. 123).

(e) *Baird's Case* (1870), 5 Ch. App. 725; *Ex parte Blakeley's Executors* (1852), 3 Mac. & G. 726; *Ex parte Gouthwaite* (1851), 3 Mac. & G. 187; *Keene's Executors' Case* (1853), 3 De G. M. & G. 272, C. A.; *Heward v. Wheatley* (1853), 3 De G. M. & G. 628, C. A.; see also *Re Herefordshire Banking Co., Bulmer's Case* (1864), 33 Beav. 435; *Fearnside and Dean's Case*, *Dobson's Case* (1865), 1 Ch. App. 231; *Buchan's Case*, *supra*.

(f) Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 29.

SECT. 16.  
Winding up  
by the  
Court.

for the contingent liability on shares, they are personally liable in respect of the shares to an amount not exceeding the legacy (*g*). As against the legatee, however, they may claim repayment of the legacy, even if at the time of payment they had notice of the contingent liability (*h*), but not if it had then become an ascertained liability (*i*). When the personal representatives are protected by statute, the liquidator can compel the legatee to refund the legacy (*k*).

Trustees

**835.** Persons whose names are entered on the register as holders of shares as trustees are contributories in their own right, and their liability is not limited to the amount of the trust estate (*l*).

(b) *Liability of Contributories in General.*

Liability in  
case of  
limited  
company.

**836.** In the case of a company limited by shares no contribution is to be required from any member exceeding the amount, if any, unpaid on the shares, in respect of which he is liable as a present or past member (*m*). His liability, if any (*n*), continues so long as anything remains unpaid upon his shares, and payment in full can alone put an end to it (*o*). Thus, persons to whom shares have been issued at a discount may be called upon in a winding up to pay in cash for their shares, not only to meet the claims of outside creditors, but also to adjust the rights of the contributories *inter se* (*p*).

In the case of a company limited by guarantee, no contribution

(*g*) *Taylor v. Taylor* (1870), L. R. 10 Eq. 477. As to the distribution of an estate comprising partly-paid shares, see *Re King, Mellor v. South Australian Land Mortgage and Agency Co.* [1907] 1 Ch. 72.

(*h*) *Jervis v. Wolferstan* (1874), L. R. 18 Eq. 19.

(*i*) *Whittaker v. Kershaw* (1890), 45 Ch. D. 320, C. A.

(*k*) Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 29.

(*l*) *Muir v. City of Glasgow Bank* (1879), 4 App. Cas. 337; *Bell's Case* (1879), 4 App. Cas. 547, 550; *Cunninghame v. City of Glasgow Bank* (1879), 4 App. Cas. 607; *Gillespie v. City of Glasgow Bank* (1879), 4 App. Cas. 632; *Cree v. Somerville* (1879), 4 App. Cas. 648; *Ker's Case* (1879), 4 App. Cas. 547, 549, 598.

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 123 (1) (iv).

(*n*) As to the extent of the liability, see p. 160, *ante*. As to the liability of a past member, see p. 162, *ante*. As to the liability when the business of the company is carried on with less than the proper number of members, see p. 160, *ante*. As to the liability in case of forfeiture for non-payment of calls, see p. 200, *ante*. Nothing in the Act of 1908 is to invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members on the policy or contract is restricted, or where the funds of the company are alone made liable in respect of the policy or contract [Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 123 (1) (vi.)] [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 38 (6)]; *Re Great Britain Mutual Life Assurance Society* (1880), 16 Ch. D. 246, C. A.). Where a company has issued such policies or made such contracts, there are two sets of creditors, those who can be paid only out of the restricted fund, and those who, being ordinary creditors, can be paid out of all the assets of the company. As to how the assets of the company should be distributed in such cases, see *Lethbridge v. Adams, Ex parte International Life Assurance Society (Liquidator)* (1872), L. R. 13 Eq. 547; *Re Agriculturist Cattle Insurance Co., Ex parte Official Manager* (1874), 10 Ch. App. 1; *Re International Life Assurance Society* (1876), 2 Ch. D. 476, C. A.; *Re Accidental Death Insurance Co.* (1878), 7 Ch. D. 568; and see *Weston's Case* (1868), L. R. 6 Eq. 17.

(*o*) *Oreogum Gold Mining Co. of India v. Roper*, [1892] A. C. 125, 145.

(*p*) *Welton v. Saffery*, [1897] A. C. 299; see also *Re Weymouth and Channel Islands Steam Packet Co.*, [1891] 1 Ch. 66, C. A.

can be required from any member exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up (*q*). But if the guarantee company has a share capital a member is liable, in addition to the amount so undertaken, to contribute to the extent of any sums unpaid on any shares held by him (*r*).

The members can, by agreement *inter se*, undertake a liability more extensive than the statutory liability (*s*). If the company is formed under the Act of 1908 it is doubtful whether the court has jurisdiction to enforce any such liability in the winding up (*t*), but it can be enforced in an action (*u*).

**837.** In the case of a limited company, any director or manager, whether past or present, whose liability is, in pursuance of the Act of 1908, unlimited (*w*) is, in addition to his liability (if any) to contribute as an ordinary member, liable to make a further contribution as if he were at the commencement of the winding up a member of an unlimited company. A past director or manager is not, however, liable to make such further contribution if he has ceased to hold office for a year or upwards before the winding up commenced; or if it is in respect of any debt or liability of the company contracted after he ceased to hold office. Subject to the articles of association, the further contribution is not required unless the court deems it necessary in order to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of the winding up (*a*).

**838.** The liability of a contributory creates a debt of the nature of a specialty accruing due from him at the time when his liability commenced, but payable at the times when calls are made for enforcing the liability (*b*).

(*q*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 123 (1) (v.); and see p. 75, *ante*.

(*r*) *Ibid.*, s. 123 (3).

(*s*) *McKewan's Case* (1877), 6 Ch. D. 447, C. A.; *Maxwell's Case* (1874), L. R. 20 Eq. 585, 588 (cases under the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), in which the extended liability imposed by the articles was enforced in the winding up); compare *Lion Insurance Association v. Tucker* (1883), 12 Q. B. D. 176, C. A.

(*t*) See *Baird's Case*, [1899] 2 Ch. 593, 598; *Re Marlborough Club Co.* (1868), L. R. 5 Eq. 365.

(*u*) *Lion Insurance Association v. Tucker, supra*; *Peninsular Co. v. Fleming* (1872), 27 L. T. 93; compare *South African Territories v. Wallington*, [1898] A. C. 309.

(*w*) See p. 235, *ante*.

(*a*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 123 (2) [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 5]. Where the court orders a director with unlimited liability to pay money due from him to the company other than under a call, the court may allow him by way of set-off any money due to him from the company on any independent contract with the company, but not any money due in respect of any dividend or profit (*ibid.*, s. 165 (2)).

(*b*) *Ibid.*, s. 125 [Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 75, 90, 134]; see *Re Vaughan, Ex parte Canwell* (1864), 4 De G. J. & Sm. 539; *Williams v. Harding* (1866), L. R. 1 H. L. 9, 29; *Re Pickering, Ex parte Pickering* (1868), 4 Ch. App. 58, 61; *Re West of England Bank, Ex parte Hatcher* (1879), 12 Ch. D. 284, 287; compare *Re Taunton, Delmard, Lane & Co., Christie v. Taunton, Delmard, Lane & Co.*, [1893] 2 Ch. 175, 185; *Griessell's Case* (1886), 1 Ch. App. 528, 535. Before liquidation, the liability of shareholders to future calls does not become a debt until a call is made (*Whittaker v. Kershaw* (1890), 45 Ch. D. 320.

SECT. 16.  
Winding up  
by the  
Court.

Contractual  
liability.

Unlimited  
liability of  
directors.

Nature of  
liability.



SECT. 16.  
Winding up  
by the  
Court.

Sums due to  
a member  
as such.

**839.** Although a sum due to any member in that character (c) by way of dividends, profits, or otherwise (d), is not deemed to be a debt of the company, payable to him in a case of competition between himself and any other creditor not a member, it may be taken into account, for the purpose of the final adjustment of the rights of the contributories among themselves (e). Sums due to a director under the articles, in respect of his remuneration, are not sums due to him in his character of a member (f).

(c) Settlement of List of Contributories.

Liquidator's  
power to  
settle list.

**840.** As soon as may be after making a winding-up order, the court is to settle a list of contributories, with power to rectify the register of members in all cases where rectification is required in pursuance of the Act of 1908 (g). In settling the list the court is to distinguish between persons who are contributories in their own right and persons who are contributories as being representatives of or liable for the debts of others (h).

In pursuance of the statutory power (i), rules have been made enabling the powers of the court with respect to settling the list of contributories and rectifying the register of members to be exercised, when required by the liquidator as an officer of the court, subject to its control (k); but there is a statutory prohibition against rectification by the liquidator of the register of members without the special leave of the court (l).

The official receiver, while acting as provisional liquidator after the winding-up order, has the powers of an ordinary liquidator as to settling the list of contributories (m).

Provisional  
list.

**841.** The liquidator must with all convenient speed after his appointment settle a provisional list of contributories of the company, and appoint a time and place for that purpose. The provisional list must contain a statement of the address of each

326, C. A.) As to companies not registered but wound up under the Act of 1908, see *Re Muggeridge, Muggeridge v. Sharp, Ex parte Bank of London and National Provincial Insurance Association* (1870), L. R. 10 Eq. 443. As to the heir's liability, see *Buck v. Robson* (1870), L. R. 10 Eq. 629. As to the right of set-off, see p. 515, *post*.

(c) A person claiming damages for an irregular forfeiture of his shares does not claim in the character of a member (*Re New Chile Gold Mining Co.* (1890), 45 Ch. D. 598).

(d) As to what claims are included in the words "or otherwise," see *Re Addlestone Linoleum Co.* (1887), 37 Ch. D. 191, 198, C. A.

(e) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 123 (1) (vii.) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 38 (7)]; and see p. 529, *post*.

(f) *Re Dale and Plant* (1889), 43 Ch. D. 255; *Re New British Iron Co., Ex parte Beckwith*, [1898] 1 Ch. 324; *Re A1 Biscuit Co.*, [1899] W. N. 115; compare *Re Leicester Club and County Racecourse Co., Ex parte Cannon* (1885), 30 Ch. D. 629; *Re Dover Coalfield Extension, Ltd.*, [1908] 1 Ch. 65, C. A.

(g) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 163 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 98].

(h) *Ibid.*, s. 163 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 99].

(i) *Ibid.*, s. 173 [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 13].

(k) Companies (Winding-up) Rules, r. 75 (1).

(l) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 173 [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 13].

(m) *Re English Bank of the River Plate*, [1892] 1 Ch. 391.

SECT. 16.  
Winding up  
by the  
Court.

contributory, and the number of shares or extent of interest to be attributed to him, and distinguish the several classes of contributories. As regards representative contributories, the liquidator must, so far as practicable, observe the statutory requirement that in settling the list a distinction must be made between persons who are contributories in their own right and persons who are contributories as being representatives of or liable for the debts of others (n). If the liquidator has already commenced an action for calls this does not preclude him from discontinuing, and settling the defendant on the list, but the costs of action will be deducted from the amount recovered (o).

In many cases there is not only a list of present members, called the "A" list, but also a list of past members, called the "B" list. The liquidator can settle the "A" list without application to the court. Before settling the "B" list he must, however, apply to the court for directions, and the court, before directing the settlement of the "B" list, must be satisfied that the present members will probably be unable to meet their obligations (p). When a duly executed transfer has been lodged before the winding up began, then, unless the company made default in registering the transfer before the winding up, the transferor's name must be put on the "A" list (a).

**842.** The liquidator must give notice in writing of the time and place appointed for the settlement of the list to every person whom he proposes to include in it, and must state in the notice to each person in what character and for what number of shares or interest he proposes to include him in the list (b).

**843.** On the day appointed for settlement the liquidator must hear any person who objects to being settled as a contributory, and after such hearing must finally settle the list, which, when so

Notice of  
appointment  
to settle list.

Final settle-  
ment.

(n) Companies (Winding-up) Rules, r. 77. For the form of provisional list of contributories, see *ibid.*, Form 42. The persons whose names are placed on the list in a representative capacity are the personal representatives, or trustees in bankruptcy, of persons who, when the winding up commenced, were registered as members, but who, either before or after the commencement, have died or become bankrupt. In the absence of any provision in articles of association as to the liability of joint holders of shares, the survivor at the commencement of the winding up is alone liable as a contributory, and the personal representatives of a deceased joint holder cannot be placed on the list (*Hill's Case* (1875), L. R. 20 Eq. 585, 595; *Re Kharashkoma Exploring and Prospecting Syndicate* (1897), 66 L. J. (CH.) 675, 681, C. A.). As to a company being estopped from placing a personal representative on the list, see *Meux's Executors' Case* (1852), 2 De G. M. & G. 522.

(o) *Re United Service Association*, [1901] 1 Ch. 97.

(p) *Wright's Case* (1868), L. R. 12 Eq. 345, n., C. A.; *Needham's Case* (1867), L. R. 4 Eq. 135; *Andrew's Case* (1867), 3 Ch. App. 161; compare *Re BARNED'S BANK, Helbert v. Banner* (1871), L. R. 5 H. L. 28. As to the liabilities of past members, see p. 488, *ante*.

(a) *Re North of England Banking Co., Chartres' Case* (1849), 1 De G. & Sm. 581; as to rectifying the register in such a case, see p. 496, *post*.

(b) Companies (Winding-up) Rules, r. 78. For the form of notice of appointment, see *ibid.*, Form 43; and for form of affidavit of postage of such notices, *ibid.*, Form 44. The notice may be served out of the jurisdiction (*Re Newman (Nathan) & Co.* (1887), 35 Ch. D. 1, C. A.); compare *Re Liebig's (Baron) Cocoa and Chocolate Works, Ltd.*, [1888] W. N. 120.

**SECT. 16.**  
**Winding up by the Court.**

settled, will be the list of contributories of the company (c). He makes a certificate of the result of the settlement of the list, so far as it is settled up to the date of the certificate, the particulars required as to the persons settled on or excluded from it, the number of shares and otherwise being stated in schedules annexed to the certificate (d).

Notice of final settlement.

**844.** Having finally settled the list of contributories, the liquidator must forthwith give notice to every person whom he has finally placed thereon, stating in what character and for what number of shares or interest he has been placed on the list, and informing him that any application for the removal of his name from the list, or for a variation of it, must be made to the court by summons within twenty-one days from the date of the service on him of the notice (e).

Varying the list.

**845.** The liquidator may from time to time vary or add to the list of contributories, but any such variation or addition must be made in the same manner in all respects as the settlement of the original list (f).

(d) *Rectification of Register or List of Contributories.*

Court's power to rectify list.

**846.** In a compulsory winding up the court has power, on the settlement of the list of contributories, to rectify the register of members (g) in all cases where rectification is required in pursuance of the Act of 1908 (h). This may be done either before or after the list of contributories has been settled, and the court may make any consequential alterations in the list (i).

Liquidator's power.

**847.** The liquidator cannot make any rectification of the register without the special leave of the court (k). If he places on the list

(c) Companies (Winding-up) Rules, r. 79. The register of members and the books and papers of the company and the liquidator are *prima facie* evidence against the contributories (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 33, 220).

(d) Companies (Winding-up) Rules, Form 45.

(e) *Ibid.*, r. 80. For the form of notice, see *ibid.*, Form 46; and for form of affidavit of service of notice, *ibid.*, Form 48. As to the effect of a scheme of arrangement, see *Re Lionel Spinning Co., Ex parte Connor*, [1900] 1 L. R. 250. Subject to the power of the court to extend the time or to allow an application to be made notwithstanding the expiration of the time limited for that purpose, no application to the court by any person who objects to the list of contributories as finally settled by the liquidator is entertained after the expiration of twenty-one days from the date of the service on such person of notice of the settlement of the list (Companies (Winding-up) Rules, r. 81 (1); and see *Re Liverpool Household Stores Association, Ex parte Weld-Blundell* (1890), 63 L. T. 383). For the form of order on application to vary, see Companies (Winding-up) Rules, Form 49. The official receiver is not in any case personally liable to pay any costs of or in relation to an application to set aside or vary his act or decision settling the name of a person on the list of contributories (*ibid.*, r. 81 (2)).

(f) *Ibid.*, r. 82. For the form of supplemental list of contributories, see *ibid.*, Form 47. The supplemental list cannot be used to obtain balance orders against contributories for sums not due by them as such (*Re Marlborough Club Co.* (1868), L. R. 5 Eq. 365).

(g) As to the effect of entries in the register, see p. 151, *ante*.

(h) Companies (Consolidation), Act 1908 (8 Edw. 7, c. 69), ss. 32, 163 (1).

(i) *Ibid.*

(k) *Ibid.*, s. 173.

**SECT. 16.**  
**Winding up by the Court.**

the name of a person who is not on the register of members, the liquidator has to satisfy the court, on an application by such person to vary the list by removing his name therefrom, that the circumstances are such that the applicant's name ought to have been upon the register, and was improperly omitted therefrom (l). Where a sale and transfer of shares are made after the winding-up order, the court will only direct the registration of the transferee for the benefit of the company or of those interested in its assets (m).

The principles upon which the court exercises the power of rectifying the register after the commencement of a winding up are similar to those upon which it exercises the power of rectifying the register while the company is a going concern (n). Where, however, a person whose name is duly entered on the register as a member at the date of the commencement of the winding up seeks to have his name removed on the ground that, although he agreed to become a member, the agreement is voidable at his option—as where the contract was induced by fraud—it is necessary that he should, before the winding up commenced, have definitely and effectively repudiated the agreement (o) and followed up his repudiation by active measures to have his name removed from the register (p), except where there is some agreement which exonerates the member from the necessity of taking such steps (q). The same principles apply whether the winding up is compulsory or is a voluntary winding up, either under supervision or not (r).

**848.** The court will, on the application of the liquidator in the name of the company (s), if satisfied that the justice of the case requires it (t), rectify its register of members and, if necessary, the list of contributories, where a person's name is, without sufficient cause (a), entered in or omitted from the register or list, or if default has been made or unnecessary delay has taken place in entering on the

Principles guiding the court.

Where rectification ordered.

(l) *Re Macdonald, Sons & Co.*, [1894] 1 Ch. 89, C. A.

(m) *Re Onward Building Society*, [1891] 2 Q. B. 463, C. A.

(n) See p. 153, *ante*.

(o) *Re Overend, Gurney & Co. Oakes v. Turquand and Harding* (1867), L. R. 2 H. L. 325; *Reese River Silver Mining Co. v. Smith* (1869), L. R. 4 H. L. 64, 81; *Re Dunlop-Truffault Cycle and Tube Manufacturing Co., Shearman's Case* (1896), 75 L. T. 385; *Re Sussex Bride Co.*, [1901] 1 Ch. 698; *Ward's Case* (1866), L. R. 2 Eq. 226. After winding up commenced the shareholder who has been induced to take shares by fraud, and has not in the meantime repudiated and taken active steps, has no claim against the liquidator of the company or its assets for damages in respect of the fraud (*Houldsworth v. City of Glasgow Bank* (1880), 5 App. Cas. 317; *Burgess's Case* (1880), 15 Ch. D. 507).

(p) *Hare's Case* (1869), 4 Ch. App. 503; *Kent v. Freehold Land and Brick-making Co.* (1863), 3 Ch. App. 493; *Re Central Klondyke Gold Mining and Trading Co., Thomson's Case* (1898), 5 Mans. 282; *Re Scottish Petroleum Co.* (1883), 23 Ch. D. 413, C. A.; compare *Hart's Case* (1868), L. R. 6 Eq. 512.

(q) *Pawle's Case* (1869), 4 Ch. App. 497; compare *Whiteley's Case*, [1900] 1 Ch. 365, C. A.

(r) *Stone v. City and County Bank* (1877), 3 C. P. D. 282, C. A.

(s) *Re Bank of Hindustan, China and Japan, Ex parte Kintrea* (1869), 5 Ch. App. 95.

(t) *Trevor v. Whitworth* (1887), 12 App. Cas. 409, 440; *Re Onward Building Society, supra*; *Re Hannan's King (Browning) Gold Mining Co.* (1898), 14 T. L. R. 314, C. A.

(a) For instance, where a person's name is registered without his authority

SECT. 16.  
Winding up  
by the  
Court.

Cases of  
rectification.

register the fact of any person having ceased to be a member (b). Where a transfer has not been registered before winding up, owing to the default of the company, the court will not, at the liquidator's instance, rectify the register (c); but it will do so on the application of other persons by substituting the name of the transferee for that of the transferor (d). It will not, however, do so where there has been no default or unnecessary delay on the company's part (e). If a person's name is improperly entered or omitted, it must be considered to be entered or omitted without sufficient cause, as, for instance, where a transfer is fraudulently made to escape liability and contains incorrect statements (f); but an out-and-out transfer to escape liability is good (g), even although there has been a misdescription of the transferee (h). Where a person, with intent to deceive a company, takes shares in the name of a fictitious person, or of some other person without his authority, the liquidator can place his name on the list of contributories, and the court will rectify the list of members and, if necessary, the list of contributories (i). Rectification by substituting the name of a beneficiary for that of his registered trustee cannot be obtained (j), unless when the winding up commenced the trustee is an infant (k). The liquidator can substitute a transferor for the transferee where the latter was an infant when the winding up commenced (l), unless the company has been guilty of laches (m). After a company has

(Alabaster's Case (1868), L. R. 7 Eq. 273; Somerville's Case (1871), 6 Ch. App. 266), and the circumstances do not show assent (Crawley's Case (1869), 4 Ch. App. 322; Challis's Case (1871), 6 Ch. App. 266).

(b) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 32, 163 (1).

(c) Sichel's Case (1867), 3 Ch. App. 119.

(d) Nation's Case (1866), L. R. 3 Eq. 77; Fyfe's Case (1869), 4 Ch. App. 768; Hill's Case (1867), 4 Ch. App. 769, n.; Lowe's Case (1870), L. R. 9 Eq. 589; Re Manchester and Oldham Bank, [1885] W. N. 169.

(e) Shepherd's Case (1866), 2 Ch. App. 16; Re Anglo-Indian and Colonial, Industrial and Commercial Institution, Ltd., Montagu's (Lord R.) Case, Grey's Case, [1888] W. N. 137. On a sale and transfer made after a compulsory order the power to rectify the register will only be exercised on strong grounds (Re Onward Building Society, [1891] 2 Q. B. 463, C. A.).

(f) Re Bank of Hindustan, China and Japan, Ex parte Kintrea (1869), 5 Ch. App. 95.

(g) Re Smith, Knight & Co., Hakim's Case (1869), 7 Ch. App. 296, n.; compare Re Mexican and South American Co., Costello's Case (1860), 2 De G. F. & J. 302, C. A.; Re Electric Telegraph Co. of Ireland, Budd's Case (1861), 3 De G. F. & J. 297, C. A.; Re Discoverers' Finance Corporation, [1908] 1 Ch. 141, compromised on appeal; and overruled in Re Discoverers' Finance Corporation, Lindlar's Case, [1910] 1 Ch. 312, C. A.

(h) Re Financial Insurance Co., Bishop's Case (1869), 7 Ch. App. 296, n.; Masters' Case (1872), 7 Ch. App. 292; Williams' Case (1875), 1 Ch. D. 576.

(i) Pugh and Sharman's Case (1872), L. R. 13 Eq. 566; Richardson's Case (1875), L. R. 19 Eq. 588; Re Yeolana's Consols, Manley's Case (1890), 2 Meg. 74; Re Central Klondyke Gold Mining and Trading Co., Savigny's Case (1898), 5 Mans. 336; King's Case (1871), 6 Ch. App. 196.

(j) King's Case, supra.

(k) Weston's Case (1870), 5 Ch. App. 614; compare Re National Bank of Wales, Ltd., Massey and Giffin's Case, [1907] 1 Ch. 583.

(l) Curtis's Case (1868), L. R. 6 Eq. 455; Costello's Case (1869), L. R. 8 Eq. 504; Capper's Case (1867), 3 Ch. App. 458; Re Joint Stock Discount Co., Mann's Case (1867), 3 Ch. App. 459, n.; Symons' Case (1870), 5 Ch. App. 298; Richardson's Case (1875), L. R. 19 Eq. 588.

(m) Parsons' Case (1869), L. R. 8 Eq. 656.

SECT. 16.  
Winding up  
by the  
Court.

Agreements  
to take  
shares etc.

once obtained an adult member, a prior transfer to an infant cannot be avoided, and the transferor to the infant cannot be placed on the B. list (n). The liquidator cannot substitute the name of a husband for that of a wife, although she has no separate estate and the shares were given to her by him (o).

Where a person makes a binding agreement with a company to take shares, but his name is not entered on the register as the holder, the register may be rectified and his name entered on the list of contributories (p). An agreement by a person to "place" shares is not an agreement to accept an allotment, and his name cannot be entered on the register or list (q). Where fully-paid shares have been given to a director as a bribe, he cannot be placed on the list in respect of such shares as if they were unpaid (r); but he may be placed on the list in respect of shares which he agreed to take, but which he purported to pay for with money obtained from the vendor to the company (s). Where registration of a transfer has been procured by misrepresentation of the transferor contained in the transfer itself, and directors have the power of refusing to register a transfer, the court will, if the transfer was made when the company was insolvent, rectify the register and list by substituting the name of the transferor for that of the transferee (t). This will not be done after a lapse of years where the misrepresentation was made by the purchaser who took the transfer in the name of a nominee misdescribed in the transfer (u). A shareholder's name will be taken off the register after winding up commenced where there is no contract by him to take the shares (a). Where shareholders' names have been improperly removed from

(n) Gooch's Case (1872), 8 Ch. App. 266.

(o) Re London, Bombay and Mediterranean Bank (1881), 18 Ch. D. 581.

(p) Re Oola Mining Co. Palmer's Case (1868), 1 R. 2 Eq. 573; Re East India Cotton Agency, Sands' Case (1875), 32 L. T. 299.

(q) Gorriessen's Case (1873), 8 Ch. App. 507.

(r) Dent's Case, Forbes' Case (1873), 8 Ch. App. 768; Carling, Hespeler and Walsh's Cases (1875), 1 Ch. D. 115, C. A.; De Rivigne's Case (1877), 5 Ch. D. 306, C. A.; Re Innes & Co., Ltd., [1903] 2 Ch. 254 C. A.; compare Ex parte Daniell (1857), 1 De G. & J., 372, commented on in Carling, Hespeler and Walsh's Cases, supra.

(s) Hay's Case (1875), 10 Ch. App. 593.

(t) Payne's Case (1869), L. R. 9 Eq. 223; Williams' Case (1869), L. R. 9 Eq. 225, n.

(u) Williams' Case (1875), 1 Ch. D. 576.

(a) For instance, because he has not applied for or agreed to take shares (Hutchinson's Case, [1895] 1 Ch. 226; Ormerod's Case, [1894] 2 Ch. 474; Bailie's Case, [1898] 1 Ch. 110); or his application for shares was withdrawn before notice of allotment was given (Truman's Case, [1894] 3 Ch. 272; Ritsos' Case (1877), 4 Ch. D. 774, C. A.; Hebb's Case (1867), L. R. 4 Eq. 9); or although application for shares was made, notice of allotment was not given (Crawley's Case, Robinson's Case (1869), 4 Ch. App. 322; Gunn's Case (1867), 3 Ch. App. 40); or, the application for shares being conditional, the condition was not fulfilled (Re London and Southern Counties Freehold Land Co. (1885), 31 Ch. D. 223); or the application for shares was not accepted (Beck's Case (1874), 9 Ch. App. 392). As to a shareholder acting as a member, or otherwise by word or deed precluding himself from objecting that there was not a contract binding him to take the shares, see Crawley's Case, Robinson's Case, supra; Challis's Case (1871), 6 Ch. App. 266; Re Railway Time Tables Publishing Co., Ex parte Sandys (1889), 42 Ch. D. 98, C. A.; Re Barded's Banking Co., Ex parte Contract Corporation (1867), 3 Ch. App. 105.

SECT. 16.  
Winding up  
by the  
Court.

the register before a winding up commenced, the court will, on the liquidator's application, rectify the register by replacing their names (b).

## (e) Calls.

When calls  
may be  
made.

**849.** The court may, at any time after making a winding-up order, and either before or after it has ascertained the insufficiency of the assets of the company, make calls on all or any of the contributories for the time being settled on the list of contributories, to the extent of their liability, for payment of any money which it considers necessary to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding up, and for the adjustment of the rights of the contributories among themselves. In making a call the court may take into consideration the probability that some of the contributories may partly or wholly fail to pay the call (c).

The call may be made before or after ascertaining what claims against the company will be established as debts (d); but the list of contributories must first have been settled (e). Shareholders are liable to pay calls made in the winding up, although by the contract under which they took their shares the calls were only payable by instalments, and the date for payment has not arrived (f).

Liquidator's  
power to  
make calls.

**850.** The court's powers in relation to making calls are exercisable by the liquidator, in a winding up by the court, as an officer of the court, but only with the court's leave or the committee's sanction, and subject to the following rules (g):—

Sanction of  
committee.

A liquidator desiring to make a call may, if there is a committee of inspection, summon a meeting of the committee, to obtain its sanction to the intended call, by a notice in the prescribed form (h) sent to each member in sufficient time to reach him not less than seven days before the day appointed for holding the meeting, and containing a statement of the proposed amount of the call and the purpose for which it is intended (i). Notice of the intended call and the intended meeting of the committee must also be advertised once at least in a London newspaper, or, where the winding up is not in

(b) *Duff's Executors' Case* (1886), 32 Ch. D. 301, C. A.; *Re Bank of Hindustan, China and Japan, Ex parte Kintrea* (1869), 5 Ch. App. 95; *Re Companies Guardian Society, Wallscourt's (Lord) Case*, [1899] W. N. 258.

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7. c. 69), s. 166 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 102]. As to the effect of a mortgage of calls after a winding-up order has been made, see *Gwelo (Matabeleland) Exploration and Development Co.*, [1901] 1 I. R. 38.

(d) *Re Contract Corporation* (1866), 2 Ch. App. 95; *Re BARNED'S BANKING CO.* (1867), 36 L. J. (CH.) 215, C. A.

(e) *Needham's Case* (1867), L. R. 4 Eq. 135, 138; *Re English Bank of the River Plate*, [1892] 1 Ch. 391, 394.

(f) *Re Cordova Union Gold Co.*, [1891] 2 Ch. 580; *Re Pyle Works* (1890), 44 Ch. D. 534, C. A., per LINDLEY, L.J., at p. 583; *London Provident Building Society v. Morgan*, [1893] 2 Q. B. 266, 272.

(g) Companies (Consolidation) Act, 1908 (8 Edw. 7. c. 69), s. 173; Companies (Winding-up) Rules, r. 83. Calls in respect of uncalled capital charged by debentures can only be made in the liquidator's names; see *Fowler v. Broad's Patent Night Light Co.*, [1893] 1 Ch. 724; *Re Westminster Syndicate, Ltd.*, [1908] W. N. 236.

(h) See Companies (Winding-up) Rules, Form 50.

(i) *Ibid.*, r. 83.

SECT. 16.  
Winding up  
by the  
Court.

the High Court, in a newspaper circulating in the district of the court in which the proceedings are pending, by an advertisement in the prescribed form (j), stating the time and place of the intended meeting of the committee, and that each contributory may either attend the meeting and be heard, or make any communication to the liquidator or members of the committee, to be laid before the meeting, in reference to the intended call (k).

At the meeting any statements or representations made either to the meeting personally, or addressed in writing to the liquidator or members of the committee, by any contributory, must be considered before the intended call is sanctioned. The committee's sanction is given by resolution, which must be passed by a majority of the members present (l).

Where there is no committee of inspection, the liquidator cannot make a call without obtaining the leave of the court (m). The application to the court for leave is made by summons stating the proposed amount of the call. The summons must be served four clear days at the least before the day appointed for making the call on every contributory proposed to be included in the call; or, if the court so directs, notice of such intended call may be given by advertisement, without a separate notice to each contributory (n).

Leave of  
court.

**851.** When the liquidator is authorised by resolution or order to make a call on the contributories, he must file with the registrar a document in the prescribed form, with such variations as circumstances may require, making the call (o).

Document  
making a  
call.

When a call has been made by the liquidator, a copy of the resolution of the committee of inspection or order of the court (if any), as the case may be, must, as soon as the call has been made, be served upon each of the contributories included in the call, together with a notice from the liquidator specifying the amount or balance due from such contributory in respect of the call, but such resolution or order need not be advertised unless for any special reason the court so directs (p). If the notice of call states that if it is not paid at the time appointed interest will be charged from that time, the interest must be paid (q).

(j) See Companies (Winding up) Rules, Form 51.

(k) *Ibid.*, r. 83.

(l) *Ibid.* For the form of resolution, see *ibid.*, Form 52.

(m) *Ibid.*, r. 83.

(n) *Ibid.*, r. 84. For the form of summons, see *ibid.*, Form 54; for the form of affidavit, *ibid.*, Form 55; for the form of advertisement, *ibid.*, Form 56; and for the form of order, see *ibid.*, Form 57.

(o) *Ibid.*, r. 85. For the form of document, see *ibid.*, Form 58.

(p) Companies (Consolidation) Act, 1908 (8 Edw. 7. c. 69), s. 173; Companies (Winding-up) Rules, r. 86. For the form of notice of a call sanctioned by the committee, see *ibid.*, Form 53, and for the form of notice to be served with the order, see *ibid.*, Form 59.

(q) Civil Procedure Act, 1833 (3 & 4 Will. 4. c. 42), s. 28; *Re Overend, Gurney & Co., Ex parte Lintott* (1867), L. R. 4 Eq. 184; *Barrow's Case* (1868), 3 Ch. App. 784. Provisions in articles of association as to payment of interest on calls, joint and several liability for calls, or as to the time of payment and amount, do not apply to calls made by a liquidator (*Re Welsh Flannel and Tweed Co.* (1875), L. R. 20 Eq. 360; *Re Kharashkoma Exploring and Prospecting Syndicate* (1897), 66 L. J. (CH.) 675, 681, C. A.; *Re Cordova Union Gold Co.*, [1891] 2 Ch. 580.

SECT. 16.  
Winding up  
by the  
Court.  
"Balance  
order."

**852.** The payment of the amount due from each contributory on a call may be enforced by order of the court, to be made in chambers on summons by the liquidator (*r*). This order is generally called a "balance order" (*s*), and the summons by which it is applied for must be supported by an affidavit by the liquidator (*t*).

When twenty years have elapsed since a contributory was discharged from further liability by compromise with the liquidator every presumption is made in favour of the discharge (*u*).

(*f*) *Rights of Contributories in regard to Debts due from and to the Company.*

Shareholder s  
claim as  
creditor.

**853.** When a shareholder has paid all calls which have become due, he is entitled to a dividend on the amount of any debt owing to him from the company *pari passu* with the other creditors (*a*). If he has bought up a debt of the company for less than its amount, he may prove for the full amount (*b*); but if after the winding up commenced he assigns a debt due to him from the company, his assignee cannot receive any dividend upon it unless and until the shareholder has paid all calls due (*c*). A shareholder who claims as assignee of a debt due by the company can prove for his debt in competition with creditors (*d*). A shareholder whose shares have been improperly forfeited and sold may prove for damages in competition with creditors (*e*).

A contributory, who petitions for and obtains a winding-up order, is entitled to the costs of his petition before payment of any calls due from him to the company (*f*).

Set off by  
contributory.

**854.** A shareholder cannot in a winding up set off a debt owing to him by the company against a call (*g*), whether made before or after the winding up (*h*), although in the former case there has been an

(*r*) Companies (Winding-up) Rules, r. 87.

(*s*) See p. 504, *post*.

(*t*) For form of affidavit, see Companies (Winding-up) Rules, Form 60. For the form of a balance order, see *ibid.*, Form 61; and for the form of affidavit of the service of the order, see *ibid.* Form 62; and see p. 504, *post*. As to a trustee's right to indemnity against calls, see *Hardoon v. Belilios*, [1901] A. C. 118, P. C.

(*u*) *Watt v. Assets Co.*, [1905] A. C. 317.

(*a*) *Re West of England Bank, Ex parte Brown* (1879), 12 Ch. D. 823; *Grissell's Case* (1866), 1 Ch. App. 528.

(*b*) *Re Humber Iron Works Co.* (1869), L. R. 8 Eq. 122.

(*c*) *Re China Steamship Co., Ex parte Mackenzie* (1869), L. R. 7 Eq. 240.

(*d*) *Re Railway Time Tables Publishing Co., Ex parte Welton*, [1899] 1 Ch. 108, C. A.

(*e*) *Re New Chile Gold Mining Co.* (1890), 45 Ch. D. 598.

(*f*) *Re General Exchange Bank* (1867), L. R. 4 Eq. 138.

(*g*) *Grissell's Case* (1866), 1 Ch. App. 528; *Gill's Case* (1879), 12 Ch. D. 755; *Calisher's Case* (1868), L. R. 5 Eq. 214; *Re West of England Bank, Ex parte Brown* (1879), 12 Ch. D. 823; compare *Re London and Colonial Co., Ex parte Clark* (1869), L. R. 7 Eq. 550; *Re United Service Association*, [1901] 1 Ch. 97, 101. The rule is the same in a voluntary winding up (*Black & Co.'s Case* (1872), 8 Ch. App. 254; *Re Whitehouse & Co.* (1873), 9 Ch. D. 595, disapproving *Brighton Arcade Co. v. Dowling* (1868), L. R. 3 C. P. 175); and see *Hoby & Co. v. Birch* (1890), 59 L. J. (q. b.) 247.

(*h*) *Barnett's Case* (1875), L. R. 19 Eq. 449; *Government Security Investment Co. v. Dempsey* (1880), 50 L. J. (q. b.) 199. A debt cannot be set off in answer to a bankruptcy notice by the liquidator (*Re G.E.B.*, [1903] 2 K. B. 340). Where an action for calls has been commenced before winding up, and set-off has been

SECT. 16.  
Winding up  
by the  
Court.

agreement to do so (*i*); but his trustee in bankruptcy may do so (*k*) even although the debt was assigned before the bankruptcy but after the winding up commenced (*l*). Where, however, a company in liquidation is both a creditor and a shareholder of another company in liquidation it cannot, even when insolvent, set off against calls made by the liquidator of the latter company a debt owing to it by that company (*m*) or take any dividend on the debt until it has paid up all calls in full (*n*). A member who holds shares in trust for the company cannot set off against a call a claim to indemnity (*o*).

The assignee of a debt assigned after the winding up commenced is in the same position as the contributory (*p*). Where the assignment is made before the winding up commenced he is entitled to any dividends on the debt that may be declared, notwithstanding the non-payment by his assignor of calls on shares due from him to the company (*q*).

The right of a liquidator to require payment of money due from a contributory, before he is allowed to participate in a dividend, only applies where both amounts are due at the commencement of the winding up (*r*).

**855.** In the case of an unlimited company, where a contributory is ordered to pay moneys due from him or the estate of the person whom he represents, not being moneys payable by virtue of a call in the winding up (*s*), the court may allow to him, by way of set-off, any money due to him or the estate which he represents from the company on any independent dealing or contract with it, but not moneys due to him as a member in respect of any dividend or profit. In the case of a limited company the court may make the like allowance to any director or manager whose estate is unlimited, or to his estate (*t*). Whether the company is limited or unlimited, when all the creditors have been paid in full, any money due on

Assignee.

Set-off where  
company or  
liability  
unlimited.

pleaded but there has been no judgment, after winding up no set-off can be allowed against the calls (*Re Hiram Maxim Lamp Co.*, [1903] 1 Ch. 70).

(*i*) *Re Branksea Island Co., Ex parte Bentinck* (No. 1) (1888), 1 Meg. 12, C. A.  
(*k*) *Re Duckworth* (1867), 2 Ch. App. 578; *Re Anglo-Greek Navigation and Trading Co., Carralli and Haggard's Claim* (1869), 4 Ch. App. 174.

(*l*) *Re Universal Banking Corporation, Ex parte Strang* (1870), 5 Ch. App. 492. The rule is the same whether the claim is in bankruptcy or in the winding up (*ibid.*).

(*m*) *Re Auriferous Properties, Ltd.*, [1898] 1 Ch. 691.

(*n*) *Re Auriferous Properties, Ltd.* (No. 2), [1898] 2 Ch. 428; *Re Leeds and Hanley Theatres of Varieties, Ltd.*, [1904] 2 Ch. 45.

(*o*) *Re Munster Bank, Ltd. (Dillon's Claim)* (1886), 17 L. R. Ir. 341, C. A.

(*p*) *Re China Steamship Co., Ex parte Mackenzie* (1869), L. R. 7 Eq. 240.

(*q*) *Re Taunton, Delmard, Lane & Co., Christie v. Taunton, Delmard, Lane & Co.*, [1893] 2 Ch. 175.

(*r*) *Grissell's Case* (1866), 1 Ch. App. 528.

(*s*) The right of set-off does not exist as against calls made in the winding up (*Re West of England and South Wales District Bank, Ex parte Branwhite* (1879), 48 L. J. (CH.) 463, not following *Gibbs and West's Case* (1870), L. R. 10 Eq. 312).

(*t*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 165 (1) (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 101; Companies Act, 1867 (30 & 31 Vict. c. 131), s. 6].

SECT. 16. any account whatever to a contributory from the company may be allowed to him by way of set-off against any subsequent call (a).

Winding up by the Court.

(g) Orders against Contributories.

Balance orders.

**856.** Money payable on shares upon the terms of allotment or payable in respect of calls made before the winding-up order may be due when the winding up commences. At any time after making a winding-up order the court may order any contributory for the time being settled on the list of contributories to pay, in the manner directed by the order, any money due from him or from the estate of the person whom he represents to the company, exclusive of any money payable by him or the estate by virtue of any call made by the liquidator in the winding up (b). The order, which is usually called a "balance order," is not a judgment, and it cannot be enforced by action; but the right of action in respect of the amount due is not merged in or destroyed by the order, and the amount may be sued for (c). A bankruptcy notice cannot be issued in respect of a balance order (d).

Order for payment.

Contributories may be required, on notice by the liquidator, to pay or transfer to him money or property of the company, or may be ordered to pay money due to the company into the Bank of England (e).

Conclusive evidence of order.

**857.** An order made by the court on a contributory is (subject to any right of appeal) conclusive evidence that the money, if any, thereby appearing to be due or ordered to be paid is due. All other pertinent matter stated in the order is to be taken to be truly stated as against all persons, and in all proceedings, except proceedings against the real estate of a deceased contributory, in which case the order is only *prima facie* evidence for the purpose of

(a) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 165 (3) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 101].

(b) *Ibid.*, s. 165 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 101]. As to enforcing an order made in one part of the United Kingdom in another part thereof, see *Re Hollyford Copper Mining Co.* (1867), 5 Ch. App. 93; *Re City of Glasgow Bank* (1880), 14 Ch. D. 628. The rules as to making calls in the winding up apparently do not apply in respect of allotment moneys, or calls made before the winding up; but under s. 167 (1) of the Act of 1908 the court may order any person from whom money is due to the company to pay the same into the Bank of England, or any branch thereof, to the account of the liquidator, and under *ibid.*, s. 173, rules may be made to enable the powers of the court as to requiring delivery of property to the liquidator to be exercised by him; see *ibid.*, s. 164, and Companies (Winding-up) Rules, r. 76.

(c) *Chalk, Webb & Co. v. Tennent* (1887), 57 L. T. 598; *Westmoreland Green and Blue Slate Co. v. Feilden*, [1891] 3 Ch. 15, C. A.; see *Re Hubback, International Marine Hydropathic Co. v. Hawes* (1885), 29 Ch. D. 934, C. A.; and compare Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 177 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 119], which provides that any powers conferred on the court by the Act are in addition to and not in restriction of any existing powers of instituting proceedings against any contributory or debtor of the company, or the estate of any contributory or debtor, for the recovery of any call or other sums. In an action for the amount due the order is conclusive evidence that the money is due (*ibid.*, s. 168 (1)).

(d) *Re Shirley, Ex parte Mackay* (1887), 58 L. T. 237; *Re Sanders, Ex parte Whinney* (1884), 13 Q. B. D. 476; *Re Tennent, Ex parte Grimwade* (1886), 17 Q. B. D. 357, C. A.

(e) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 167.

charging his real estate, unless his heirs or devisees were on the list of contributories at the time when the order was made (f).

As between the contributories of the company, all books and papers of the company and of the liquidators are *prima facie* evidence of the truth of all matters purporting to be therein recorded (g).

**858.** The court, at any time, either before or after making a winding-up order, on proof of probable cause for believing that a contributory is about to quit the United Kingdom, or otherwise to abscond, or to remove or conceal any of his property, for the purpose of evading payment of calls, or of avoiding examination respecting the affairs of the company, may cause the contributory to be arrested and his books and papers and movable personal property to be seized, and him and them to be safely kept until such time as the court may order (h). The court may order the seizure of a contributory's goods without ordering the arrest of his person (i).

(vi.) Realisation of Property.

**859.** The liquidator in a winding up by the court has power to sell the company's real and personal property and choses in action by public auction or private contract, as a whole or in parcels, and to do all acts and to execute, in its name and on its behalf, all deeds, receipts, and other documents, for which purpose he may use its seal, when necessary (k). The power may be exercised without the sanction of the court or of the committee of inspection. The exercise of the power is, however, subject to the control of the court, and any creditor or contributory may apply to the court with respect to any exercise or proposed exercise of the power (l). The liquidator himself may apply to the court for directions as to the sale (m). A claim for misfeasance against directors or promoters may be sold (n). The property may be sold for a consideration other than cash (o).

SECT. 16. Winding up by the Court.

Arrest of contributory and seizure of his books.

Liquidator's power of sale.

(f) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 168 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 106]. As to balance order for payment of calls, see p. 504, *ante*.

(g) *Ibid.*, s. 220 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 154].

(h) *Ibid.*, s. 176 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 118].

(i) *Re Imperial Mercantile Credit Co.* (1867), L. R. 5 Eq. 264.

(k) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 151 (2) (a), (b) [Companies Act, 1862 (25 & 26 Vict. c. 89), 95, as amended by Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 12 (2)].

(l) *Ibid.*, s. 151 (3) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 12 (3)]; and see *ibid.*, s. 158 (5) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 24].

(m) *Ibid.*, s. 158 (3). When a sale is sanctioned by the court, the Court of Appeal will not readily interfere (*Re Oriental Bank Corporation* (1887), 56 L. T. 868, C. A.). As to the effect of s. 70 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), relating to the conclusiveness of orders of court, see *Jones v. Barnett*, [1900] 1 Ch. 370, C. A. As to inquiries as to incumbrances, see *Re Hamilton's Windsor Ironworks Co., Ex parte General Credit Discount Co.* (No. 2) (1879), 27 W. R. 827, C. A.

(n) *Re Park Gate Waggon Works Co.* (1881), 17 Ch. D. 234; *Wood v. Woodhouse and Rawson United*, [1896] W. N. 4; compare *New Westminster Brewery v. Hannah*, [1876] W. N. 215, where it was held that the claim did not in fact pass on the sale.

(o) *Re Agra and Masterman's Bank* (1866), cited L. R. 12 Eq. 509, n. (deferred



SECT. 16.  
Winding up  
by the  
Court.

Restrictions  
on purchase.

Proceeds of  
sale.

Conveyances  
on sale.

Necessary  
permission.

**860.** Neither the liquidator nor any member of the committee of inspection of a company while so acting may, except by leave of the court, either directly or indirectly, by himself or any partner, clerk, agent, or servant, become purchaser of any part of the company's assets. Any such prohibited purchase may be set aside by the court on the application of the Board of Trade or of any creditor or contributory, and the court may make such order as to costs as it thinks fit (*p*).

**861.** Where assets are sold through an auctioneer or other agent, the gross proceeds of the sale must be paid over by him, and the charges and expenses connected with the sale must afterwards be paid to him, on the production of the necessary certificate of the taxing officer. Every liquidator by whom such auctioneer or agent is employed is, unless the court otherwise orders, accountable for the proceeds of every such sale (*q*).

**862.** As the property is not, in the absence of a special order, vested in the liquidator, he is not a necessary party to conveyances made by the company in liquidation. He is, however, often made a party in order to obtain the covenant implied by law from his conveying as trustee, and to show that he concurred (*r*).

(vii.) *Carrying on the Company's Business.*

**863.** So far as may be necessary for the beneficial winding up of the company, the liquidator may carry on its business (*s*) with the sanction either of the court or of the committee of inspection (*t*). He cannot, however, carry on the business with the view of making a profit for the company (*a*), or of facilitating reconstruction (*b*). Contracts may be made for the purposes of the beneficial winding up of the company (*c*), and the onus of proving that a contract is not beneficial lies upon the party objecting to it (*d*).

A liquidator carrying on the business must not, without

payments secured by promissory notes); *Re Bank of South Australia* (2), [1895] 1 Ch. 578, C. A.; *Re Cambrian Mining Co.* (1882), 48 L. T. 114.

(*p*) Companies (Winding-up) Rules, r. 156; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 116, 118. On a sale being set aside interest is not charged on the profits (*Silkstone and Haigh Moor Coal Co. v. Edey*, [1900] 1 Ch. 167).

(*q*) Companies (Winding-up) Rules, r. 176. As to the taxation of the charges, see p. 565, *post*.

(*r*) See Encyclopædia of Forms, Vol. IV., p. 810; Vol. XII., pp. 766, 769.

(*s*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 151 (1) (*b*); *British Waggon Co. v. Lea* (1880), 5 Q. B. D. 149. As to contracts made where it is unnecessary to carry on the business, see *Bateman & Co. v. Ball* (1887), 56 L. J. (Q. B.) 291. As to payment of the costs of carrying on the business, see *Re Regent's Canal Ironworks Co., Ex parte Grissell* (1875), 3 Ch. D. 411.

(*t*) The sanction of the committee of inspection need not be in writing, but must be specific, and not retrospective; compare *Re Vauisour*, [1900] 2 Q. B. 309; *Re White, Ex parte Nichols*, [1902] W. N. 114 (both bankruptcy cases).

(*a*) Compare *Re Batey, Ex parte Emmanuel* (1881), 17 Ch. D. 35, C. A.

(*b*) *Re Wreck Recovery and Salvage Co.* (1880), 15 Ch. D. 353, C. A.; *Re Regent's Canal Ironworks Co., Ex parte Grissell, supra*.

(*c*) *Ibid.*

(*d*) *Hire Purchase Furnishing Co. v. Richens* (1887), 20 Q. B. D. 387, C. A.; *Bateman & Co. v. Ball* (1887), 56 L. J. (Q. B.) 291.

the express sanction of the court (*e*), purchase goods for carrying it on from any person whose connection with him is of such a nature as would result in the liquidator obtaining any portion of the profit (if any) arising out of the transaction (*f*). No member of a committee of inspection may, except under and with the sanction of the court (*e*), directly or indirectly, by himself or by any employer, partner, clerk, agent, or servant, be entitled to derive any profit from any transaction arising out of the winding up, or to receive out of the assets any payment for any goods supplied by him to the liquidator for or on account of the company. If it appears to the Board of Trade that any such profit or payment has been made, it may disallow such payment or recover such profit, as the case may be, on the audit of the liquidator's account (*g*).

**864.** The liquidator must keep a distinct account of the trading, incorporating in the cash book the total weekly amount of the receipts and payments (*h*). The trading account must from time to time, and not less than once in every month, be verified by affidavit, and submitted to the committee of inspection (if any), or such member as may be appointed by the committee for that purpose, to be examined and certified (*i*).

**865.** The liquidator is not liable for loss occasioned by the felonious acts of servants, if properly selected and employed (*k*).

SUB-SECT. 10.—*Proof of Debts.*

(i.) *In General.*

**866.** In a winding up by the court every creditor must prove his debt, unless the judge in any particular winding up gives directions that any creditors or class of creditors shall be admitted without proof (*l*). A creditor must bear the cost of proving his debt, unless the court otherwise orders (*m*).

**867.** The court may fix a time or times within which creditors are to prove their debts or claims, or to be excluded from the benefit of any distribution made before those debts are proved (*n*). This power has been delegated to the liquidator (*o*). Subject to the Act of 1908, and unless otherwise ordered by the court, the liquidator in any winding up may from time to time fix a

(*e*) The cost of obtaining the sanction must be borne by the person in whose interest it is obtained, and is not payable out of the company's assets (Companies (Winding-up) Rules, r. 159).

(*f*) *Ibid.*, r. 157.

(*g*) *Ibid.*, r. 158. As to the similar rule which applies to dealings by a liquidator with moneys in his hands, see *Re Anon.* (1866), 15 L. T. 170.

(*h*) Companies (Winding-up) Rules, r. 171 (1).

(*i*) *Ibid.*, r. 171 (2).

(*k*) *Jobson v. Palmer*, [1893] 1 Ch. 71.

(*l*) Companies (Winding-up) Rules, r. 88.

(*m*) *Ibid.*, r. 94.

(*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 169 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 107].

(*o*) *Ibid.*, s. 173 (*e*) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 13].

SECT. 16.  
Winding up  
by the  
Court.

Making  
profit.

Liquidator's  
trading  
account.

Felonious act  
of servants.

When debts  
must be  
proved.

Limitation  
of time.

SECT. 16.  
Winding up  
by the  
Court.

certain day (not being less than fourteen days from the date of the notice) on or before which the company's creditors are to prove their debts or claims, or to be excluded from the benefit of any distribution made before such debts are proved. He must give notice in writing of the day so fixed by advertisement in such newspaper as he considers convenient. The notice must also be given, in a winding up by the court, to every person mentioned in the statement of affairs as a creditor who has not proved his debt, and, in any other winding up, to the last known address or place of abode of each person who, to the knowledge of the liquidator, claims to be a creditor of the company and whose claim has not been admitted (*p*).

Proof after  
expiration of  
time limit.

Whenever there are funds in court or otherwise available, a creditor, although the time appointed for his bringing in his claim has long elapsed, is invariably allowed to prove, subject to terms as to costs and as regards dividends already paid (*q*).

(ii.) Debts Provable.

What debts  
are provable.

**868.** In every winding up all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, are admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value (*r*).

A creditor may prove for a debt not payable at the date of the winding-up order or resolution as if it were payable presently, and may receive dividends equally with the other creditors; but a rebate of interest must be deducted at the rate of £5 per cent. per annum, computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted (*s*).

Claims under contracts made on behalf of a company before its registration, or before it is entitled to commence business,

(*p*) Companies (Winding-up) Rules, r. 102; see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 147.

(*q*) *Harrison v. Kirk*, [1904] A. C. 1; *Re McMurdo, Penfield v. McMurdo*, [1902] 2 Ch. 684, C. A.; *Re General Rolling Stock Co., Joint Stock Discount Co.'s Claim* (1872), 7 Ch. App. 646; *Re Kit Hill Tunnel, Ex parte Williams* (1881), 16 Ch. D. 590. As to secured creditors, see *Re Lee, Ex parte Good* (1880), 14 Ch. D. 82, C. A.; *Re Metcalfe, Hicks v. May* (1879), 13 Ch. D. 236, C. A.

(*r*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 206 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 153]. This is subject in the case of insolvent companies to the application, in accordance with the provisions of the Act, of the law of bankruptcy (*ibid.*). As to the application of bankruptcy rules, see p. 512, *post*. The rule in bankruptcy, that there cannot be a double proof so as to entitle a creditor to receive two dividends from one estate in respect of the same debt, was applied in the winding up of companies long before the bankruptcy rules were made applicable in the case of insolvent companies (*Re Oriental Commercial Bank, Ex parte European Bank* (1871), 7 Ch. App. 99).

(*s*) Companies (Winding-up) Rules, r. 98. This rule applies where the company is insolvent (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II, z. 21); and see *Re Browne and Wingrove, Ex parte Ador*, [1891] 2 Q. B. 574, C. A.

cannot be proved for unless the contracts have been adopted by the company (*t*).

Proof may be made for damages for breach of contract such as, for instance, for breach of a contract to buy goods (*u*); to purchase a business (*a*); to repair a ship (*b*); to give fully-paid shares in satisfaction of a debt (*c*), or to employ a person as a servant of the company (*d*); and the claim may include the damage sustained under a continuing breach of contract after the winding up commenced (*e*), or for breach of contracts.

**869.** The making of a winding-up order (*f*), or the appointment of a receiver in a debenture-holder's action (*g*), operates as a wrongful dismissal of the servants of the company; and damages are allowed for breach of the contract of service (*h*). Where by the contract a liquidated sum is to be paid to a servant in case the contract is determined before the expiration of the term of service, proof is allowed for the agreed sum (*i*). Where there is no such agreement, proof is allowed for the present value of the salary for the remainder of the term, less a deduction in respect of the servant being at liberty to obtain other employment (*j*). Where an agent is to be paid partly by salary and partly by a commission on business done, he is not entitled to prove for loss of commission (*k*). When, however, payment is entirely by commission, proof is allowed in respect of commission which might have been earned during the remainder of the period of service fixed by the agreement (*l*).

SECT. 16.  
Winding up  
by the  
Court.

Dismissal of  
servants.

**870.** The Statutes of Limitation cease to run against a creditor on a winding-up order being made, and he is allowed to prove at any time before the company is dissolved, but so as not to interfere

Statutes of  
limitation.

(*t*) *Re National Motor Mail-Coach Co., Ltd., Clinton's Claim*, [1908] 2 Ch. 515, C. A.; *New Druce-Portland Co. v. Blakiston* (1908), 24 T. L. R. 583.

(*u*) *Re Central Corporation, Claim of Ebbw Vale Co.* (1869), L. R. 8 Eq. 14.

(*a*) *Lafitte & Co. v. Lafitte* (1873), 42 L. J. (CH.) 716, H. L.

(*b*) *Ibid.*

(*c*) *Re Railway Time Tables Publishing Co., Ex parte Welton*, [1899] 1 Ch. 108.

(*d*) See *infra*.

(*e*) *Re Trent and Humber Co., Ex parte Cambrian Steam Packet Co.* (1868), 4 Ch. App. 112.

(*f*) The decisions whether a voluntary winding up operates as a dismissal of servants are conflicting; but the better opinion is that it does not; see *Shirreff's Case* (1872), L. R. 14 Eq. 417; *Midland Counties District Bank, Ltd. v. Attwood*, [1905] 1 Ch. 357.

(*g*) *Reid v. Explosives Co.* (1887), 19 Q. B. D. 264, C. A.; *Brace v. Calder*, [1895] 2 Q. B. 253, C. A.

(*h*) *Chapman's Case* (1866), L. R. 1 Eq. 346; *Macdowall's Case* (1886), 32 Ch. D. 366; and see, *Re English Joint Stock Bank, Ex parte Harding* (1867), L. R. 3 Eq. 341.

(*i*) *Re English and Scottish Bank, Ex parte Logan* (1870), L. R. 9 Eq. 149; *Shirreff's Case, supra*. As to the effect of an agreement for payment of a share of "net profits," see *Frames v. Bultfontein Mining Co.*, [1891] 1 Ch. 140.

(*j*) *Yelland's Case* (1867), L. R. 4 Eq. 350; *Re London and Colonial Co., Ex parte Clark* (1869), L. R. 7 Eq. 550; *Hartland v. General Exchange Bank, Ltd.* (1866), 14 L. T. 863; see, generally, title MASTER AND SERVANT.

(*k*) *Re English and Scottish Marine Insurance Co., Ex parte McClure* (1870), 5 Ch. App. 737; *Rhodes v. Forwood* (1876), 1 App. Cas. 256; compare *Ogdens, Ltd. v. Nelson*, [1905] A. C. 109.

(*l*) *Re Patent Floor Cloth Co. Ltd., Dean and Gilbert's Claim* (1872), 26 L. T. 467.

SECT. 16.  
Winding up  
by the  
Court.

Proof of  
particular  
claims.

with dividends already paid (*m*); but a proof in respect of claims statute-barred before the order is not allowed (*n*).

871. A person holding shares in another company on which there is a liability as trustee for a company in liquidation can prove in its winding up for an indemnity against such liability (*o*).

A person holding acceptances of the company may prove in its winding up, but only for the amount actually due to him; if he has received anything from other parties, he can only prove in the winding up for the balance (*p*), although the part payment was made after the winding up commenced (*q*).

Where money lent on security of debentures is repayable on a certain date, and winding up supervenes before that date arrives, the debenture-holders are entitled to realise their security for the full amount of principal, interest, and costs, as though the time for repayment had arrived (*r*).

Money deposited by one party to a gaming and wagering contract with the other party thereto, as cover for differences, may be proved for, if there is a surplus after paying creditors in full, interest including, from the date of winding up till the date of the final dividend (*s*).

A creditor proving his debt must deduct therefrom all trade discounts, but is not compelled to deduct any discount not exceeding 5 per cent. on the net amount of his claim, which he may have agreed to allow for payment in cash (*t*).

When any rent or other payment falls due at stated periods, and the order or resolution to wind up is made at any time other than one of those periods, the persons entitled to the rent or payment may prove for a proportionate part thereof up to the date of the winding-up order or resolution as if the rent or payment accrued due from day to day (*a*).

(*m*) *Re General Rolling Stock Co., Joint Stock Discount Co.'s Claim* (1872), 7 Ch. App. 646.

(*n*) *Re River Steamer Co., Mitchell's Claim* (1871), 6 Ch. App. 822.

(*o*) *Re National Financial Co., Ex parte Oriental Commercial Bank* (1868), 3 Ch. App. 791.

(*p*) *Re Oriental Commercial Bank, Ex parte Mazoudoff* (1868), L. R. 6 Eq. 582. As to securities for payment of such acceptances, the rule in *Ex parte Waring, Inglis, Clarke* (1815), 19 Ves. 344, obtains in England (*Hickie & Co.'s Case* (1867), L. R. 4 Eq. 226; *Re Barned's Banking Co., Leech's Claim* (1871), 6 Ch. App. 388; *Re Barned's Banking Co., Ex parte Joint Stock Discount Co.* (1875), 10 Ch. App. 198; but not in Scotland (*Royal Bank of Scotland v. Commercial Bank of Scotland* (1882), 7 App. Cas. 366). For the rule in *Ex parte Waring, Inglis, Clarke, supra*, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 171.

(*q*) *Re Oriental Commercial Bank, Ex parte Mazoudoff, supra*.

(*r*) *Wallace v. Universal Automatic Machines Co.*, [1894] 2 Ch. 547, 555, C. A.; *Hodson v. Tea Co.* (1880), 14 Ch. D. 859; compare *Re Panama, New Zealand and Australian Royal Mail Co.* (1870), 5 Ch. App. 318.

(*s*) *Universal Stock Exchange v. Strachan*, [1896] A. C. 166; *Re Duncan (W. W.) & Co.*, [1905] 1 Ch. 307.

(*t*) Companies (Winding-up) Rules, r. 95.

(*a*) *Ibid.*, r. 96. But where the liquidator remains in occupation of premises demised to a company which is being wound up, nothing in the rule is to prejudice or affect the right of the landlord to claim payment by the company, or the liquidator, of rent during the period of the company's or the liquidator's occupation (*ibid.*); see *Re South Kensington Co-operative Stores* (1881), 17 Ch. D. 161. As to proof for rent payable in advance, see *Shackell & Co. v. Chorlton & Sons*, [1895] 1 Ch. 378.

872. On any debt or sum certain, payable at a certain time or otherwise, on which interest is not reserved or agreed for, and which is overdue at the date of the winding-up order or resolution, the creditor may prove for interest at a rate not exceeding 4 per cent. per annum to that date from the time when the debt or sum was payable, if the debt or sum is payable by virtue of a written instrument at a certain time, and if payable otherwise, then from the time when a demand in writing has been made, giving notice that interest will be claimed from the date of the demand until the time of payment (*b*). A demand may be made after the date of the winding-up order (*c*).

Interest in a winding up cannot be paid in respect of debts which do not carry interest (*d*).

Judgment debts carry interest at 4 per cent., even where the sum for which judgment was given carried a higher rate, unless the judgment was given as collateral security for the debt (*e*).

In the case of an insolvent company, creditors whose debts carry interest are entitled to dividends only on what is due for principal and interest when the winding up commences (*f*). This rule does not prevent a secured creditor from receiving dividend for the full amount of the principal, and also paying himself the interest out of the security (*g*). Nor does it prevent a creditor who has a right of proof against two insolvent companies from receiving dividends from both until he has been paid in full the amount of his proof and of the interest accruing due after the winding up commenced (*h*). A secured creditor who has realised his security cannot, however, apply the proceeds first in payment of interest since the winding up, and then of principal, and prove for the balance; his proof must be for the sum due at the winding up, less the amount realised from the security, though he may set off

(*b*) Companies (Winding-up) Rules, 1909, r. 97.

(*c*) *Re East of England Banking Co.* (1868), 4 Ch. App. 14.

(*d*) *Re Herefordshire Banking Co.* (1867), L. R. 4 Eq. 250; *Re East of England Banking Co.*, *supra*; compare *Re Hatfield Cask Co.* (1863), 11 W. R. 971; *Re State Fire Insurance Co.* (1864), 11 L. T. 489. As to interest on express or implied contracts, see *Caledonian Rail. Co. v. Carmichael* (1870), L. R. 2 Sc. & Div. 56, 66; and title MONEY AND MONEY-LENDING. As to interest on debentures to cover an overdraft, see *Re Vint & Sons, Ltd.*, [1905] 1 I. R. 112. As to interest on bills of exchange and promissory notes, see title BILLS OF EXCHANGE ETC., Vol. II., pp. 524, 525. As to interest on debts or sums certain payable under an instrument in writing at a time certain, or in other cases after demand, see Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 28; *London, Chatham and Dover Rail. Co. v. South Eastern Rail. Co.*, [1893] A. C. 429; and title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 232.

(*e*) Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 17; R. S. C., Ord. 42, r. 16, Ord. 58, r. 19; *Re European Central Rail. Co., Ex parte Oriental Financial Corporation* (1876), 4 Ch. D. 33, C. A.; *Re Agriculturist Cattle Insurance Co., Ex parte Hughes* (1872), 4 Ch. D. 34, n., C. A.; compare *Popple v. Sylvester* (1882), 22 Ch. D. 98.

(*f*) *Warrant Finance Co.'s Case* (1869), 4 Ch. App. 643; *Re Whitaker, Whitaker v. Palmer (Thomas), Ltd.*, [1904] 1 Ch. 299; *Re Salt & Co.*, [1908] W. N. 63; see *Re International Contract Co., Hughes' Claim* (1872), L. R. 13 Eq. 623.

(*g*) *Warrant Finance Co.'s Case* (No. 2) (1869), 5 Ch. App. 88; *Economic Life Assurance Society v. Osborne*, [1902] A. C. 147.

(*h*) *Warrant Finance Co.'s Case* (No. 2), *supra*

SECT. 16.  
Winding up  
by the  
Court.

Proof for  
interest.

Amount  
receivable.

**SECT. 16.**  
**Winding up by the Court.**

against interest profits arising from the security during the winding up (i). The mere fact that a creditor, on being paid the whole amount of his proof, gives a receipt for it "in full discharge" of his claim, or that the amount of the proof was adjudicated on, does not prevent his claiming interest after the date of the winding-up order, if the assets prove sufficient (k).

In the case of a solvent company, each dividend is treated as an ordinary payment on account, and applicable first in payment of interest then due, and then in reduction of principal (l).

(iii.) *Application of Bankruptcy Rules.*

Bankruptcy rules applicable.

**873.** In the winding up of an insolvent company, the respective rights of secured and unsecured creditors, the debts provable, and the valuation of annuities and future and contingent liabilities are regulated by the same rules as are in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt. All persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up and make such claims against the company as they respectively are entitled to by virtue of this provision (m).

This provision is applicable to any company in liquidation until it is shown that its assets are sufficient for payment of its debts in full (n) and the expenses of the winding up (o); and it makes applicable in the winding up of an insolvent company the bankruptcy rules (1) as to proofs by secured creditors (p); (2) as to mutual credits and set-off (q), except that no set-off is allowed against calls unless the contributory is bankrupt (a); (3) as to debts and liabilities provable (b); and (4) as to interest on

(i) *Quartermaine's Case*, [1892] 1 Ch. 639; compare *Re Savin* (1872), 7 Ch. App. 760 (a bankruptcy case).

(k) *Re Duncan (W. W.) & Co.*, [1905] 1 Ch. 307; as to interest on moneys deposited to cover differences on a gambling transaction, see p. 510, *ante*.

(l) *Warrant Finance Co.'s Case* (1869), 4 Ch. App. 643; *Ebbw Vale Co.'s Case* (1869), 5 Ch. App. 112.

(m) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 207 [Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 10]. As to the object of s. 10 of the Judicature Act, 1875 (38 & 39 Vict. c. 77), see *Re Withernsea Brickworks* (1880), 16 Ch. D. 337, 342, 343, C. A.; *Re Hopkins, Williams v. Hopkins* (1881), 18 Ch. D. 370, 377, C. A.; *Re D'Epineuil (Count)*, *Tadman v. D'Epineuil* (1882), 20 Ch. D. 217; *Re Milan Tramways Co., Ex parte Theys* (1884), 25 Ch. D. 587, 591, C. A.; *Gorringe v. Irwell India Rubber and Gutta Percha Works* (1886), 34 Ch. D. 128, C. A.

(n) *Re Milan Tramways Co., Ex parte Theys, supra*.

(o) See *Re Leng, Tarn v. Emmerson*, [1895] 1 Ch. 652, C. A.

(p) *Quartermaine's Case*, [1892] 1 Ch. 639; see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 226 *et seq.*

(q) *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App. Cas. 434; *Re Asphaltic Wood Pavement Co., Lee and Chapman's Case* (1884), 26 Ch. D. 624; *Gill's Case* (1879), 12 Ch. D. 755; *Re Auriferous Properties, Ltd.*, [1898] 1 Ch. 691; see further pp. 514, 515, *post*; and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 211—215.

(a) See p. 515, *post*.

(b) *Re Northern Counties of England Fire Insurance Co., MacFarlane's Claim* (1881), 17 Ch. D. 337; *Re British Gold Fields of West Africa*, [1899] 2 Ch. 7, C. A. As to debts provable or not provable in bankruptcy, see title BANKRUPTCY

**SECT. 16.**  
**Winding up by the Court.**

debts (c). Hence, all liabilities of a company are provable in winding up, except demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust, and except liabilities which in the opinion of the court cannot be fairly estimated (d).

The following bankruptcy rules are not applicable in winding up, namely, those relating to (1) the restriction on the rights of an execution creditor (e); or (2) reputed ownership (f); or (3) the landlord's right to distrain for rent accrued due before the winding up (g); or (4) the right to disclaim leases and onerous contracts (h); or (5) the abolition of the priority of the Crown against the property of the debtor (i); or (6) the avoidance of unregistered bills of sale, as against the trustee in bankruptcy (k); or (7) a secured creditor not being a good petitioning creditor unless by his petition he offers to surrender his security or estimates its value at an amount less than his debt (l). Many of the above matters do not arise in the winding-up of companies (m).

Rules not applicable.

**874.** There are frequently creditors in a winding up whose claims are in respect of contingent debts. The liquidator must estimate the value of their claims subject to the right to appeal to the court, which, unless it thinks that the debt or liability is incapable of being fairly estimated, will assess its value, and thereupon the amount of the value becomes provable (n). Claims contingent when the

Proofs for contingent debts.

AND INSOLVENCY, Vol. II., pp. 197—235. As to double proof, see *Re Oriental Commercial Bank, Ex parte European Bank* (1871), 7 Ch. App. 99.

(c) *Re Salt (Thomas) & Co., Ltd.* (1908), 98 L. T. 558; see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 232, 233.

(d) As to proofs for unliquidated damages for torts or otherwise, and for damages ascertained by verdict or otherwise, see *Watson v. Holliday* (1882), 20 Ch. D. 780; *Re Lennox, Ex parte Lennox* (1885), 16 Q. B. D. 315, C. A.; *Re Tollemache, Ex parte Revell* (No. 1) (1884), 13 Q. B. D. 720, C. A.; *Re Blythe, Ex parte Banner* (1881), 17 Ch. D. 480, C. A.; *Re Onslow, Ex parte Kibble* (1875), 10 Ch. App. 373; *Jack v. Kipping* (1882), 9 Q. B. D. 113; compare title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 198.

(e) *Re Taylor, Ex parte Railway Steel and Plant Co.* (1878), 8 Ch. D. 183; *Re Richards & Co.* (1879), 11 Ch. D. 676; *Re Withernsea Brickworks* (1880), 16 Ch. D. 337, C. A., overruling *Re Printing and Numerical Registering Co.* (1878), 8 Ch. D. 535; *Pratt v. Inman* (1889), 43 Ch. D. 175; *Re National United Investment Corporation*, [1901] 1 Ch. 950.

(f) *Re Crumlin Viaduct Works Co.* (1879), 11 Ch. D. 755; *Gorringe v. Irwell India Rubber and Gutta Percha Works* (1886), 34 Ch. D. 128, C. A.

(g) *Re Coal Consumers Association* (1876), 4 Ch. D. 625; *Re Bridgewater Engineering Co.* (1879), 12 Ch. D. 181; *Thomas v. Patent Lionite Co.* (1881), 17 Ch. D. 250, C. A.

(h) *Re Westbourne Grove Drapery Co.* (1877), 5 Ch. D. 248.

(i) *Re Oriental Bank Corporation, Ex parte The Crown* (1884), 28 Ch. D. 643. The bankruptcy rule as to the priority of rates did not apply (*Re Albion Steel and Wire Co.* (1878), 7 Ch. D. 547). As to the priority of rates now, see p. 516, *post*.

(k) *Re D'Epineuil (Count), Tadman v. D'Epineuil* (1882), 20 Ch. D. 217; *Re Whitaker, Whitaker v. Palmer*, [1901] 1 Ch. 9, C. A.

(l) *Moor v. Anglo-Italian Bank* (1879), 10 Ch. D. 681.

(m) As to the valuation of and proof for annuities, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 203; *Re British Nation Life Assurance Association, Ex parte Young and Garrett* (1879), 27 W. R. 443, C. A.

(n) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 37; see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 198, 199.

SECT. 16.  
Winding up  
by the  
Court.

Proof by  
lessors.

Mutual  
credits.

winding up commenced, but ascertained during the winding up, may be admitted to proof for the ascertained amount, but not so as to disturb previous dividends (o).

**875.** When the company is lessee of leasehold premises, then, if the lessor is willing that the lease should be determined, he may prove for the loss thereby sustained by him (a). If he is not willing to accept a surrender of the lease, he can only prove for rent accrued and breaches of covenant committed prior to the date of the proof (b). He may, however, in the latter case enter a claim for the whole of the future rent (c), and, though he cannot have a sum equal to a dividend (at the rate paid to other creditors) on the amount of this claim impounded for his benefit (d), distribution of the assets amongst contributories will not be allowed until the claim has been provided for (e).

**876.** The mutual credit clause in bankruptcy (f) does not apply as between a contributory and the company so as to enable him to set off a debt due to him against calls made in a winding up, unless he is a bankrupt; but it applies to every creditor of an insolvent company other than a contributory (g). For the purposes of set-off the commencement of the winding up fixes the rights of the parties (h). Mutual credits are not allowed when the result would be to make a fraudulent preference (i). The mutual credit clause is only applicable where the claims on each side are such as result in pecuniary liabilities. Thus, a claim for money cannot be set off against one for return of goods (k). A surety for a company's debt,

(o) *Re Northern Counties of England Fire Insurance Co., MacFarlane's Claim* (1880), 17 Ch. D. 337; compare *Re Bridges, Hill v. Bridges* (1881), 17 Ch. D. 342; *Holdich's Case* (1872), L. R. 14 Eq. 72, 80.

(a) *Re Panther Lead Co.*, [1896] 1 Ch. 978.

(b) *Re New Oriental Bank Corporation* (No. 2), [1895] 1 Ch. 753; see, however, *Craig's Claim*, [1895] 1 Ch. 267, 276, C. A.; *Re Panther Lead Co.*, *supra*, where it was said that the earlier cases would have to be reconsidered, having regard to *Hardy v. Fothergill* (1888), 13 App. Cas. 351 (a bankruptcy case).

(c) *Re Haytor Granite Co.* (1865), 1 Ch. App. 77; *Re New Oriental Bank Corporation* (No. 2), *supra*.

(d) *Re London and Colonial Co., Horsey's Claim* (1868), L. R. 5 Eq. 561; compare *Re Westbourne Grove Drapery Co.* (1877), 5 Ch. D. 248.

(e) *Oppenheimer v. British and Foreign Exchange and Investment Bank* (1877), 6 Ch. D. 744; *Gooch v. London Banking Association* (1886), 32 Ch. D. 41, C. A.; *Elphinstone (Lord) v. Monkland Iron and Coal Co.* (1886), 11 App. Cas. 332; *Craig's Claim*, *supra*; compare *Re Telegraph Construction Co.* (1870), L. R. 10 Eq. 384 (a case of reduction of capital). The existence of continuing contractual obligations may prevent the dissolution of a company (*Tolhurst v. Associated Portland Cement Manufacturers* (1900), [1902] 2 K. B. 660, C. A., per COZENS-HARDY, L. J., at pp. 678, 679; affirmed, [1903] A. C. 414).

(f) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 38; see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 211—215.

(g) *Campbell's Case* (1876), 4 Ch. D. 470, 475; *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App. Cas. 434. As to contributories, see p. 503. *ante*.

(h) *Re Milan Tramways Co., Ex parte Theys* (1884), 25 Ch. D. 587, 591, C. A.; *Sankey Brook Coal Co. v. Marsh* (1871), L. R. 6 Exch. 185; *Re United Ports and General Insurance Co., Ex parte Etna Insurance Co.* (1877), 46 L. J. (CH.) 403.

(i) *Re Washington Diamond Mining Co.*, [1893] 3 Ch. 95, C. A.

(k) *Eberle's Hotels and Restaurant Co. v. Jonas* (1887), 18 Q. B. D. 459, C. A.

who pays the debt after the winding up commenced, may set off the amount paid against a debt due from him to the company when the winding up commenced (l).

(iv.) *Set-off.*

**877.** The right of set-off may be exercised in respect of claims arising before the winding up commenced, although not ascertained until afterwards (m); and unliquidated damages for breach of contract can be set off against a liquidated sum (n). The liquidator may disallow a proof, in whole or in part, if the company, as a matter of account, has a set-off (o).

A surety may prove in the winding up of an insolvent company, although he has not paid the debt for which he is liable (p).

As between the company and those of its creditors who are not contributories, if the company is solvent the ordinary law as to set-off is applicable (q); but if the company is insolvent the bankruptcy rules as to set-off apply (r).

A debt to a company contracted after the commencement of a winding up cannot be set off against a debt owing by the company before the commencement of the winding up (s). Where a director, who is ordered to pay money under a misfeasance summons, is a debenture-holder, and after the commencement of the winding up, but before the issue of the summons, has transferred his debentures, the transferee is entitled to payment of the moneys due on the debentures, and the company cannot set off the moneys due under the misfeasance order (t).

Moneys handed to a creditor for a specific purpose cannot be retained by him by way of set-off against a debt owing to him; such moneys, if not applied for the specified purpose, must be returned (u).

Claims resulting in pecuniary liabilities may be set off (a).

(l) *Re Moseley Green Coal and Coke Co., Ltd., Barrett's Case* (No. 2) (1865), 4 De G. J. & Sm. 756.

(m) *Re Progress Assurance Co., Ex parte Bates* (1870), 39 L. J. (CH.) 496.

(n) *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App. Cas. 434; *Eberle's Hotels and Restaurant Co. v. Jones* (1887), 18 Q. B. D. 459, C. A.; compare *Re South Blackpool Hotel Co., Ex parte James* (1869), L. R. 8 Eq. 225.

(o) *Re National Wholemeal Bread and Biscuit Co.*, [1892] 2 Ch. 457. Applications by way of appeal from his decision should be made in chambers (*ibid.*). An applicant, if successful, will be allowed his costs of appeal out of the assets, but not his costs of proof (*ibid.*).

(p) *Re Herepath and Delmar, Ex parte Delmar* (1890), 38 W. R. 752.

(q) *Anderson's Case* (1866), L. R. 3 Eq. 337. As to set-off in relation to contributories, see p. 502, *ante*. As to set-off generally, see title SET-OFF AND COUNTERCLAIM.

(r) *Sankey Brook Coal Co. v. Marsh* (1871), L. R. 6 Exch. 185; *Ince Hall Rolling Mills Co. v. Douglas Forge Co.* (1882), 8 Q. B. D. 179; see p. 514, *ante*.

(s) See cases cited in note (n), *supra*.

(t) *Re Goy & Co., Ltd., Farmer v. Joy & Co., Ltd.*, [1900] 2 Ch. 149; *Re Milan Tramways Co., Ex parte Theys* (1884), 25 Ch. D. 587, C. A.; and see *Re Brown and Gregory, Ltd., Shephard v. Brown and Gregory, Ltd., Andrews v. Brown and Gregory, Ltd.*, [1904] 2 Ch. 448; *Re Rhodesia Goldfields, Ltd., Partridge v. Rhodesia Goldfields, Ltd.*, [1910] W. N. 7.

(u) *Re Mid-Kent Fruit Factory*, [1896] 1 Ch. 567.

(a) *Sovereign Life Assurance Co. v. Dodd*, [1892] 2 Q. B. 573, C. A.; *Biggerstaff v. Rowatt's Wharf, Ltd.*, [1896] 2 Ch. 93, C. A.

SECT. 16.  
Winding up  
by the  
Court.

Against  
creditors.

## SECT. 16.

Winding up  
by the  
Court.What are  
assets  
Priority of  
Crown debts.Preferential  
debts.Rates and  
taxes.

## (v.) Priority of Debts.

**878.** The assets available for distribution in the winding up are those which remain after satisfying the claims of secured creditors (*b*) so far as their rights have not been affected by statute (*c*).

**879.** Subject to the express provisions of the Act of 1908 with regard to assessed taxes, land tax, and property or income tax (*d*), debts owing by the company to the Crown have priority over all other unsecured debts (*e*), a surety who has paid a Crown debt being entitled to the same priority (*f*). Where there is competition between the Crown and a subject as regards proceedings by distress, the Crown has priority though the subject's distress was put in first (*g*).

**880.** The security of some secured creditors is postponed, and the Crown's priority among unsecured creditors is affected, by the special preference given to the following debts, which have priority over other debts and rank equally *inter se*, namely:—  
(1) All parochial or other local rates (*h*) which were due from the company at the date of the winding-up order when there is no previous voluntary winding up (*i*), and which became due and payable within the preceding twelve months, and all assessed taxes, land tax, property or income tax assessed on the company up to the preceding April 5th, not exceeding in the whole one year's assessment (*j*); (2) all wages or salary of any clerk or

(*b*) See p. 519, *post*

(*c*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 209; see *infra*.

(*d*) Reversion duty has no priority (Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 15 (1)).

(*e*) *Re Oriental Bank Corporation, Ex parte The Crown* (1884), 28 Ch. D. 643; *New South Wales Taxation Commissioners v. Palmer*, [1907] A. C. 179, P. C.; *Re Henley & Co.* (1878), 9 Ch. D. 469, C. A.; *Re West London Commercial Bank* (1888), 38 Ch. D. 364. As to what are Crown debts, see *Fox v. Newfoundland Government*, [1898] A. C. 667, P. C.; and see *Exchange Bank of Canada v. R.* (1886), 11 App. Cas. 157, P. C.

(*f*) *Re Churchill (Lord), Manisty v. Churchill* (1888), 39 Ch. D. 174.

(*g*) *A.-G. v. Leonard* (1888), 38 Ch. D. 622.

(*h*) As to the manner in which rates are to be paid and the apportioning of water rate, see *Re Mannesmann Tube Co., Ltd., Von Siemens v. Mannesmann Tube Co., Ltd.*, [1901] 2 Ch. 93.

(*i*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 209 (5) (a). In any other case the date is that of the commencement of the voluntary winding up (*ibid.*, s. 209 (5) (b)), namely, the date of the extraordinary resolution, or of the confirmatory resolution in the case of a special resolution, and this is so whether the winding up has or has not been continued under supervision; see p. 577, *post*.

(*j*) The Board of Trade and the Inland Revenue authorities have authorised regulations with reference to the King's taxes, to the following effect:—

(1) Where a winding-up order is made on or after December 1st in the year of assessment, or the official receiver or liquidator remains in possession of the premises in respect of which King's taxes are assessed under a winding-up order made prior to that date until the following January 1st, the collector is entitled to prove for such taxes, namely, the income tax (Sched. A), inhabited house duty and land tax, assessed on the company up to April 5th next following the date of the winding-up order, as if such taxes had become due and payable at the date of the winding-up order, and such proof is to rank for dividend.

(2) Where a winding-up order is made prior to December 1st in the year of

servant (*k*), in respect of services rendered to the company during four months before the date, not exceeding £50; (3) all wages of any workman or labourer, not exceeding £25, whether payable for time or for piece work, in respect of services rendered to the company during two months before the date of the winding-up order (any labourer in husbandry who has entered into a contract for the payment of a portion of his wages in a lump sum at the end of the year of hiring, having priority in respect of the whole or part of such sum as the court decides to be due under the contract, proportionate to the time of service up to the date of the order); and (4) (unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company), all amounts, not exceeding in any individual case £100, due in respect of compensation under the Workmen's Compensation

assessment, the Inland Revenue authorities make no claim on the official receiver or liquidator for income tax (Sched. A), inhabited house duty, and land tax for the year ending April 5th next following the date of the winding-up order, unless the official receiver or liquidator remains in possession of the premises in respect of which the taxes are assessed until the following January 1st.

(3) Where the official receiver or liquidator disposes of a business as a going concern, he is to allow to the purchaser the proportion of the income tax (Sched. A) and land tax for the current year to the date of the completion of the purchase, and the purchaser becomes liable to the Inland Revenue authorities for the taxes in question for the whole year.

(4) Nothing in these regulations is to be deemed to interfere with the right of the Crown to enforce payment of income tax (Sched. A) and land tax, actually due and payable, by distress levied on the property of the company. These taxes for the year ending April 5th next following the date of the winding-up order must, therefore, be dealt with on the footing of secured debts, and be paid by the official receiver or liquidator on demand without any proof on the part of the collector, if on or after January 1st in the year of assessment there are on the premises sufficient goods belonging to the company on which the collector might levy, and notice of any such claim must be given to the official receiver or liquidator by the collector forthwith upon the making of the winding-up order. If at such time there are no goods upon which distress can be levied, proof of the debt may be made by the collector as directed in paragraph (1), and such proof will, if found correct, be admitted to rank for dividend.

In like manner, any income tax (Sched. A) and land tax, assessed on the company up to April 5th next before the date of the winding-up order, must be dealt with as secured debts, if there are at the time of the collector's demand sufficient goods on the premises on which he might levy. If there are no such goods, proof of the debt may be made by the collector, and such proof must, if found correct, be admitted as a preferential claim in so far as it relates to taxes payable in full under s. 209 (1) (a) or of the Act of 1908, and as ranking for dividend for any part not so payable in full.

(5) Where income tax is outstanding under Scheds. B, D, or E, the Inland Revenue authorities will, on receipt of an affidavit by the secretary or other officer of the company, with a certificate by the official receiver or liquidator, setting out that no income taxable under such schedule has been made, forego all claim to payment of the tax, whether the same is payable in full under s. 209 (1) (a) of the Act of 1908 or otherwise, but the waiver of claim under this regulation does not embrace rents, royalties, interest of money, or annuities, or fees, or salaries, from which deductions have been made on account of income tax.

(6) Where an affidavit by the secretary or other officer of the company cannot be obtained, the certificate of the official receiver or liquidator may be accepted as sufficient evidence.

(*k*) See *Re Smith, Ex parte Fox* (1886), 17 Q. B. D. 4.

SECT. 16.  
Winding up  
by the  
Court.

Wages.



SECT. 16. Act, 1906 (*l*), the liability for which accrued before the date of the order (*m*).

Winding up  
by the  
Court.

A managing director is not a clerk or servant (*n*). A secretary to a company may be a clerk or servant. Where, however, the secretary does not give his whole time to the company's service, but discharges the duties of his office by a clerk appointed and paid by himself, or where he is also managing clerk to a firm of solicitors (*o*), he is not a clerk or servant (*p*). Artists employed to sing by an opera company are clerks or servants (*q*).

The above-mentioned preferential debts must be paid in full, unless the assets are insufficient to meet them, in which case they abate in equal proportions. Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, they must be discharged forthwith so far as the assets are sufficient to meet them (*r*).

Secured and  
preferential  
debts.

881. The above-mentioned debts have no preference or priority over the claims of secured creditors (*s*), except that (1) in the case of a registered company, so far as the assets of the company available for payment of general creditors are insufficient to meet them, they have priority over the claims of holders of debentures or debenture stock under any floating charge created by the company, and are to be paid accordingly out of any property comprised in

(*l*) 6 Edw. 7, c. 58; see title MASTER AND SERVANT. Where the compensation is a weekly payment, the amount due is to be taken to be the lump sum for which the weekly payments could, if redeemable, be redeemed if the employer made an application for that purpose under *ibid.*, Sched. I. (*ibid.*, s. 5 (3)). This Act is amended by s. 209 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 30], for in it the date fixed was in all cases "the date of the commencement of the winding-up." There is no priority or preference under the Act of 1906 where the company in winding up has entered into a contract with any insurers in respect of any liability under that Act to any workman, but in that case the rights of the employers against the insurers are transferred to and vested in the workman, and the insurers have the same rights and remedies, and are subject to the same liabilities, as if they were the employers, but are not under any greater liability to the workman than they would have been to the employer (Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 5 (1)).

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 209 (1) [Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), s. 1 (1), (2); Companies Act, 1907 (7 Edw. 7, c. 50), s. 30; Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 5].

(*n*) *Re News paper Proprietary Syndicate, Ltd., Hopkinson v. Newspaper Proprietary Syndicate, Ltd.*, [1900] 2 Ch. 349.

(*o*) *Cairney v. Back*, [1906] 2 K. B. 746.

(*p*) *Re Callender's Paper Manufacturing Co.* (unreported), SWINFEN EADY, J., in chambers, June 30th, 1908.

(*q*) *Re Winter German Opera, Ltd.* (1907), 23 T. L. R. 662; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 217, 218. Wages varying in amount and paid by way of commission on the tonnage of ships constructed are wages within the Act (*Re Earle's Shipbuilding and Engineering Co., Barclay & Co. v. Earle's Shipbuilding and Engineering Co.*, [1901] W. N. 78); compare *Re Klein, Ex parte Goodwin*, [1906] W. N. 148, where a commission was held to be "salary."

(*r*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 209 (2), (3) [Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), s. 1 (2), (3)].

(*s*) *Richards v. Kidderminster Overseers*, [1896] 2 Ch. 212.

or subject to that charge (*a*); (2) in the event of a landlord or other person distraining or having distrained on any goods or effects of the company within three months next before the date of a winding-up order (*b*), they are to be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof, although in respect of any money paid under any such charge the landlord or other person who has distrained has the same rights of priority as the person to whom the payment is made (*c*).

(vi.) Secured Creditors.

882. A secured creditor (*d*) need not prove at all, but may rely on his security. He may bring an action to realise it without leave in a voluntary winding up, and with the leave of

SECT. 16.  
Winding up  
by the  
Court.

Effect of  
distress for  
rent.

Position of  
secured  
creditors.

(*a*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 209 (2) (*b*) [Preferential Payments in Bankruptcy Amendment Act, 1897 (60 Vict. c. 19), s. 2]. The Act of 1897 was not confined to registered companies, but applied in the winding up of any company under the Acts then in force; and see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 107.

(*b*) This provision, apparently, does not apply in the case of a voluntary winding up, although the provision for which it was substituted was of general application.

(*c*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 209 (4) [Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), s. 1 (4)].

(*d*) The definition of a "secured creditor" in the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 168 (see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 44—46, 67, 224—230), applies in the winding up of insolvent companies. (*Re Lough Neagh Ship Co.*, [1896] 1 I. R. 29; *Re Whitaker, Whitaker v. Palmer* [1901] 1 Ch. 9, C. A.; *Re Leinster Contract Corporation*, [1903] 1 I. R. 517). The following are secured creditors in a winding-up:—Persons holding security under an execution put in, or under a garnishee order *nisi* which has been duly served (*Re Stanhope Silkstone Collieries Co.* (1879), 11 Ch. D. 160, C. A.; *Re National United Investment Corporation*, [1901] 1 Ch. 950), or under a charging order which has been duly served (*Haly v. Barry* (1868), 3 Ch. App. 452); persons holding security by agreement (*Re Printing and Numerical Registering Co.* (1878), 8 Ch. D. 535). An execution creditor who has seized land under an *elegit* is a secured creditor (*Re Gourlay, Ex parte Abbott* (1880), 15 Ch. D. 447, C. A.; *Re Hobson* (1886), 33 Ch. D. 493); but a creditor who obtains the appointment of a receiver, or issues a writ of sequestration, is not a secured creditor except as regards property actually in the possession of the receiver or the sequestrator (*Crosshaw v. Lyndhurst Ship Co.*, [1897] 2 Ch. 154; *Re Potts, Ex parte Taylor*, [1893] 1 Q. B. 648, C. A.; *Re Shephard, Atkins v. Shephard* (1889), 43 Ch. D. 131, C. A.). A landlord having power to distrain is not in England a secured creditor (*Re Oak Pits Colliery Co.* (1882), 21 Ch. D. 322, C. A.); but in Scotland a landlord is a secured creditor (*Re Wanzer, Ltd.*, [1891] 1 Ch. 305), and so is a creditor who has arrested in Scotland, *jurisdictionis fundandæ causâ*, property of a company which is subsequently ordered to be wound up (*Re West Cumberland Iron and Steel Co.*, [1893] 1 Ch. 713; *Re Queensland Mercantile and Agency Co., Ex parte Australasian Investment Co., Ex parte Union Bank of Australia*, [1892] 1 Ch. 219, C. A.). In order to be a secured creditor of a company in liquidation the creditor must hold a security on property of the company at the commencement of the liquidation; a security on the property of a third person does not constitute the creditor a secured creditor of the company; see *Re Hallett & Co., Ex parte Cocks, Biddulph & Co.*, [1894] 2 Q. B. 256, C. A. When security is taken without notice of an irregularity known to the directors, and is paid off by one of the directors, the security is valid (*Owen and Ashworth's Claim, Whitworth's Claim*, [1901] 1 Ch. 115, C. A.).

SECT. 16.  
Winding up  
by the  
Court.

Proof of  
amount due.

the court in a compulsory winding up or in a winding up under supervision (e),

883. Where a secured creditor of an insolvent company proves for his debt, the rules in bankruptcy applicable to proofs by secured creditors apply (f). If he realises his security, the amount for which he may prove (g) is the balance arrived at by deducting from the amount due, when the winding up commenced, for principal and interest, the net amount realised; but he may set off profits arising from the security after the commencement of the winding up interest accrued during the same period (h). He may prove for his whole debt if he surrenders his security (i). If he proves for his whole debt, or votes in respect of it, he thereby elects to surrender his security; but the court may allow him to amend his proof in case of inadvertence (k). Where the company is solvent, he may prove for the whole amount of his debt without giving credit for the value of his security (l), if he has not realised his security and his debt is ascertained (m). Where he holds debentures as collateral security for a debt less than the nominal amount of the debentures, he cannot prove for an amount greater than his debt (n).

Valuation and  
redemption.

884. For the purposes of voting, a secured creditor must, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and he is entitled to vote only in respect of the balance (if any) due to him after deducting the value of the security (o). The official receiver or liquidator may, within twenty-eight days after a proof estimating the value of a security has been used in voting at a meeting, require the creditor to give up the security for the benefit of the creditors generally on payment of the estimated value with an addition of 20 per cent. The creditor may, at any time before being required to give up his security,

(e) *Re Longdendale Cotton Spinning Co.* (1878), 8 Ch. D. 150.

(f) See Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., rr. 9—17; and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 44—46, 67, 224—230.

(g) Companies (Winding-up) Rules, r. 9.

(h) *Quartermaine's Case*, [1892] 1 Ch. 639. As to proof in regard to interest, see *Re Savin* (1872), 7 Ch. App. 760; and p. 511, *ante*. Proof is allowed for the balance after dividends have been paid, but not so as to disturb such distribution (*Re K&H Hill Tunnel, Ex parte Williams* (1881), 16 Ch. D. 590).

(i) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 10.

(k) *Re Lister (Henry) & Co., Ltd., Ex parte Huddersfield Banking Co.*, [1892] 2 Ch. 417; Companies (Winding-up) Rules, r. 135. As to what is inadvertence, see *Re Safety Explosives, Ltd.*, [1904] 1 Ch. 226, C. A.; *Re Rowe, Ex parte West Coast Gold Fields, Ltd.*, [1904] 2 K. B. 489; *Re Burr, Ex parte Clarke* (1892), 67 L. T. 232.

(l) *Kellock's Case, Re Xeres Wine Shipping Co., Ex parte Alliance Bank* (1869), 3 Ch. App. 769.

(m) *Re BARNED'S BANKING CO., COUPLAND'S CLAIM* (1869), L. R. 8 Eq. 472.

(n) *Re Blakely Ordnance Co., Metropolitan and Provincial Bank's Claim* (1869), L. R. 8 Eq. 244; compare *Warrant Finance Co.'s Case* (No. 2) (1869), 5 Ch. App. 88. As to the rights of the creditors as regards the holders of *pari passu* debentures, see *Re Regent's Canal Ironworks Co.* (1876), 3 Ch. D. 43.

(o) Companies (Winding-up) Rules, r. 135. As to the effect of voting for the whole debt, see *supra*.

correct the valuation by a new proof and deduct the new value from his debt; but in that case the 20 per cent. addition is not to be made if the security is required to be given up (p).

(vii.) *Mode of Proof; Admission and Rejection of Proof.*

885. A debt may be proved in any winding up by delivering or sending through the post an affidavit verifying the debt (q). The affidavit may be made by the creditor himself or by some person authorised by him or on his behalf; if made by a person so authorised it must state his authority and means of knowledge (r). It must contain or refer to a statement of account showing the particulars of the debt, and must specify the vouchers, if any, by which the same can be substantiated (s). It must also state whether the creditor is or is not a secured creditor (t).

The affidavit may, in a winding up by the court, be sworn before an official receiver or assistant official receiver, or any officer of the Board of Trade or any clerk of an official receiver duly authorised in writing by the court or the Board in that behalf (a). For the purpose of any of his duties in relation to proofs, the liquidator, in a winding up by the court, may administer oaths and take affidavits (b).

In a winding up by the court the affidavit proving a debt must be sent to the official receiver or, if a liquidator has been appointed, to the liquidator (c); in any other winding up it may be sent to the liquidator (d).

886. Where a creditor seeks to prove in respect of a negotiable instrument or security on which the company is liable, the instrument or security must, subject to any special order of the court to the contrary, be produced to the official receiver, chairman of a meeting, or liquidator, as the case may be, and be marked by him before the proof can be admitted either for voting or for any purpose (e).

(p) Companies (Winding-up) Rules, r. 136; see *Re London, Bombay and Mediterranean Bank, Ex parte Cama* (1874), 9 Ch. App. 686.

(q) Companies (Winding-up) Rules, r. 89. But where a creditor has to take proceedings to establish the debt or claim, the cost of such proceedings, if successful, can be proved for also (*Re British Gold Fields of West Africa*, [1899] 2 Ch. 7, C. A.). As to costs of adjournment of a claim into court, see *Re General Estates Co., Ex parte Wright and Gamble* (1869), L. R. 8 Eq. 123; *Holden's (Henry) Case* (1869), L. R. 8 Eq. 444.

(r) Companies (Winding-up) Rules, r. 90.

(s) *Ibid.*, r. 91; and for the general form of proof of debt, see *ibid.*, Form 63. According to the form the amount is ascertained as at the date of the winding-up order, but in the case of contingent claims subsequent facts may be taken into consideration to show what the real value at that time was (*Holdich's Case* (1872), L. R. 14 Eq. 72, 80). The official receiver or liquidator to whom the proof is sent may at any time call for the production of the vouchers (Companies (Winding-up) Rules, r. 91).

(t) *Ibid.*, r. 92. As to secured creditors, see *ibid.*, r. 135.

(a) *Ibid.*, r. 93.

(b) *Ibid.*, r. 107.

(c) Proofs received by the official receiver must be handed over to the liquidator, who must give a receipt for the same on the list of proofs (*ibid.*, r. 101).

(d) *Ibid.*, r. 89.

(e) *Ibid.*, r. 100.

SECT. 16.  
Winding up  
by the  
Court.

Affidavit.

Swearing  
proofs.

Lodging  
proof.

Bills and  
notes.

SECT. 16.  
Winding up  
by the  
Court.  
Wages.

**887.** Where there are numerous claims for wages by workmen and others employed by the company, it is sufficient if one proof for all the claims is made either by a foreman or by some other person on behalf of all. To the proof must be annexed a schedule setting forth the names of the workmen and others, and the amounts severally due to them. Any such proof is to have the same effect as if separate proofs had been made by each of the workmen and others (*f*).

Admission  
and rejection.

**888.** The liquidator (*g*) must examine every proof of debt lodged with him and the grounds of the debt. Within twenty-eight days after receiving it, subject to the power of the court to extend the time (*h*), he must in writing admit or reject it, in whole or in part, or require further evidence in support of it. If he rejects it, he must state in writing to the creditor the grounds of the rejection (*i*). In examining a proof he may also examine a set-off, if it is a matter of account, to determine the amount to be admitted (*k*).

Filing.

**889.** In a winding up by the court the official receiver, where no other liquidator is appointed, must, before payment of a dividend, file all proofs tendered in the winding up, with a list of them, distinguishing the proofs which were wholly or partly admitted and the proofs which were wholly or partly rejected (*l*).

Every liquidator in a winding up by the court (other than the official receiver) must on the first day of every month file with the registrar of the court a certified list of all proofs, if any, received by him during the preceding month, distinguishing the proofs admitted, those rejected, and such as stand over for further consideration. In the case of proofs admitted or rejected, he must cause the proofs to be filed with the registrar (*m*).

Appeal.

**890.** If a creditor or contributory is dissatisfied with the decision of the liquidator in respect of a proof, the court may, on the application of the creditor or contributory, reverse or vary the decision (*n*).

(*f*) Companies (Winding-up) Rules, r. 99.

(*g*) As to the powers of the official receiver as liquidator, see pp. 424 *et seq.*, *ante*.

(*h*) Companies (Winding-up) Rules, r. 113. Where the liquidator has given notice of his intention to declare a dividend (see *ibid.*, Form 67), he must, within fourteen days after the date mentioned in the notice as the latest date up to which proofs must be lodged, examine, and in writing admit or reject, or require further evidence in support of, every proof which has not been already dealt with, and must give notice of his decision, rejecting a proof wholly or in part, to the creditors affected thereby. Where a creditor's proof has been admitted, the notice of dividend (see *ibid.*, Form 71) is a sufficient notification of the admission (*ibid.*, r. 113). Subject to the power of the court to extend the time in a winding up by the court, the official receiver, as liquidator, must not later than fourteen days from the latest date specified in the notice of his intention to declare a dividend (see *ibid.*, Form 67) as the time within which such proofs must be lodged, in writing either admit or reject wholly, or in part, every proof lodged with him, or require further evidence in support of it (*ibid.*, r. 112).

(*i*) *Ibid.*, r. 103; and for the form of notice of rejection of proof, see *ibid.*, Form 65.

(*k*) *Re National Wholemeal Bread and Biscuit Co.*, [1892] 2 Ch. 457.

(*l*) Companies (Winding-up) Rules, r. 109.

(*m*) *Ibid.*, r. 110; and for the form of list of proofs to be filed, see *ibid.*, Form 66.

(*n*) *Ibid.*, r. 104. A contributory creditor, unless he is the one whose proof is rejected, can only be interested where the proof is admitted; for the admission

Subject to the court's power to extend the time, no such application can be entertained unless notice of the application is given before the expiration of twenty-one days from the date of service of the notice of rejection (*o*).

The liquidator (including the official receiver when he is liquidator) must, within three days after receiving notice from a creditor of his intention to appeal against a decision rejecting a proof, file the proof with the registrar, with a memorandum of his disallowance (*p*).

**891.** If the liquidator thinks that a proof has been improperly admitted, the court may on his application, after notice to the creditor who made the proof, expunge the proof or reduce its amount (*q*). The court may also expunge or reduce a proof upon the application of a creditor or contributory if the liquidator declines to interfere in the matter (*r*).

Sub-SECT. 11.—Distribution of Assets.

(i.) In General.

**892.** Although in a compulsory winding up there is no statutory provision, as in the case of a voluntary winding up (*s*), that all costs, charges, and expenses properly incurred in the winding up, including the remuneration of the liquidator, shall be payable out of the assets in priority to all other claims, the same principle is practically applied (*t*). After the costs, charges, and expenses have been paid, the assets are to be applied in payment of the company's debts and liabilities to creditors (*a*). When the creditors have been paid in full, any surplus is to be distributed amongst the contributories according to their rights *inter se* as adjusted by the court (*b*).

(ii.) Payment of Costs, Charges, and Expenses.

**893.** Whether the winding up is compulsory or voluntary, all claims of creditors in respect of costs ought *prima facie* to be dealt with in the winding up in accordance with the rules applicable to the distribution of the assets (*c*).

Costs which a company has previously to the winding up been

results in a diminution of the assets (*Re Canadian Pacific Colonization Corporation* (1891), 40 W. R. 40). The right of appeal is not confined to creditors whose proofs have been dealt with. An appeal is by application to chambers even where it is from the official receiver (Companies (Winding-up) Rules, r. 5).

A successful appellant is allowed his costs of appeal (*Re National Wholemeal Bread and Biscuit Co.*, [1892] 2 Ch. 457). The official receiver is in no case liable personally for the costs of an appeal; see Companies (Winding-up) Rules, r. 114.

(*o*) Companies (Winding-up) Rules, r. 104.

(*p*) *Ibid.*, r. 111.

(*q*) *Ibid.*, r. 105.

(*r*) *Ibid.*, r. 106; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 234, 235.

(*s*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 196.

(*t*) *Webb v. Whiffin* (1872), L. R. 5 H. L. 711, 735.

(*a*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 123, 158, 163 (1), 166, 169.

(*b*) *Ibid.*, s. 170; see *Re Bridgewater Navigation Co., Ltd., Birch v. Cropper* (1889), 14 App. Cas. 525.

(*c*) *Re Wenborn & Co.*, [1905] 1 Ch. 413. That is to say, the creditor must prove if his action was commenced before winding up, although judgment is

SECT. 16.  
Winding up  
by the  
Court.

Expunging  
by court.

How assets  
to be applied.

Rules  
applicable.

**SECT. 16.**  
**Winding up by the Court.**

Actions commenced before winding up.

ordered to pay are provable in the winding up if the sum recovered in the proceedings in which they were ordered to be paid is provable, and the order to pay them is made before the company goes into liquidation (*d*).

If an action is pending to which the company is a party, and the company by its liquidator determines to prosecute or defend the proceedings for the estate, the estate must be treated as the party litigant, and must in case of failure pay the costs in full (*e*). Thus, where an action by the company, commenced before winding up, is continued afterwards by leave, the defendant, if he obtains judgment for costs, is entitled to be paid in full as from the commencement of the action (*f*). Where an action has been brought against a company before winding up, and the plaintiff subsequently recovers judgment for damages and costs, the costs are ordered to be paid in full out of the assets (*g*). But the costs of a representative action brought before winding up, although commenced by shareholders against promoters for the company's benefit, cannot, if the action is continued after the winding up without leave, and afterwards dismissed by consent, be paid out of the assets (*h*).

Actions brought after winding up.

Where, while the winding up is pending, an action or other proceeding is brought in the name of the company or by its liquidator, and an order for costs is made against it or him, the costs are payable in full out of the assets in priority to the costs of winding up (*i*). Similarly, where leave is given to bring an action against the company and to the liquidator to defend it, the successful plaintiff is entitled to have his costs in full out of the assets, including his costs of obtaining leave (*k*).

Realisation of assets subject to security.

**894.** Where property subject to a specific charge is realised by the liquidator in the winding up, the proceeds are applicable (1) to the costs of realisation; (2) in payment of the costs of preservation, strictly so described, so far as the other assets of the company are not sufficient; and (3) in payment of the principal, interest, and mortgagees' costs, all of which have priority over the general costs

obtained afterwards (*Re Thurso New Gas Co.* (1889), 42 Ch. D. 486; *Re Snyder Dynamite Projectile Co.*, *Peck v. Snyder Dynamite Projectile Co.*, [1893] W. N. 37).

(*d*) *Re Duffield, Ex parte Peacock* (1873), 8 Ch. App. 682; *Re British Gold Fields of West Africa*, [1899] 2 Ch. 7, C. A.; *Vint v. Hudspeth* (1885), 30 Ch. D. 24, C. A. As to taxation of a solicitor's bill of costs delivered before winding up, see *Re James, Ex parte Quilter* (1850), 4 De G. & Sm. 183; *Re Marseilles Extension Railway and Land Co., Ex parte Evans* (1870), L. R. 11 Eq. 151.

(*e*) *Re Wenborn & Co.*, [1905] 1 Ch. 413.

(*f*) *Re London Drapery Stores*, [1898] 2 Ch. 684.

(*g*) *Re Wenborn & Co.*, *supra*.

(*h*) *Re Hull Central Drapery Co.* (1880), 15 Ch. D. 326, C. A. As to the costs where an action by the company before winding up is afterwards discontinued, see *Re United Service Association*, [1901] 1 Ch. 97.

(*i*) *Re Wenborn & Co.*, *supra*; *Re Home Investment Society* (1880), 14 Ch. D. 167; *Madrid Bank v. Pelly* (1869), L. R. 7 Eq. 442; *Re Bank of Hindustan, China, and Japan, Ex parte Levick* (1867), L. R. 5 Eq. 69; *Re Bank of Hindustan, China, and Japan, Ex parte Smith* (1867), 3 Ch. App. 125; *Ferrao's Case*, (1874), 9 Ch. App. 355. As to the lien of the successful party's solicitor, see *Re Bank of Hindustan, China, and Japan, Ex parte Smith, supra*.

(*k*) *Bailey and Leatham's Case* (1869), L. R. 8 Eq. 94; *Re Wenborn & Co.*, *supra*.

of the liquidation and the costs of carrying on the business of the company (*l*). When money recovered in misfeasance proceedings by the liquidator is subject to a debenture charge, the liquidator's costs of the proceedings, but not the costs of the petition for winding up, are payable out of it in priority to the debentures (*m*).

**SECT. 16.**  
**Winding up by the Court.**

Where property is recovered by the company by action, the liquidator's solicitor may be entitled to claim a lien on that property for his costs (*n*). His bill of costs is part of the costs of winding up (*o*).

Solicitor's lien.

A solicitor's lien in respect of costs incurred before winding up may be enforced by a charging order after the winding up has commenced (*p*). His lien on documents may be enforced in respect of documents which came to his hands before, and not in the course of, the winding up (*q*); but this does not apply to books or documents on which the directors had no power to create a lien, such as the share register or minute book (*r*), or other books or documents which are required to be kept at the company's office (*s*), or to the file of proceedings in the winding up, and the documents relating thereto (*t*), nor can any lien on the company's books or documents be acquired in respect of costs incurred before the incorporation of the company (*a*).

**895.** The assets out of which costs, whether payable to an outside litigant or as winding-up costs, are payable are those which are left after satisfying the claims of secured creditors (*b*).

Assets out of which costs payable.

**896.** The successful litigant whose costs are ordered to be paid by the liquidators or the company out of its assets is *prima facie* entitled to have his costs paid immediately, and the order of priority mentioned below does not affect the matter (*c*). The date of the order gives no priority, but payment will not be indefinitely postponed until all claims have come in (*d*). The onus is on the

Immediate payment of costs.

(*l*) *Re Marine Mansions Co.* (1867), L. R. 4 Eq. 601; *Re Oriental Hotels Co., Perry v. Oriental Hotels Co.* (1871), L. R. 12 Eq. 126; *Re Regent's Canal Ironworks Co., Ex parte Grissell* (1875), 3 Ch. D. 411, C. A.; *Re Ormerod, Grierson & Co.*, [1890] W. N. 217; *Re Northern Milling Co.*, [1908] 1 L. R. 473; compare *Lathom v. Greenwich Ferry Co.*, [1895] W. N. 77.

(*m*) *Re Anglo-Austrian Printing and Publishing Union, Brabourne v. Same*, [1895] 2 Ch. 891; compare *Re Bonelli's Electric Telegraph Co., Cook's Claim* (No. 2) (1874), L. R. 18 Eq. 656, where a fund was paid into court to answer a particular claim.

(*n*) *Re Massey, Re Freehold Land and Brickmaking Co.* (1870), L. R. 9 Eq. 267, 368.

(*o*) *Ibid.*, at p. 369.

(*p*) *Re Born, Curnock v. Born*, [1900] 2 Ch. 433.

(*q*) *Re Rapid Road Transit Co.*, [1909] 1 Ch. 96; *Re Capital Fire Insurance Association* (1883), 24 Ch. D. 408, C. A.

(*r*) *Re Capital Fire Insurance Association, supra*.

(*s*) *Re Anglo-Maltese Hydraulic Dock Co.*, [1885] W. N. 84.

(*t*) *Re Union Cement and Brick Co., Ex parte Pulbrook* (1869), 4 Ch. App. 627.  
(*a*) *Re Galland*, [1885] W. N. 224, C. A.; compare *Re English and Colonial Produce Co., Ltd.*, [1906] 2 Ch. 435, 439, C. A.; *Re National Motor Mail-Coach Co., Ltd., Clinton's Claim*, [1908] 2 Ch. 515.

(*b*) See p. 519, ante.

(*c*) See *Re London Metallurgical Co.*, [1895] 1 Ch. 758; Companies (Winding up) Rules, r. 187 (3).

(*d*) *Re London Metallurgical Co.*, *supra*.

SECT. 16.  
Winding up  
by the  
Court.

Priority of  
payments.

liquidator to show that payment of the costs should be postponed until provision has been made for any prior claims (e). Where the costs are to be paid by the liquidator personally, and he is to be at liberty to retain them out of the assets of the company, such costs rank even before the costs of realisation (f).

897. The court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the costs, charges, and expenses incurred in the winding up in such order of priority as the court thinks just (g).

Subject to any order of the court, whether the assets are or are not insufficient to satisfy the liabilities (h), the assets of a company (a) in a winding up by the court, remaining after payment of the fees and actual expenses incurred in realising or getting in the assets, are liable to the following payments, which are to be paid in the following order of priority, namely: (1) the taxed costs of the petition, including the taxed costs of any person appearing on the petition whose costs are allowed by the court (b); (2) the remuneration of the special manager (if any); (3) the costs and expenses of any person who makes or concurs in making the company's statement of affairs; (4) the taxed charges of any shorthand writer appointed to take an examination (provided that where the shorthand writer is appointed at the instance of the official receiver, the cost of the shorthand notes is deemed to be an expense incurred by the official receiver in getting in and realising the company's assets); (5) the liquidator's necessary disbursements, other than actual expenses of realisation; (6) the costs of any person properly employed by the liquidator; (7) the remuneration of the liquidator (c); (8) the actual out-of-pocket expenses necessarily

(e) *Re London Metallurgical Co.*, [1895] 1 Ch. 758.

(f) *Re Dominion of Canada Plumbago Co.* (1884), 27 Ch. D. 33, C. A., disapproving *Re Dronfield Silkestone Coal Co.* (No. 2) (1883), 23 Ch. D. 511.

(g) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 171 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 110].

(h) See *Re London Metallurgical Co.*, *supra*. Nothing contained in the Companies (Winding-up) Rules, r. 187, is to apply to or affect costs which, in the course of legal proceedings by or against a company which is being wound up by the court, are ordered by the court in which such proceedings are pending or a judge thereof to be paid by the company or the liquidator, or the rights of the person to whom such costs are payable (*ibid.*, r. 187 (3)).

(a) As to the winding up of a company to which the Stannaries Act, 1887 (50 & 51 Vict. c. 43), as modified by the Act of 1908, applies, see p. 672, *post*.

(b) *Re Audley Hall Cotton Spinning Co.* (1868), L. R. 6 Eq. 245. The petitioner's costs include the costs of establishing his debt (*Re Universal Non-Tariff Fire Insurance Co.*, [1875] W. N. 54), and costs on appeal (*Re Bright, Ex parte Wingfield and Blew*, [1903] 1 K. B. 735). They are a first charge on the assets and must be paid in full in priority to the costs of the liquidator (*Re Audley Hall Cotton Spinning Co.*, *supra*; and see *Re Sanitary Burial Association*, [1900] 2 Ch. 289, C. A.); and no set-off is allowed against them even where the petitioner is a contributory against whom calls have been made (*Re General Exchange Bank* (1867), L. R. 4 Eq. 138). As to costs of instructions for brief, see *Re Consolidated Exploration and Finance Co.*, [1899] 2 Ch. 599.

(c) The liquidator's remuneration has a more favourable position than it formerly had, for under the practice prior to 1891 he was not entitled to any remuneration until all the costs of winding up (including the costs of the solicitor employed by him) had been paid in full (*Re Massey, Re Freshold Land*

SECT. 16.  
Winding up  
by the  
Court.

Actual  
expenses of  
realisation  
etc.

Notice of  
intention to  
declare  
dividend.

incurred by the committee of inspection, subject to the approval of the Board of Trade (d).

The court will not vary the above order of priority except for sufficient reason (e).

898. Actual expenses of realisation mean strictly the costs of a sale of any of the assets, and do not extend to the liquidator's solicitor's bill of costs (f). The fees, costs, and charges payable by the liquidator to the official receiver on taking possession of the assets, in respect of which the official receiver has a lien, are, if not realisation expenses, sums in respect of which the liquidator, standing in the shoes of the official receiver, is a secured creditor (g).

The expenses of the special manager are probably actual expenses of realisation, but his costs of giving security are to be borne by himself personally (h). The liquidator's necessary disbursements do not include his costs of giving security, as he is to bear them personally (i). If the liquidator changes his solicitor and the costs cannot be paid in full, they will, as a rule, be paid rateably (k).

(iii.) *Distribution amongst Creditors.*

899. Not more than two months before declaring a dividend the liquidator must give notice of his intention to do so to the Board of Trade in order that the same may be gazetted, and at the same time to such of the creditors mentioned in the statement of affairs as have not proved their debts. The notice must specify the latest

and *Brickmaking Co.* (1870), L. R. 9 Eq. 367). The costs of a liquidator incurred in a voluntary winding up before a supervision order is made are payable in priority to those of the petitioner who obtains the order; see *Re New York Exchange Co.*, [1893] 1 Ch. 371. As to priorities between the voluntary liquidator's remuneration and his solicitor's costs incurred during the same period, see *Re Sanitary Burial Association*, [1900] 2 Ch. 289, C. A.

(d) Companies (Winding-up) Rules, r. 187 (1). As to the priority of the liquidator's costs, expenses, and remuneration before 1890, see *Re Regent's Canal Ironworks Co., Ex parte Grissell* (1875), 3 Ch. D. 411, C. A.; *Re Oriental Hotels Co., Perry v. Oriental Hotels Co.* (1871), L. R. 12 Eq. 126; *Re Dominion of Canada Plumbago Co.* (1884), 27 Ch. D. 33, C. A. As to the remuneration of liquidators in force before the Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), see 3 Ch. App. p. lxiv.; *Re Mysore Reef's Gold Mining Co.* (1886), 34 Ch. D. 14, C. A. Joint liquidators, in the absence of any special agreement, are entitled to share equally in the remuneration granted to them (*Re Langham Hotel Co., Ex parte Liquidator* (1869), 20 L. T. 163).

(e) *Re London Metallurgical Co.*, [1895] 1 Ch. 758; *Re Bright, Ex parte Wingfield and Blew*, [1903] 1 K. B. 735 (a bankruptcy case).

(f) *Re Bright, Ex parte Wingfield and Blew, supra*. In the Chancery Division in a debenture-holder's action the costs of realisation, including the costs of an abortive sale, come first in order of priority (*Batten v. Wedgwood Coal and Iron Co.* (1884), 28 Ch. D. 317); and see *Re Dronfield Silkestone Coal Co.* (No. 2) (1883), 23 Ch. D. 511. Costs of realisation have been held in the Chancery Division to be confined to costs of actual sale and not to include costs of preservation (*Lathom v. Greenwich Ferry Co.*, [1895] W. N. 77), but the correctness of the decision is open to doubt; see *Re Wrexham, Mold, and Connah's Quay Rail Co.*, [1900] 1 Ch. 261; *Re Boynton (A.), Ltd., Hoffman v. Boynton (A.), Ltd.*, [1910] 1 Ch. 519.

(g) See Companies (Winding-up) Rules, r. 161.

(h) *Ibid.*, r. 57.

(i) *Ibid.*

(k) *Re Audley Hall Cotton Spinning Co.* (1868), L. R. 6 Eq. 245.

**SECT. 16.**  
**Winding up**  
**by the**  
**Court.**

date up to which proofs must be lodged, which must not be less than fourteen days from the date of the notice (*l*).

Where no notice of appeal against the rejection of any proof has been given within the time specified (*m*), the liquidator must exclude all proofs which have been rejected from participation in the dividend (*n*).

Declaration  
of dividend.

Immediately after the expiration of the time fixed for appealing against his decision (*o*) he must proceed to declare a dividend, giving notice to the Board of Trade (in order that the same may be gazetted), and also sending a notice of dividend to each creditor whose proof has been admitted (*p*).

Transmission  
of list to  
Board of  
Trade.

**900.** Upon the declaration of a dividend the liquidator must forthwith transmit to the Board of Trade a list of the proofs already filed with the registrar (*q*), in the form which is applicable, as the case may be (*a*). If the winding up is in a court other than the High Court the list must, on payment of the prescribed fee, be examined by the registrar with the proofs tendered for filing, and if found correct certified by him. If the winding up is in the High Court, the liquidator must, if so required by the Board of Trade, transmit to the Board office copies of all lists of proofs filed by him up to the date of the declaration of the dividend (*b*).

The creditors in the lists must be numbered consecutively, so that for the purpose of identification corresponding numbers may be affixed to the cheques and money orders. The Board requires great care to be exercised in the preparation of these lists; in all cases of payment to executors, trustees, representative officials etc., the name or names should be inserted in the list (*c*).

Payment of  
dividends.

**901.** The payment of dividends is in every instance, except where a special bank account has been authorised, made by cheques

(*l*) Companies (Winding-up) Rules, r. 150 (1), and for the form of notice to creditors, see *ibid.*, Form 67.

(*m*) Where any creditor, after the date mentioned in the notice of intention to declare a dividend as the latest date up to which proofs may be lodged, appeals against the decision of the liquidator rejecting a proof, notice of appeal must, subject to the power of the court to extend the time in special cases, be given within seven days from the date of the notice of the decision against which the appeal is made, and the liquidator may in such case make provision for the dividend upon such proof, and the probable costs of such appeal in the event of the proof being admitted (*ibid.*, r. 150 (2)).

(*n*) *Ibid.*, r. 150 (2).

(*o*) See p. 522, *ante*.

(*p*) Companies (Winding-up) Rules, r. 150 (3); and for the form of notice to creditor, see *ibid.*, Form 71. If it becomes necessary, in the opinion of the liquidator and the committee of inspection, to postpone the declaration of the dividend beyond the limit of two months, the liquidator has to give a fresh notice of his intention to declare a dividend to the Board of Trade in order that the same may be gazetted; but it is not necessary for him to give a fresh notice to creditors mentioned in the statement of affairs who have not proved their debts. In all other respects the same procedure follows the fresh notice as would have followed the original notice (*ibid.*, r. 150 (4)). Dividends are payable on the full amount without regard to payments made by third persons (*Re Ligoniel Spinning Co.*, [1900] 1 I. R. 324).

(*q*) See Companies (Winding-up) Rules, r. 110; and p. 522, *ante*.

(*a*) See *ibid.*, Forms 68, 69. Form 68 includes a request for orders for payment. Form 69 is used where there is a special bank account.

(*b*) *Ibid.*, r. 150 (5).

(*c*) Board of Trade Regulations, 1909, r. 11.

on the Bank of England, or money orders, which are prepared by the Board of Trade on the application of the liquidator in the prescribed form (*d*), and are transmitted to him for distribution amongst the creditors. The Board requires ten days' notice to enable it to prepare the cheques or money orders for dividends (*e*). The total amount of the dividend payable must be charged in the cash book in one sum. If the dividend has been paid by cheques on the Companies Liquidation Account, the liquidator, on the expiration of six months from the date of issue, or on application for his release, if that event occurs earlier, must return any cheques remaining in hand to the Accountant-General to the Board (*f*).

If the dividend is paid through a special bank, the liquidator must, on the declaration of the dividend, forward to the Comptroller of the Companies Department, Board of Trade, the above-mentioned list of proofs filed in the prescribed form (*g*), together with the office copy list of proofs filed if the case is in the High Court, and at the expiry of six months from the date of the declaration of the dividend must forward to the comptroller, for audit, vouchers for the dividends paid and a list of those remaining unclaimed. The liquidator is then furnished with a receivable order for payment into the Bank of England of the amount of the dividends unclaimed. In no circumstances must unclaimed dividends be credited to the estate without the previous sanction of the comptroller (*h*).

Dividends may, at the request and risk of the person to whom they are payable, be transmitted to him by post (*i*). If he desires them to be paid to some other person he may lodge with the liquidator a document in the prescribed form, which is a sufficient authority for payment of the dividend to the person therein named (*j*).

An unclaimed share of assets paid into the Companies Liquidation Account cannot be attached by a creditor of the shareholder entitled to it by means of a garnishee order (*k*).

(iv.) *Distribution amongst Contributories.*

**902.** The court is to adjust the right of the contributories among themselves and distribute any surplus among the persons entitled (*l*) in accordance with their rights and interests in the company (*m*).

(*d*) See Companies (Winding-up) Rules, Form 68; and *supra*.

(*e*) Board of Trade Regulations, 1909, r. 11.

(*f*) *Ibid.*

(*g*) Companies (Winding-up) Rules, Form 69.

(*h*) Board of Trade Regulations, r. 11.

(*i*) Companies (Winding-up) Rules, r. 150 (6).

(*j*) *Ibid.*, r. 150 (7); and for the form of authority, see *ibid.*, Form 72. Compare *Wragge's Case* (1868), L. R. 5 Eq. 284.

(*k*) *Spence v. Coleman*, [1901] 2 K. B. 199, C.A.

(*l*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 170 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 109].

(*m*) *Griffith v. Paget* (1877), 5 Ch. D. 894; 6 Ch. D. 511; *Wall v. London and Northern Assets Corporation*, [1898] 2 Ch. 469, C. A.; *Re North West Argentine Railway*, [1900] 2 Ch. 882. As to the rights of a B contributory to return of money, see *Re Barned's Bank, Helbert v. Banner* (1871), L. R. 5 H. L. 28.

**SECT. 16.**  
**Winding up**  
**by the**  
**Court.**

Payment  
through  
special bank.

Adjusting  
rights.



**SECT. 16.**  
Winding-up  
by the  
Court.

In a winding up past and present members are liable to contribute to the assets of the company to an extent sufficient (amongst other purposes) for the adjustment of the rights of the contributories amongst themselves (*n*). The contributories get nothing until the costs, charges and expenses properly incurred in the winding up have been paid and the debts and liabilities of the company discharged in full, and, in some cases, until provision has been made for future contingent claims (*o*). A sum due to a person in his character of a member, by way of profits, dividends, or otherwise, may be taken into account for the purposes of the final adjustment of contributories' rights (*p*). Only the rights of contributories *quid* contributories can be adjusted under this provision; hence it does not enable directors who are contributories to enforce against persons who also are contributories rights which have nothing to do with their position as contributories (*q*).

Distribution  
according to  
nominal  
capital.

**903.** If the memorandum and articles of association contain no provision as to how surplus assets (*r*) are to be divided, then, subject to the terms on which any capital has been issued, the surplus assets are divided and losses are borne in proportion to the nominal amounts of the shares and not to the sums paid up. Where, however, some shareholders have paid up more than others, the court adjusts the amounts until all have paid up in the same proportion, and the surplus thus arrived at is then distributed in proportion to the nominal amounts (*s*).

The rights may be adjusted by making larger returns to those

(*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 123 (1); and see p. 500, *ante*.

(*o*) See pp. 516 *et seq.*, *ante*.

(*p*) See *Re New Transvaal Co.*, [1896] 2 Ch. 750; *Re Peabody Gold Mining Corporation*, [1897] W. N. 170; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 123 (1) (vii).

(*q*) *Re Alexandra Palace Co.* (1883), 23 Ch. D. 297, 300 (rights between a tortfeasor and creditors and contributories); *Addison's Case* (1875), L. R. 20 Eq. 620 (contracts by some contributories to indemnify the rest); compare *Baird's Case*, [1899] 2 Ch. 593.

(*r*) The term "surplus assets" as used in the company's regulations may mean either what remains after paying the costs, charges, and expenses of the winding up and debts, or after making those payments and returning the paid-up capital to the shareholders (*Re Anglo-Continental Corporation of Western Australia*, [1898] 1 Ch. 327; *Re Mutoscope and Biograph Syndicate*, [1899] 1 Ch. 896; *Re Crichton's Oil Co.*, [1902] 2 Ch. 86, 93, C. A.; *Re Welsh Whisky Distillery Co., Ltd.*, [1900] W. N. 59).

(*s*) *Re Hodges' Distillery Co., Ex parte Maude* (1870), 6 Ch. App. 51; *Re Bridgewater Navigation Co., Ltd.*, *Birch v. Cropper* (1889), 14 App. Cas. 525, 543; *Re Driffield Gas Light Co.*, [1898] 1 Ch. 451; *Re Eclipse Gold Mining Co.* (1874), L. R. 17 Eq. 490 (new capital); *Re Wakefield Rolling Stock Co.*, [1892] 3 Ch. 165; *Oakbank Oil Co. v. Crum* (1882), 8 App. Cas. 65. In the absence of agreement, by all the shareholders or through the machinery of modification clauses, the distribution must be in accordance with the legal rights of the shareholders (*Re North West Argentine Rail. Co.*, [1900] 2 Ch. 882, where WRIGHT, J., distinguished his former decision in *Re Beeston Pneumatic Tyre Co.*, [1898] W. N. 34, which cannot be supported). *Somes v. Currie* (1855), 1 K. & J. 605, and *Sheppard v. Scinde, Punjab and Delhi Rail. Co.* (1887), 38 W. R. 1, C. A., were decided on special circumstances; see *Re Driffield Gas Light Co., supra*; *Re Espuella Land and Cattle Co.*, [1909] 2 Ch. 187.

who have paid larger amounts (*t*), or by making calls (*a*). The articles may, however, be so framed as to prevent calls being made on the holders of partly-paid shares to equalise the amounts paid up (*b*).

A provision in the articles as to how dividends are to be distributed while the company is a going concern does not, *per se*, govern or affect the distribution of surplus assets in a winding up (*c*).

Subject as above stated, the rights of the contributories as regards surplus assets are regulated by the memorandum and articles of association, due regard being had to the rights of preference shares as thereby declared (*d*). There is no general rule that shareholders with a preference as to repayment of capital can have no further share in surplus assets. The question depends on the construction of the memorandum and articles, and if these are silent, the surplus must be divided among all the shareholders, ordinary and preference, in proportion to the nominal amounts of the shares (*e*).

**904.** Any discount on shares unlawfully issued at a discount is treated as capital unpaid, which may be so regarded in adjusting accounts, or may be called up to adjust the rights of the contributories (*f*).

**905.** Where a company has proved in the bankruptcy of a shareholder for the uncalled amount of the shares and received a dividend

(*t*) *Re Hodges' Distillery Co., Ex parte Maude* (1870), 6 Ch. App. 51; *Re Wakefield Rolling Stock Co.*, [1892] 3 Ch. 165; *Re Bridgewater Navigation Co., Ltd.*, *Birch v. Cropper* (1889), 14 App. Cas. 525; *Re Driffield Gas Light Co.*, [1898] 1 Ch. 451; *Re Weymouth and Channel Islands Steam Packet Co.*, [1891] 1 Ch. 66, C. A.; *Re West Coast Gold Fields, Ltd., Rowe's Trustee's Claim*, [1906] 1 Ch. 1, C. A., where shares on which a dividend had been paid in the bankruptcy of the holder were held to be not fully paid.

(*a*) *Re Anglo-Continental Corporation of Western Australia*, [1898] 1 Ch. 327; *Welton v. Saffery*, [1897] A. C. 299; *Re Anglesea Colliery Co.* (1866), 1 Ch. App. 555; and see *Re Provision Merchants' Co.* (1872), 26 L. T. 862; *Re Sheppard's Corn Malting Co., Ex parte Lowenfeld* (1893), 70 L. T. 3, C. A.; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 123.

(*b*) *Re Holyford Mining Co.* (1869), 3 I. R. Eq. 208, C. A.; *Re New Transvaal Co.*, [1896] 2 Ch. 750; *Re Peabody Gold Mining Corporation*, [1897] W. N. 170; see *Re Eclipse Gold Mining Co.* (1874), L. R. 17 Eq. 490; *Re Coed Madog Slate Co.*, [1877] W. N. 190; compare *Re Provision Merchants' Co.* (1872), 26 L. T. 862.

(*c*) *Re Driffield Gas Light Co., supra*; *Re London India Rubber Co.* (1868), L. R. 5 Eq. 519; compare *Simpson v. Palace Theatre, Ltd.*, [1893] W. N. 91, where a scheme for voluntary liquidation and reconstruction was held to be invalid because it did not provide for a *pro rata* division among all the shareholders.

(*d*) *Re Bangor and Portmadoc Slate and Slab Co.* (1875), L. R. 20 Eq. 59; *Sime v. Coats*, [1908] S. C. 751. Ss. 170, 186 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), do not supply a rule for the mode of adjusting loss of capital or of distributing surplus assets, but only supply the necessary powers for giving effect to the rights and interests of the parties (*Re Driffield Gas Light Co., supra*). As to a company being estopped from denying the validity of an issue of preference shares, see *Re London and Northern Bank* (1902), 18 T. L. R. 320.

(*e*) *Re Espuella Land and Cattle Co.*, [1909] 2 Ch. 187; *Simpson v. Palace Theatre, Ltd., supra*.

(*f*) *Welton v. Saffery, supra*; *Re Weymouth and Channel Islands Steam Packet Co.*, [1891] 1 Ch. 66, C. A.

**SECT. 16.**  
Winding up  
by the  
Court.

Preference  
shareholders.

Shares issued  
at a discount.

Bankrupt  
shareholder.

SECT. 16.  
Winding up  
by the  
Court.Money  
received in  
advance of  
calls.Surplus after  
refunding  
paid-up  
capital.Statute of  
Limitations.

of less than 20s. in the pound, the shares are not treated as fully paid for the purposes of the trustee receiving a share of the surplus assets in the subsequent winding up of the company until the other shareholders have received dividends sufficient to equalise the amount paid up (g).

**906.** Where inequality in the amounts paid up arises from the shareholder having made payments in advance of calls, each shareholder, for the purpose of equalising, is entitled to be repaid the amount advanced, with interest at the agreed rate up to the date of repayment, before any payment is made, in respect of the other shares ranking *pari passu* with his shares, in repayment of capital (h). The same principle applies where the company issues both fully-paid and partly-paid shares (i).

**907.** Where, after repayment to the shareholders of all paid-up capital, there is still a surplus remaining for distribution, then, subject to the articles and the terms of issue (j), the surplus, so far as it represents capital, is divisible in proportion to the nominal amount of the shares, whether they are preference or ordinary shares, and whether at the winding up they were partly or fully paid up (k). The surplus, so far as it represents undivided profits, is in some cases divisible amongst the shareholders as if it were profit available for dividend (l), but in other cases it must be treated as capital (m). Unless the articles so provide, the holders of shares issued at a premium are not in a winding up entitled to have the premium repaid (n). Because shares are entitled to a preferential dividend it does not follow that they are entitled to preference in repayment of capital (o). The regulations of most companies authorise the distribution of surplus assets in specie.

**908.** The holder of shares, the certificate of which is under the seal of the company and refers (as is usual) to the memorandum and articles of the company, is not barred by the Statute of Limitations, in respect of dividends declared on the shares, until the expiration of twenty years from the date of declaration (p).

(g) *Re West Coast Gold Fields, Ltd., Rowe's Trustee's Claim*, [1906] 1 Ch. 1, C. A.  
(h) *Re Exchange Drapery Co* (1888), 38 Ch. D. 171; *Re Wakefield Rolling Stock Co.*, [1892] 3 Ch. 165.

(i) *Re Hodges' Distillery Co., Ex parte Maude* (1870), 6 Ch. App. 51.

(j) *Re Microscope and Biograph Syndicate*, [1899] 1 Ch. 896.

(k) *Re Bridgewater Navigation Co., Ltd., Birch v. Cropper* (1889), 14 App. Cas. 525.

(l) *Re Bridgewater Navigation Co.*, [1891] 2 Ch. 317, C. A.; *Bishop v. Smyrna and Cassaba Rail. Co.*, [1895] 2 Ch. 265; compare *Re Odessa Waterworks Co.* (1897), reported [1901] 2 Ch. 190, n.; *Re Hall (W. J.) & Co., Ltd.*, [1909] 1 Ch. 521.

(m) See *Bishop v. Smyrna and Cassaba Rail. Co.* (No. 2), *supra*; *Re Crichton's Oil Co.*, [1902] 2 Ch. 86, C. A., where the subject is fully discussed; *Re Accrington Corporation Steam Tramways Co.*, [1909] 2 Ch. 40.

(n) *Re Driffield Gas Light Co.*, [1898] 1 Ch. 451.

(o) *Re London India Rubber Co.* (1868), L. R. 5 Eq. 519; *Re North West Argentine Rail. Co.*, [1900] 2 Ch. 882.

(p) *Re Artisans' Land and Mortgage Corporation*, [1904] 1 Ch. 796; *Re Drogheda Steam Packet Co., Ltd.*, [1903] 1 I. R. 512; and see *Severn and Wye and Severn Bridge Rail. Co.*, [1896] 1 Ch. 559; *Re Cornwall Minerals Rail. Co.*, [1897] 2 Ch. 74, where the company was incorporated by a special Act.

**909.** Every order by which the liquidator is authorised to make a return to contributories of the company must, unless the court otherwise directs, contain or have appended thereto a schedule or list setting out in a tabular form the full names and addresses of the persons to whom the return is to be paid, and the amount of money payable to each person, and particulars of the transfers of shares (if any) which have been made, or the variations in the list of contributories which have arisen, since the date of the settlement of the list of contributories. The schedule or list which the liquidator must prepare must be in the prescribed form, with such variations as circumstances shall require (q).

**910.** Applications for cheques for returns to contributories must be made on the prescribed form (r), which must give the name of each contributory, together with the amount for which he has been settled on the list, and, in cases where the amount payable is under £2, the place at which the money order should be made payable. The total amount of each return to contributories must be entered in the cash book in one sum, as in the case of dividends (s).

## SUB-SECT. 12.—Stay and Transfer of Proceedings, and Special Case.

## (i.) Proceedings by or against the Company.

**911.** The court has power, at any time after the presentation of a winding-up petition and before a winding-up order has been made (t), on the application of the company, or any creditor or contributory, to stay or restrain any proceedings against the company on such terms as it thinks fit (a). Where the action or proceeding is pending in the High Court or Court of Appeal, the application is made to the court in which the action or proceeding is pending for a stay of proceedings. In the case of any other action or proceeding the application is made to the court having jurisdiction to wind up the company to restrain further proceedings (b). Where the company has been registered under Part VII. of the Act of 1908, or is an unregistered company, the power extends, where the application to stay or restrain is by a creditor, to actions and proceedings against any contributory of the company (c).

An application to stay any proceedings in the High Court must

(q) Companies (Winding-up) Rules, r. 151. For the form of schedule, see *ibid.*, Form 74; and for the form of notice of return to contributories, *ibid.*, Form 73.  
(r) This form is called Form C, No. 6.

(s) Board of Trade Regulations, 1909, r. 12; as to the payment of dividends, see p. 528, *ante*. As to payment when the shares are vested in a Scotch sequestrator, see *Re Tuticorin Cotton Press Co.*, [1894] W. N. 181.

(t) For this purpose a petition for the continuance of a voluntary winding up subject to supervision, and a supervision order made thereon, are deemed a petition and order respectively for compulsory winding up [Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 200, 203].

(a) *Ibid.*, s. 140 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 85; Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (5); Judicature (Ireland) Act, 1877 (40 & 41 Vict. c. 57), s. 27 (5)].

(b) See p. 391, *ante*.

(c) *Ibid.*, ss. 265, 270 [Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 197, 201]. In the case of an unregistered company the application may also be made by the company (*Rudow v. Great Britain Mutual Life Assurance Society* (1881), 17 Ch. D. 600, C. A.).

SECT. 16.  
Winding up  
by the  
Court.Return  
schedule.Application  
for return  
cheques.Power to  
stay.

SECT. 16.  
Winding up  
by the  
Court.

be made to the division in which the matter is pending (*d*), and may be made *ex parte* (*e*). It is generally made by summons, but sometimes by motion. All actions pending against the company in the King's Bench Division may be stayed by a single order (*f*).

The jurisdiction to stay is discretionary (*g*), and in its exercise regard must be had to the primary object of winding up, namely, the collection and distribution of the assets *pari passu* amongst unsecured creditors after payment of preferential debts (*h*).

Avoidance of  
executions.

912. Where any registered company is being wound up by or subject to the supervision of the court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding up is, unless leave to proceed is given by the court (*i*), avoided altogether (*k*), so that no interest in any goods seized is acquired even as against third persons (*l*). The court will set aside a judgment obtained without leave after the making of the winding-up order (*m*).

The provision applies to distress for rent (*n*), or rates (*o*), to

(*d*) *Walker v. Banagher Distillery Co.* (1875), 1 Q. B. D. 129; *Re People's Garden Co.* (1875), 1 Ch. D. 44; *Re Morrison Patent Fuel and Brick Co.*, [1877] W. N. 20; *Re Artistic Colour Printing Co.* (1880), 14 Ch. D. 502; *Re General Service Co-operative Stores*, [1891] 1 Ch. 496; compare *Garbutt v. Fawcus* (1875), 1 Ch. D. 155, C. A.; *Rose v. Gardden Lodge Coal Co.* (1878), 3 Q. B. D. 235.

(*e*) *Masbach v. Anderson & Co.* (1877), 26 W. R. 100; *Everingham v. Co-operative Pure Family Beer Co.*, [1880] W. N. 99, C. A.

(*f*) *Re People's Garden Co.*, *supra*.

(*g*) *Re Great Ship Co., Ltd., Parry's Case* (1863), 4 De G. J. & Sm. 63, C. A. As to costs, see p. 539, *post*.

(*h*) *Smith, Flanning & Co.'s Case, Gledstanes & Co.'s Case* (1866), 1 Ch. App. 538, *Publishing Co.*, [1894] 2 Q. B. 380.

(*i*) *Re Exhall Coal Mining Co., Ltd.* (1864), 4 De G. J. & Sm. 377, C. A.; *Re Lancashire Cotton Spinning Co., Ex parte Carnelley* (1887), 35 Ch. D. 656, C. A.; *Re Higginshaw Mills and Spinning Co.*, [1896] 2 Ch. 544, C. A.; *Re Bank of Hindustan, China and Japan, Ex parte Smith* (1867), 3 Ch. App. 125, 129; *Re Wanzer, Ltd.*, [1891] 1 Ch. 305. Ss. 142 and 211 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69) (see p. 538, *post*), are to be construed together (*Re Exhall Coal Mining Co., Ltd., supra*; *Re Lancashire Cotton Spinning Co., Ex parte Carnelley, supra*; *Re Wanzer, Ltd., supra*; *Re Higginshaw Mills and Spinning Co., supra*). As to whether s. 211 of the Act applies to an execution on a judgment against the company in an action brought by the liquidator, see *Re Bank of Hindustan, China and Japan, Ex parte Smith, supra*.

(*k*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 211 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 163], which is confined to companies registered in England or Ireland. The operation of s. 163 of the Act of 1862 was not confined to companies registered in England or Ireland. But see s. 273 of the Act of 1908.

(*l*) *Re Artistic Colour Printing Co., Ex parte Fourdrinier* (1882), 21 Ch. D. 510, C. A.; distinguish *Re New City Constitutional Club Co., Ex parte Pursell* (1887), 34 Ch. D. 646, C. A.

(*m*) *Hartford v. Amicable Mutual Life Assurance Co.* (1871), 5 I. B. C. L. 368.

(*n*) *Re Exhall Coal Mining Co., Ltd., supra*; *Re Lancashire Cotton Spinning Co., Ex parte Carnelley, supra*, where a mortgagee distrained under an attachment clause; *Re Higginshaw Mills and Spinning Co., supra*, where a mortgagee distrained for interest under an express power in the mortgage. The provision includes sequestration in Scotland (*Re Wanzer, Ltd., supra*).

(*o*) *Re Dry Docks Corporation of London* (1888), 39 Ch. D. 306, C. A.

equitable execution (*p*), to arrest of vessels by the Admiralty Court (*q*), and to an embargo on foreign assets (*r*).

When any execution, distress, or similar process is levied or put in force after the winding up has commenced, a stay will be granted or leave to proceed refused (*s*), except in very special circumstances, as where, after the winding up, the liquidator, without taking any objection, allows the plaintiff to go on and alter his position (*t*), or where the execution would have been put in force before the winding up commenced but for resistance made to the sheriff's officer (*a*).

The Act of 1908 does not import the bankruptcy provisions restricting creditors' rights under execution or attachment into the winding up of a company (*b*).

As the Crown is not bound by the Act, the court cannot prevent the Crown from proceeding against a company in liquidation, or from levying execution upon its property (*c*).

913. If execution or process of the same nature has been duly levied or put in force before the winding up commenced, so as to make the creditor a secured creditor, a stay will be refused or leave to proceed and to sell given (*d*), unless the liquidator pays the

(*p*) *Croschaw v. Lyndhurst Ship Co.*, [1897] 2 Ch. 154.

(*q*) The arrest of a ship to enforce a maritime lien is a sequestration, and the proper mode of enforcing it on a vessel belonging to a company is ordinarily by application in the winding up, and not by proceeding *in rem* in the Admiralty Court (*Re Australian Direct Steam Navigation Co.* (1875), L. R. 20 Eq. 325). But where the vessel has been mortgaged, and the mortgagees are not before the winding-up court, a person having a maritime lien is permitted to proceed *in rem* in the Admiralty Court (*Re Rio Grande Do Sul Steamship Co.* (1877), 5 Ch. D. 282, C. A.). As to arrest in Admiralty generally, see title ADMIRALTY, Vol. I., pp. 81 *et seq.* As to arrestment in Scotland *jurisdictionis fundandæ causâ*, see *Re West Cumberland Iron and Steel Co.*, [1893] 1 Ch. 713.

(*r*) *Flack's Case*, [1894] 1 Ch. 366; *Re South-Eastern of Portugal Rail. Co.* (1889), 17 W. R. 982; *Re Oriental Inland Steam Co., Ex parte Scinde Rail. Co.* (1874), 9 Ch. App. 557.

(*s*) *Re London and Devon Biscuit Co.* (1871), L. R. 12 Eq. 190; *Re Dimson's Estate Fire-Clay Co.* (1874), L. R. 19 Eq. 202; *Re Universal Disinfecter Co.* (1875), L. R. 20 Eq. 162; *Re Vron Colliery Co.* (1882), 20 Ch. D. 442, 445, C. A. (doubting *Re Bastow & Co.* (1867), L. R. 4 Eq. 681; *Re Imperial Steam and Household Coal Co.* (1868), 37 L. J. (CH.) 517; *Re Taylor, Ex parte Railway Steel and Plant Co.* (1878), 8 Ch. D. 183; *Re Richards & Co.* (1879), 11 Ch. D. 676; *Re Artistic Colour Printing Co., Ex parte Fourdrinier* (1882), 21 Ch. D. 510; *Croschaw v. Lyndhurst Ship Co., supra*.

(*t*) *Rudow v. Great Britain Mutual Life Assurance Society* (1881), 17 Ch. D. 600, C. A.

(*a*) *Re London Cotton Co.* (1866), L. R. 2 Eq. 53.

(*b*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 207; *Re Withernsea Brickworks* (1880), 16 Ch. D. 337, 341, C. A.; *Gorringer v. Irwell India Rubber and Gutta Percha Works* (1886), 34 Ch. D. 128, 133, 134, C. A.; compare *Mersey Steel and Iron Co. v. Naylor, Benson & Co.* (1884), 9 App. Cas. 434, 437. As to the bankruptcy provisions, see Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 45; and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 271 *et seq.*

(*c*) *Re Henley & Co.* (1878), 9 Ch. D. 469, 481, 482, C. A.; *Re West London Commercial Bank* (1888), 38 Ch. D. 364.

(*d*) *Re Great Ship Co., Ltd., Parry's Case* (1863), 4 De G. J. & Sm. 63, C. A.; *Ex parte Milwood Colliery Co.* (1876), 24 W. R. 898, C. A. (overruling *Re Hill Pottery Co.* (1866), L. R. 1 Eq. 649; and *Re Plas-yn-Mhouys Coal Co.* (1867), L. R. 4 Eq. 689); *Re West Cumberland Iron and Steel Co., supra*; *Re Opera, Ltd.*, [1891] 3 Ch. 260, C. A. As to a mortgagee submitting to have his rights determined in the winding up, see *Re Gaudet Frères Steamship Co.*

SECT. 16.  
Winding up  
by the  
Court.

When  
execution  
allowed  
to proceed.

Executions  
levied before  
winding up.

**SECT. 16.**  
**Winding up**  
**by the**  
**Court.**

debt (e), or there are special circumstances (f). Service of a garnishee order nisi is for this purpose equivalent to execution (g); but an order appointing a receiver by way of equitable execution does not *per se* make the judgment creditor obtaining it a secured creditor (h). If the writ has merely reached the hands of the sheriff, but he has not seized at the date of the commencement of the winding up, the court will not in the absence of special circumstances allow execution to be levied (i). An execution is not put in force until possession is taken under it (k).

Distress for  
rent etc.

**914.** A landlord is permitted to distrain for rent accrued due before or during the winding up where he is not a creditor and therefore cannot prove for the amount of his rent, as, for instance, where the company is not legally or equitably entitled to the lease (l), or is only equitably entitled to the lease (m), even although it has collaterally secured the rent (n). He is not allowed to distrain for rent accrued due before the winding up commenced in respect of which he is a creditor of the company, but must in that case prove his debt (o). If, however, a distress has been put in

(1879), 12 Ch. D. 882; *Re Dry Docks Corporation of London* (1888), 39 Ch. D. 306, 315, C. A.

(e) *Re Withernsea Brickworks* (1880), 16 Ch. D. 337, C. A.; *Re Dry Docks Corporation of London, supra*; *Re Hille India Rubber Co.* (No. 2), [1897] W. N. 20; *Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co.* (1897), 66 L. J. (CH.) 186, C. A.

(f) *Re Perkins Beach Lead Mining Co.* (1877), 7 Ch. D. 371; see *Re Hill Pottery Co.* (1866), L. R. 1 Eq. 649, where a sale by the execution creditors was restrained and a sale by the liquidator ordered, the creditors being declared to be entitled to a first charge on the proceeds for their debt and costs; *Re Plas-yn-Alhowys Coal Co.*, (1867), L. R. 4 Eq. 689; *Re Taylor, Ex parte Railway Steel and Plant Co.* (1878), 8 Ch. D. 183, in which cases a sale by the liquidator was ordered, the sheriff to go out of possession, but the creditors to have the same rights against the proceeds as if the sale had been made by the sheriff.

(g) *Re United English and Scottish Assurance Co., Ex parte Hawkins* (1868), 3 Ch. App. 787; *Re Stanhope Silkstone Collieries Co.* (1879), 11 Ch. D. 160, C. A.

(h) *Croshaw v. Lyndhurst Ship Co.*, [1897] 2 Ch. 154.

(i) *Ibid.*; *Re Dimson's Estate Fire-Clay Co.* (1874), L. R. 19 Eq. 202; *Re London and Devon Biscuit Co.* (1871), L. R. 12 Eq. 190; *Re Vron Colliery Co.* (1882), 20 Ch. D. 442, C. A. As to cases where the court has allowed the sheriff to seize and proceed, see *Re London Cotton Co.* (1866), L. R. 2 Eq. 53; *Re Bastow & Co.* (1867), L. R. 4 Eq. 681; *Re Taylor, Ex parte Railway Steel and Plant Co., supra*; *Re Richards & Co.* (1879), 11 Ch. D. 676; *Re Imperial Steam and Household Coal Co.* (1868), 18 L. T. 390.

(k) *Re London and Devon Biscuit Co.* (1871), L. R. 12 Eq. 190; *Re Waterloo Life etc. Assurance Co.* (No. 2) (1862), 31 Beav. 589. As to the rights of other creditors who have lodged their writs, see *Re Hille India Rubber Co.* (No. 2), *supra*; and title EXECUTION.

(l) *Re Traders' North Staffordshire Carrying Co., Ex parte North Staffordshire Rail. Co.* (1874), L. R. 19 Eq. 60, 67, 68.

(m) *Re Exhall Coal Mining Co. Ltd.* (1864), 4 De G. J. & Sm. 377, C. A.; *Re Regent United Service Stores* (1878), 8 Ch. D. 616, C. A.

(n) *Re Carriage Co-operative Supply Association, Ex parte Clemence* (1883), 23 Ch. D. 154; compare *Re Harpur's Cycle Fittings Co.*, [1900] 2 Ch. 731; *Re New City Constitutional Club Co., Ex parte Purcell* (1887), 34 Ch. D. 646, C. A.

(o) *Thomas v. Patent Lionite Co.* (1881), 17 Ch. D. 250, 257, C. A.; *Re Brown, Bailey and Dixon, Ex parte Roberts and Wright* (1881), 18 Ch. D. 649; *Re Traders' North Staffordshire Carrying Co., Ex parte North Staffordshire Rail. Co.* (1874), L. R. 19 Eq. 60; *Re Coal Consumers Association* (1876), 4 Ch. D. 625. This is the case even where the company is insolvent (*Re Coal Consumers Association, supra*; *Re Bridgewater Engineering Co.* (1879), 12 Ch. D. 181).

before the winding up commenced, although not completed by sale, the landlord is a secured creditor, and the distress is allowed to proceed unless the liquidator pays the debt (p). A distress is allowed in respect of rent accrued due after winding up where the company, with a view to its own benefit in working its property or carrying on its business, is in possession of the property (q), but not where it retains possession for the benefit of all persons interested in the property (r) or without a view to its own benefit (s), unless the liquidator has agreed to pay rent. Where the liquidator refuses to pay the rent, leave is given to the landlord to re-enter (t). Where a landlord is entitled to re-enter for non-payment of rent his proper remedy is to sue for recovery of possession (u). Where, however, he asks the court in a winding up for possession, and the claim is one against which the liquidator would have no defence, the court orders the liquidator to give up possession, and not to put the applicant to the expense of bringing an action (a). The landlord is allowed to distrain where the goods are mortgaged for more than their value, inasmuch as the liquidator has no interest (b).

A distress for rates put in before the winding up commenced is allowed to proceed unless the liquidator pays the rates (c). If the liquidator has beneficially occupied premises within the meaning of those words in rating cases (d), he must pay in full the rates becoming due in respect of such premises after the winding up commenced, or leave will be given to distrain for them (e).

**SECT. 16.**  
**Winding-up**  
**by the**  
**Court.**

Recovery of  
possession.

Rates.

(p) *Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co.*, [1897] 1 Ch. 373, C. A.; see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 209 (4).

(q) *Re Lundy Granite Co., Ex parte Heaven* (1871), 6 Ch. App. 462; *Re North Yorkshire Iron Co.* (1878), 7 Ch. D. 661; *Re Silkstone and Dodworth Coal and Iron Co.* (1881), 17 Ch. D. 158; *Re South Kensington Co-operative Stores* (1881), 17 Ch. D. 161; *Re Brown, Bailey and Dixon, Ex parte Roberts and Wright*, (1881), 18 Ch. D. 649.

(r) *Re Progress Assurance Co., Ex parte Liverpool Exchange Co.* (1870), L. R. 9 Eq. 370; *Re Bridgewater Engineering Co.*, (1879), 12 Ch. D. 181; *Re Lancashire Cotton Spinning Co., Ex parte Carnelley* (1887), 35 Ch. D. 656, C. A.; *Shackell & Co. v. Chorlton & Sons*, [1895] 1 Ch. 378; *Re Higginshaw Mills and Spinning Co.*, [1896] 2 Ch. 544, C. A.

(s) *Re North Yorkshire Iron Co., supra*; *Re South Kensington Co-operative Stores, supra*; *Re Brown, Bailey and Dixon, Ex parte Roberts and Wright, supra*; *Re Oak Pits Colliery Co.* (1882), 21 Ch. D. 322, C. A.; *Re House and Land Investment Trust, Ex parte Smith* (1894), 42 W. R. 572.

(t) *General Share and Trust Co. v. Wetley Brick and Pottery Co.* (1882), 20 Ch. D. 260, C. A., where the landlord applied for leave to distrain, or, in the alternative, to re-enter.

(u) *Re Strand Hotel Co.*, [1868] W. N. 2; see further, title LANDLORD AND TENANT.

(a) *General Share and Trust Co. v. Wetley Brick and Pottery Co., supra*; *Re New North Staffordshire Coal and Iron Co.*, [1884] W. N. 106.

(b) *Re New City Constitutional Club Co., Ex parte Purcell* (1887), 34 Ch. D. 646, C. A.; *Re Harpur's Cycle Fittings Co.*, [1900] 2 Ch. 731.

(c) *Re Dry Docks Corporation of London* (1888), 39 Ch. D. 306, C. A.

(d) See title RATES AND RATING.

(e) *Re International Marine Hydropathic Co.* (1884), 28 Ch. D. 470, C. A.; *Re Wearmouth Crown Glass Co.* (1882), 19 Ch. D. 640; *Re National Arms and Ammunition Co.* (1885), 28 Ch. D. 474, C. A.; *Re Blazer Fire Lighter, Ltd.*, [1895] 1 Ch. 402; compare *Re British Fullers' Earth Co., Gibbs v. British Fullers' Earth Co.* (1901), 17 T. L. R. 232; *Re Watson, Kipling & Co.* (1883), 23 Ch. D. 500, where it was held that the occupation of the liquidator was not beneficial, and an application for payment of rates in full was refused.

**SECT. 16.**  
**Winding up**  
**by the**  
**Court.**

Proceedings  
against com-  
pany after  
winding-up  
order.

The owner of a tithe rentcharge will be allowed to distrain for arrears thereof, as he cannot prove for them (*f*).

A distress levied after the winding up has commenced is void, and will be restrained (*g*).

**915.** Except by leave of the winding-up court (*h*), and subject to such terms as it may impose (*i*) when a winding-up order has been made, no action or proceeding is to be proceeded with or commenced against the company by a person capable of proving in the winding up (*j*); or, in the case of a company registered under Part VII. of the Act of 1908 (*k*), against either the company or any contributory in respect of any of its debts (*l*); or in the case of an unregistered company against any contributory in respect of any of its debts (*m*). The proceedings which may be restrained, or as to which leave to commence or proceed is to be obtained, must be against the company or against its liquidator in that capacity, including, in the case of a company registered under Part VII. of the Act of 1908, or of an unregistered company, an action against a contributory in that capacity, to enforce a debt of the company (*n*). Applications for rectification of the register (*o*), police court proceedings as to rates or penalties (*p*), and sales, after the winding up has commenced, under executions previously levied (*q*), are included; but not a counterclaim against the company, as being in the nature of a defence (*r*); or an inquiry under the Tramways Act, 1870, as to the solvency of promoters of a tramways company in liquidation (*s*).

(*f*) *Re Trimsaran Coal, Iron, and Steel Co.* (1876), 24 W. R. 900.

(*g*) *Re Traders' North Staffordshire Carrying Co., Ex parte North Staffordshire Rail. Co.* (1874), L. R. 19 Eq. 60; *Re Progress Assurance Co., Ex parte Liverpool Exchange Co.* (1870), L. R. 9 Eq. 370.

(*h*) See p. 540, *post*.

(*i*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 142 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 87].

(*j*) *Re Trimsaran Coal, Iron, and Steel Co., supra*; *Re Lundy Granite Co., Ex parte Heaven* (1871), 6 Ch. App. 462; *Re Regent United Service Stores* (1878), 8 Ch. D. 616. In the case of a compulsory liquidation the creditor is debarred from proceeding by way of action, unless he can show grounds for granting him leave to do so (*Currie v. Consolidated Kent Collieries Corporation*, [1906] 1 K. B. 134, 138).

(*k*) See p. 39, *ante*.

(*l*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 266 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 198].

(*m*) *Ibid.*, s. 271 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 202]. See *Re Great Ship Co., Ltd., Parry's Case* (1863), 4 De G. J. & Sm. 63, C. A.; *Gray v. Raper* (1866), L. R. 1 C. P. 694. Nor, apparently, can proceedings be commenced or continued, without leave, against the company; see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 273.

(*n*) *Re Onward Building Society*, [1891] 2 Q. B. 463, 483, C. A.; *Re South of France Pottery Works Syndicate* (1877), 36 L. T. 651. Actions against directors are not included (*Re New Zealand Banking Corporation* (1869), 39 L. J. (CH.) 128). Nor are proceedings against the company's co-defendant (*Wells v. Estates Investment Co.* (1867), 15 W. R. 762).

(*o*) *Re Onward Building Society, supra*; see, however, *Hall v. Old Talargoch Lead Mining Co.* (1876), 3 Ch. D. 749.

(*p*) *Re Flint, Coal, and Cannel Co.* (1887), 56 L. J. (CH.) 232; *Re Britain Medical and General Life Assurance Association* (1886), 32 Ch. D. 503.

(*q*) *Re Perkins Beach Lead Mining Co.* (1877), 7 Ch. D. 371.

(*r*) *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1882), 9 Q. B. D. 648, C. A.

(*s*) *Re Pontypridd and Rhondda Valleys Tramways Co.* (1889), 58 L. J. (CH.) 536.

**SECT. 16.**  
**Winding up**  
**by the**  
**Court.**

Costs of  
proceedings.

Where the court stays proceedings or refuses leave to proceed, it generally requires the liquidator to admit the creditor to prove for the amount of his claim, and his costs of action and of the application to stay (*t*), or the costs until he had notice of the winding up (*u*). If an action is commenced after notice of the winding up, the creditor may be ordered to pay the costs thereafter incurred (*a*); and if the company, before the application to stay is made, offers to allow the creditor to prove for his debt and costs, he is not allowed his costs of appearing upon the application to stay (*b*).

Where, at the time when the winding-up order is made, an appeal by the company is pending in the Court of Appeal, which proves successful, the unsuccessful party can appeal to the House of Lords without obtaining the leave of the winding-up court (*c*).

Proceedings will be allowed to continue where they are to enforce a mortgage or security upon the company's property, unless the liquidator offers to give all that the mortgagee can obtain by his proceedings, or an order in the winding up has already given him that relief (*d*); or where the company is a necessary party to an action against it and other persons (*e*); or where an action is the most convenient method of trying a question (*f*); or where a shareholder has commenced proceedings for rescission and rectification of the register before the winding up (*g*); or where the

When pro-  
ceedings  
allowed to  
continue.

(*t*) *Re Poole Firebrick and Blue Clay Co.* (1873), L. R. 17 Eq. 268; *Walker v. Banagher Distillery Co.* (1875), 1 Q. B. D. 129.

(*u*) *Re Life Association of England* (1864), 34 L. J. (CH.) 64; *Re Keynsham Co.* (1863), 33 Beav. 123.

(*a*) *Re East Kent Shipping Co.* (1868), 18 L. T. 748; *Freeman v. General Publishing Co.*, [1894] 2 Q. B. 380.

(*b*) *Rose v. Garnden Lodge Coal Co.* (1878), 3 Q. B. D. 235.

(*c*) *Humber & Co. v. John Griffiths Cycle Co.* (1901), 85 L. T. 141, H. L.

(*d*) *Re Lloyd (David) & Co., Lloyd v. Lloyd (David) & Co.* (1877), 6 Ch. D. 339, C. A.; *Re Longendale Cotton Spinning Co.* (1878), 8 Ch. D. 150, 154; *Re Hamilton's Windsor Ironworks Co., Ex parte General Credit and Discount Co.* (No. 2) (1879), 27 W. R. 827, C. A.; *Moor v. Anglo-Italian Bank* (1879), 10 Ch. D. 681; *Re Pound (Henry), Son, and Hutchins* (1889), 42 Ch. D. 402, C. A. (debenture-holders); *Re Wanzer, Ltd.*, [1891] 1 Ch. 305; *Re West Cumberland Iron and Steel Co.*, [1893] 1 Ch. 713; *Re Stubbs (Joshua), Ltd., Barney v. Stubbs (Joshua), Ltd.*, [1891] 1 Ch. 475, C. A. (debenture-holders); *Strong v. Carlyle Press*, [1893] 1 Ch. 268, C. A. (debenture-holders); *Re Blakely Ordnance Co., Blakely v. Dent* (1867), 15 W. R. 663, C. A. (unpaid vendor's lien); compare *Thames Plate Glass Co. v. Land and Sea Telegraph Co.* (1870), L. R. 11 Eq. 248; *Re Compagnie Générale de Bellegarde v. Compagnie Générale de Bellegarde* (1876) 2 Ch. D. 181.

(*e*) *Re Rio Grande Do Sul Steamship Co.* (1877), 5 Ch. D. 282; *Re London, Bombay and Mediterranean Bank, McEwen v. London, Bombay and Mediterranean Bank* (1866), 15 W. R. 245; *Re Breechloading Armoury Co., Hagell v. Currie*, [1867] W. N. 75; *Re Marine Investment Co.* (1868), 17 L. T. 535.

(*f*) *Wyley v. Exhall Coal Mining Co.* (1864), 33 Beav. 538 (an action to restrain a trespass); *Re Contract Corporation, Ex parte Bateman* (1866), 15 W. R. 118, 245, C. A.; *Re Peace (Joseph) & Co.*, [1873] W. N. 127 (action for damages for diversion of water).

(*g*) *Henderson v. Lacon* (1867), L. R. 5 Eq. 249; *Hall v. Old Talargoch Lead Mining Co.* (1876), 3 Ch. D. 749; *Marshall v. Glamorgan Iron and Coal Co.* (1868), L. R. 7 Eq. 129, 132; *Cocksedge v. Metropolitan Coal Consumers Association, Ltd.* (1891), 65 L. T. 432, C. A. Where a company in liquidation is plaintiff, the defendant may put in a counterclaim in the nature of a defence without obtaining the leave of the court (*Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1882), 9 Q. B. D. 648, 656, C. A.; affirmed (1884), 9 App. Cas. 434).

**SECT. 16.**  
**Winding up by the Court.**

claim is for specific performance (*h*), or for recovery of possession (*i*). Parties to proceedings which are continued by leave are not relieved from cross-examination in the winding up as to the matters in dispute (*k*).

An application to commence or proceed with actions and proceedings against a company after a winding-up order must be made to the winding-up court (*l*), and must not be made *ex parte* (*m*). The Court of Appeal does not interfere where the winding-up judge has given leave to commence or to proceed with an action (*n*), though leave has been given in the Court of Appeal after being refused below (*o*).

Proceedings outside the jurisdiction.

**916.** The winding-up court will restrain a person within its jurisdiction from taking or continuing actions or proceedings out of the jurisdiction (*p*). It will also restrain a person domiciled in Scotland or Ireland from taking or continuing proceedings there (*q*), unless by means of such proceedings he has, before the winding up commenced, become a secured creditor (*r*). Where, however, a person has obtained a judgment *in rem* in a foreign court against the property of a company in liquidation, the liquidator cannot maintain an action against him to recover the amount received by him under the judgment, even though he be a British subject domiciled in England (*s*).

Transfer to winding-up judge.

**917.** Where a winding-up order has been made in the High Court, the judge dealing with the winding up has power, without further consent, to order the transfer to him of any action, cause, or

(*h*) *Thames Plate Glass Co. v. Land and Sea Telegraph Co.* (1870), L. R. 11 Eq. 248.

(*i*) *Re Strand Hotel Co.*, [1868] W. N. 2.

(*k*) *Re Contract Corporation, Ex parte Bateman* (1866), 15 W. R. 245, C. A.; *Massey v. Allen* (1878), 9 Ch. D. 164.

(*l*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 142. This section refers to "the court" which by *ibid.*, s. 285, means when used in relation to a company, unless the context otherwise requires, the court having jurisdiction to wind up the company. After the winding-up order has been made, the judge dealing with the winding up may obtain control of actions by transferring them under the power of transfer (see *infra*) given him by Companies (Winding-up) Rules, r. 42 (1), which extends and supersedes R. S. C., Ord. 49, r. 5, compare *Wilson v. Natal Investment Co.* (1867), 36 L. J. (CH.) 312.

(*m*) *Western and Brazilian Telegraph Co. v. Bibby* (1880), 42 L. T. 821.

(*n*) *Thames Plate Glass Co. v. Land and Sea Telegraph Construction Co.* (1871), 6 Ch. App. 643.

(*o*) *Re St. Cuthbert's Lead Smelting Co.*, [1866] W. N. 84, 90, C. A.; *Re London, Bombay, and Mediterranean Bank, McEwen v. London, Bombay and Mediterranean Bank*, [1866] W. N. 363, 407, C. A.; *Re Strand Hotel Co.*, [1868] W. N. 2.

(*p*) *Re Oriental Inland Steam Co., Ex parte Scinde Rail. Co.* (1874), 9 Ch. App. 557; *Re North Carolina Estate Co.* (1889), 5 T. L. R. 328; *Flack's Case*, [1894] 1 Ch. 369 (terms imposed upon the company); *Re Belfast Ship Owners' Co.*, [1894] 1 I. R. 321, C. A.; *Re Jenkins & Co.* (1907), 51 Sol. Jo. 715; compare *Re Maudslay, Sons & Field, Maudslay v. Maudslay, Sons & Field*, [1900] 1 Ch. 602.

(*q*) *Re Middlesbrough Firebrick Co.* (1885), 52 L. T. 98; *Re Hermann Loog, Ltd.* (1887), 36 Ch. D. 502; *Re Queensland Mercantile Agency Co.* (1888), 58 L. T. 878; *Re International Pulp and Paper Co.* (1876), 3 Ch. D. 594; *Re Thurso New Gas Co.* (1889), 42 Ch. D. 486.

(*r*) *Re West Cumberland Iron and Steel Co.*, [1893] 1 Ch. 713.

(*s*) *Minna Craig Steamship Co. v. Chartered Mercantile Bank of India, London and China*, [1897] 1 Q. B. 460, C. A.

matter pending in any other court or division brought or continued by or against the company. Any action or proceeding against the company by a mortgagee or debenture-holder for the purpose of realising his security, or by any other person for the purpose of enforcing a claim against its assets or property, which is pending in the High Court, is without further order to be transferred (*t*).

**SECT. 16.**  
**Winding-up by the Court.**

(ii.) *Transfer of Winding-up Proceedings.*

**918.** The winding up of a company by the court, or any proceedings therein, may at any time and at any stage, and either with or without application from any of the parties thereto, be transferred from one court to another, or may be retained in the court in which the proceedings were commenced, although it is not the court in which they ought to have been commenced (*u*). Thus, the judge of the High Court may at any time order the proceedings in any other court to be transferred to the High Court, or any proceedings in the High Court to be transferred to any other court (*w*); and the judge of any court other than the High Court or a palatine court may at any time order any proceedings which have been commenced or are pending in his court to be transferred to any court which has jurisdiction to order the winding up of a company, not being the High Court or a palatine court (*x*).

Power to transfer.

Notice of the application for transfer must, before the hearing, be served by the applicant on the official receiver of the court in which the proceedings are pending, and on the official receiver of the court to which they are sought to be transferred (*y*).

Notice of application.

A transfer may be made where a petition has been presented, although a winding-up order on it has not been made (*a*), and may be ordered even after the petition has been opened (*b*).

(*t*) Companies (Winding-up) Rules, r. 42 (1), which follows to some extent the wording of R. S. C., Ord. 49, r. 5. Where any action brought by or against a company is so transferred to the judge of the High Court, the Registrar in Companies Winding-up may, under the general or special directions of the judge, hear, determine and deal with any application, matter, or proceeding which, if the action had not been transferred, would have been determined in chambers, and these provisions apply to the proceedings in any action in which by the Rules of the Supreme Court or otherwise the chamber proceedings are directed to be dealt with by the registrar (*ibid.*, r. 42 (2), which supersedes R. S. C., Ord. 49, r. 5 A.). In the case of applications in chambers in actions so transferred, where the practice in winding up is different from the practice in the Chancery Division, the practice in winding up prevails (Companies (Winding-up) Rules r. 42 (1)). Every writ of summons in a debenture-holder's action must be entitled in the matter of the company, and where a company is being compulsorily wound up in the High Court, such action is to be assigned to the judge having jurisdiction in the matter of the winding-up (Practice Masters' Rules, r. 3).

(*u*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 133 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 3 (1)].

(*w*) *Ibid.*, s. 133 (2); Companies (Winding-up) Rules, r. 43. As to transfer to the stannaries jurisdiction, see *Re New Terras Tin Mining Co.*, [1894] 2 Ch. 344.

(*x*) Companies (Winding-up) Rules, r. 44.

(*y*) *Ibid.*, r. 45.

(*a*) *Re Laxon & Co.*, [1892] 3 Ch. 31, C. A.

(*b*) *Re East Dulwich No. 295 Starr-Bowkett Building Society* (1890), 39 W. R. 32.



**SECT. 16.** **Winding up by the Court.** **919.** The transfer can only be made to a court which has winding-up jurisdiction (c). In the High Court, on a petition which might have been presented in the county court, a winding-up order will be made and the proceedings at the same time will be transferred to the proper county court (d), unless the proceedings are wilfully taken in the wrong court, when they will be dismissed (e). Any particular proceeding in the winding up, for instance, a misfeasance summons, may be transferred (f).

To what courts.

Proceedings after transfer.

When an order for transfer of proceedings has been made, the person on whose application the transfer has been made must lodge with the registrar of the court to which the proceedings are transferred a sealed copy of the order of transfer. The records of the proceedings must also be transmitted to the registrar, who, as soon as he has received them, must give notice of the transfer to the official receiver of his court. The official receiver, who becomes the official receiver in the proceedings, has to give notice of the transfer to the Board of Trade, and the transferred proceedings receive a new distinctive number (g).

Transfer from county court.

**920.** No application for the transfer of a winding up or any proceedings therein from a county court to the High Court is entertained until the list of parties who have given notice of their intention to attend the hearing of the petition has been closed. The applicant for such transfer must give four days' notice by postal letter of his application to the petitioner and the respondent, and to all parties in the list, stating that, unless notice is given to him by any of the above-mentioned parties of intention to oppose, the application will be taken as not objected to by them. No costs are allowed to any parties appearing to support or oppose such a transfer, unless for special reasons the judge otherwise determines (h).

When the Lord Chancellor by order excludes a county court from having winding-up jurisdiction, or attaches the district or any part of the district of a county court to the High Court, or any other county court, or detaches the district, or any part of the district, of any county court, from the district and jurisdiction of the High Court, any winding-up matters pending in the court or district to which the order relates are to become transferred to such court as is mentioned for the purpose in the order. The rules as to transfer of proceedings thereupon apply to the transfer of such pending proceedings in all respects as if the proceedings had been transferred by order of a court having power to transfer proceedings (i).

(c) *Re Real Estates Co.*, [1893] 1 Ch. 398

(d) *Re Milford Haven Shipping Co.*, [1895] W. N. 16; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 43, 48, 312.

(e) *Re Brightmore, Ex parte May* (1884), 14 Q. B. D. 37.

(f) *R. v. East Stonehouse County Court Judge and How* (1891), 65 L. T. 730, C. A. A proceeding in court on a voluntary winding up may be transferred (*ibid.*).

(g) Companies (Winding-up) Rules, r. 46.

(h) Practice Direction, May, 1892.

(i) Companies (Winding-up) Rules, r. 47; as to county courts having jurisdiction, see p. 391, *ante*.

(iii.) *Stay of Winding-up Proceedings.*

**921.** The court may at any time after an order for winding up on the application of any creditor or contributory (j), and on proof to its satisfaction that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as it thinks fit (k). The order to stay may reserve liberty to any dissentient creditor or the official receiver to apply within a limited time to remove the stay (l). The proceedings on a compulsory order made after the commencement of a voluntary winding up may be stayed (if no creditor objects) so as to allow the voluntary winding up to continue (m). Frequently a stay is applied for in pursuance of a scheme of arrangement sanctioned by the court (n).

In the exercise of its jurisdiction to stay, the court, so far as possible, acts upon the principles applicable in exercising jurisdiction to rescind a receiving order or annul an adjudication in bankruptcy against an individual (o). The court refuses, therefore, to act upon the mere assent of the creditors in the matter, and considers not only whether what is proposed is for the benefit of the creditors, but also whether the stay will be conducive or detrimental to commercial morality and to the interests of the public at large. In particular, the court will have regard to the following facts:—That directors have not complied with their statutory duties as to giving information to the official receiver or furnishing a statement of the affairs; that there has been an undisclosed agreement between the promoter and the vendor to the company as to the participation by the former in fully-paid shares forming the consideration for the purchase of property by the company on its formation; that the promoter has made gifts of fully-paid shares to the directors; that there are any other matters connected with the promotion, formation, or failure of the company, or the conduct of its business or affairs, which appear to the court to require investigation. The same principles are apparently applicable whether the company has or has not invited

(j) In the case of an application by an alleged contributory, he may be required to admit that he is a contributory before an order is made on his application (*Re Continental Bank Corporation, Re London and Mediterranean Bank*, [1867] W. N. 114, 178, C. A.).

(k) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 144 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 89]. The order may also be made where the winding up is voluntary or under supervision (*Re South Barrule Slate Quarry Co.* (1869), L. R. 8 Eq. 688; *Re Steamship "Titian" Co.* (1888), 58 L. T. 178; *Re Schanschieff Electric Battery Syndicate, Ltd.*, [1888] W. N. 166). An order may be made under the section after the return has been made to the registrar of the conclusion of a voluntary winding up, and the period of three months after the expiration of which dissolution will follow (see p. 592, *post*) may thus in effect be extended (*Re Eastern Investment Co., Ltd.*, [1905] 1 Ch. 352).

(l) *Re Buxters, Ltd.*, [1898] W. N. 60.

(m) *Re Bristol Victoria Potteries Co.* (1872), 20 W. R. 569.

(n) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 120; see *Re Western of Canada Oil, Lands and Works Co.*, [1874] W. N. 148; *Re Lyric Syndicate* (1900), 17 T. L. R. 162.

(o) *Re Telescriptor Syndicate*, [1903] 2 Ch. 174; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 90—93.

**SECT. 16.** **Winding up by the Court.**

Order by court.

Considerations in granting order.

**SECT. 16.** Winding up by the Court. the public to subscribe for its shares—at any rate, if any shares held by those originally connected with a company of the latter description have been transferred to persons not having full knowledge of what has been previously done (*p*).

(iv.) *Special Case from County Court.*

Case stated by county court judge.

**922.** If any question arises in any winding-up proceeding in a county court which all the parties to the proceeding, or which one of them and the judge of that court, desire to have determined in the first instance in the High Court, the county court judge is to state the facts in the form of a special case for the opinion of the High Court. The special case and the proceedings, or such of them as may be required, are thereupon to be transmitted to the High Court for the purposes of the determination (*q*).

**SUB-SECT. 13.—Fraudulent Preference; Assignments for Benefit of Creditors.**

(i.) *Fraudulent Preference.*

Fraudulent preference.

**923.** Any conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property which would, if made or done by or against an individual, be deemed in his bankruptcy a fraudulent preference is, if made or done by or against a company, to be deemed, in the event of its being wound up, a fraudulent preference of its creditors, and is invalid accordingly. In this connection the presentation of the petition for winding up in the case of a winding up by or subject to the supervision of the court, and the resolution for winding up in the case of a voluntary winding up not under supervision, is deemed to correspond with the act of bankruptcy in the case of an individual (*r*).

This provision applies to winding up, whether compulsory or under supervision or voluntary, the bankruptcy law for the time being applicable to a bankrupt individual (*s*), but does not import into it the mutual credit clause of the bankruptcy law (*t*).

Meaning of the term.

**924.** The preference is deemed fraudulent when the substantial and dominant motive in the mind of the debtor (*u*) was to prefer (*a*) one creditor or particular creditors.

(*p*) *Re Telescriptor Syndicate*, [1903] 2 Ch. 174; and see title **BANKRUPTCY AND INSOLVENCY**, Vol. II., pp. 90—93.

(*q*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 133 (3) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 3 (3)]. A similar provision is contained in the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 97 (3), as to which see title **BANKRUPTCY AND INSOLVENCY**, Vol. II., p. 313. And see *Re Portsea Island Building Society*, [1893] 3 Ch. 205; *Re Ferndale Industrial Co-operative Society*, [1894] 1 Q. B. 828.

(*r*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 210 (1), (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 164]; *Re Russell Hunting Record Co., Ltd.*, [1910] W. N. 142.

(*s*) *Re Liverpool and London Guarantee and Accident Insurance Co., Mason, Gallagher, and Slater's Case* (1882), 30 W. R. 378; *Re Blackpool Motor Car Co., Ltd., Hamilton v. Blackpool Motor Car Co., Ltd.*, [1901] 1 Ch. 77; *Re Stenotyper, Ltd., Hastings Brothers v. Stenotyper, Ltd.*, [1901] 1 Ch. 250; see **BANKRUPTCY AND INSOLVENCY**, Vol. II., pp. 279—287.

(*t*) *Kent's Case* (1888), 39 Ch. D. 259, C. A.; see p. 514, *ante*.

(*u*) That is, the company acting, as a rule, by its directors (*Sharp v. Jackson* [1899] A. C. 419).

(*a*) *Kent's Case*, *supra*.

**SECT. 16.** Winding up by the Court.

A preference made to shield the company from the legal consequences of some prior act is not a fraudulent preference (*b*), though a mere sense of moral obligation is not sufficient to prevent the preference being fraudulent (*c*). Although *bond fide* pressure by independent persons or by the operation of the debtor's mind will prevent the preference being fraudulent in the case of an individual, pressure by the director of a debtor company prior to his resignation of office is not so regarded (*d*).

The preference, to be void, must be in favour of a creditor (*e*). Any person is a creditor who at the date of the impeached transaction is entitled, if winding up supervenes, to prove and to share in the distribution of the assets. Thus, security given to a surety before he has been called upon to pay may be a fraudulent preference (*f*). Where, however, a director is personally liable for a debt due by the company to a third person, the giving of a security to the third person is not a fraudulent preference, although this is done with the object of relieving the director (*g*).

Payments to creditors.

Where a director pays money on shares in advance of calls, and simultaneously receives payment of his director's fees while the company is in embarrassed circumstances, the payment of fees may be set aside as a fraudulent preference (*h*). The issue of debentures to outsiders in satisfaction of existing debts is not necessarily a fraudulent preference (*i*); but where a director takes debentures to secure an amount due to him, or for which he is a surety, and postpones registration until within three months before the winding up, the issue is a fraudulent preference (*k*).

Payments to directors.

Where any payment is void as a fraudulent preference of directors or other officers of the company, misfeasance proceedings may be taken to recover the amount paid (*l*). Where moneys which were

(*b*) *Sharp v. Jackson*, [1899] A. C. 419; compare *Re Patent File Co., Ex parte Birmingham Banking Co.* (1870), 6 Ch. App. 83. A payment made under an honest but mistaken belief in a legal obligation to make it is not a fraudulent preference (*Re Vautin, Ex parte Saffery*, [1900] 2 Q. B. 325).

(*c*) *Buckley's Case*, [1899] 2 Ch. 725; compare *Re Lake, Ex parte Dyer*, [1901] 1 K. B. 710, C. A.

(*d*) *Gaslight Improvement Co. v. Terrell* (1870), L. R. 10 Eq. 168; compare *Sykes' Case* (1872), L. R. 13 Eq. 255; *Habershon's Case* (1868), L. R. 5 Eq. 286; *Adamson's Case* (1874), L. R. 18 Eq. 670.

(*e*) *Re Gwaur-y-Gweithyr Industrial and Provident Society, Ltd., Dovey v. Morgan*, [1901] 2 K. B. 477.

(*f*) *Re Blackpool Motor Car Co., Ltd., Hamilton v. Blackpool Motor Car Co., Ltd.*, [1901] 1 Ch. 77. But where a director-surety who held unpaid shares made a payment on account of his shares, although there had been no call, and such payment was accompanied by a corresponding payment to the creditor, the transaction was held unimpeachable (*Poole, Jackson, and Whyte's Case* (1878), 9 Ch. D. 322, C. A.); and see *Kent's Case* (1888), 39 Ch. D. 259, C. A.

(*g*) *Re Stenotyper, Ltd., Hastings Brothers v. Stenotyper, Ltd.*, [1901] 1 Ch. 250.

(*h*) *Re Washington Diamond Mining Co.*, [1893] 3 Ch. 95, C. A.; *Sykes' Case, supra*; see *Re Auriferous Properties, Ltd.*, [1898] 1 Ch. 691.

(*i*) *Re Inns of Court Hotel Co.* (1868), L. R. 6 Eq. 82. Where a company has acquired an insolvent business, and has agreed to indemnify the vendor against his debts, the issue of debentures in satisfaction thereof is not a fraudulent preference, although the company is wound up within three months after its incorporation (*Seligman v. Prince & Co.*, [1895] 2 Ch. 617, C. A.).

(*k*) *Re Jackson and Bassford, Ltd.*, [1906] 2 Ch. 467.

(*l*) *Re Washington Diamond Mining Co., supra*.

SECT. 16.  
Winding up  
by the  
Court.

advanced by directors have been repaid to them to discharge pressing claims against the company, proceedings to set aside the transaction as a fraudulent preference cannot be sustained by debenture-holders having only a floating charge (*m*).

(ii.) *Deeds of Assignment.*

For benefit of  
creditors.

925. A conveyance or assignment by a company of all its property to trustees for the benefit of all its creditors is void (*n*).

For arrange-  
ment with  
creditors.

The Deeds of Arrangement Act, 1887 (*o*), does not apply to arrangements made by a company, which may validly enter into an unregistered agreement for payment of its debts by instalments. All the creditors may take advantage of such an agreement although some of them have not assented to it (*p*).

SUB-SECT. 14.—*Enforcement of Orders and Appeal.*

(i.) *Enforcing Orders.*

How enforce-  
able.

926. Every order of a court having jurisdiction to wind up a company, made in the exercise of the powers conferred by the Act of 1908 and rules, may be enforced by such court as if it were a judgment or order made in the exercise of its ordinary jurisdiction (*q*).

Every court having winding-up jurisdiction has for the purposes of that jurisdiction all the powers of the High Court (*r*).

Every order of a county court made in exercise of the powers conferred by the Act of 1908 and the rules, and every process issued therein, may be enforced, executed, and dealt with not only by such court, but by any county court, whether it has or has not jurisdiction to wind up a company, as if the order or process were made or issued for the enforcement of a judgment or order made by the last-mentioned court in the exercise of its ordinary jurisdiction (*s*).

(*m*) *Willmott v. London Celluloid Co.* (1886), 34 Ch. D. 147, C. A.

(*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 210 (3) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 164].

(*o*) 50 & 51 Vict. c. 57; see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 329 *et seq.*

(*p*) *Re Rileys, Ltd., Harper v. Rileys*, [1903] 2 Ch. 590.

(*q*) Companies (Winding-up) Rules, 1909, r. 24 (1). As to orders of the High Court, see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 178 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 120]; R. S. C., Ord. 42, r. 24; and title PRACTICE AND PROCEDURE. As to enforcing orders of the Lancaster Palatine Court out of the jurisdiction of that court, see *Dunmore v. Wharam*, [1898] W. N. 15. As to making an order of the House of Lords an order of the Chancery Division, see *British Dynamite Co. v. Krebs* (1879), 11 Ch. D. 448.

The court exercising the stannaries jurisdiction has, in addition to its ordinary powers, the same power of enforcing its orders as the High Court has (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 178 (2); and see p. 672, *post*).

(*r*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 131 (6) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 1 (6)].

(*s*) Companies (Winding-up) Rules, r. 24. As to enforcing orders in county courts, see title COUNTY COURTS, Vol. VIII., pp. 550, 578.

SECT. 16.  
Winding up  
by the  
Court.

Balance  
order.

927. A balance order (*t*) cannot be enforced by *feri facias*, unless it directs payment to the liquidator (*u*). A county court, however, cannot issue a writ of *feri facias* addressed to the sheriff to enforce an order directing payment to the liquidator of moneys received on behalf of the company (*a*). If personal representatives of a contributory make default in paying any money ordered to be paid by them, proceedings may be taken to administer the real and personal estate of the deceased contributory, or either of them, and to compel payment of the money due out of the estate (*b*).

928. Any order made by the court in England for or in the course of winding up a company can be enforced in Scotland and Ireland in the courts that would respectively have jurisdiction in respect of that company if registered in Scotland or Ireland in the same manner in all respects as if the order had been made by them (*c*). An office copy of the order must be produced to the proper officer of the Scotch or Irish court, and its production is sufficient evidence of the order. The Scotch or Irish court must thereupon take the requisite steps in the matter for enforcing the order in the same manner as if it had been made by that court (*d*).

Enforcement  
in Scotland  
and Ireland.

(*t*) See p. 502, *ante*.

(*u*) *Re Leeds Banking Co.* (1866), 1 Ch. App. 150.

(*a*) *Re Bassett's Plaster Co.*, [1894] 2 Q. B. 96.

(*b*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 126 (3).

(*c*) *Ibid.*, s. 180 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 122]. As to the court having jurisdiction to wind up companies registered in Ireland, see *ibid.*, s. 134. As to the courts in Scotland, see *ibid.*, ss. 135, 136. In all winding-up proceedings all courts, judges, and persons judicially acting, and all officers, judicial or ministerial, of any court, or employed in enforcing the process of any court, are to take judicial notice of the signatures of officers of the English, Scotch, and Irish winding-up courts, and the seals of those courts when attached to the documents issued under the Act, or official copies thereof (*ibid.*, s. 225). An order on appeal may be enforced in Scotland or Ireland, and therefore the court will not stay execution pending appeal on the ground that the person to whom money is ordered to be paid is in Scotland or Ireland (*Re Queensland Mercantile and Agency Co., Ex parte Union Bank of Australia*, [1891] W. N. 132). As to whether a claimant resident in Scotland in an English winding up may be required to give security for costs, notwithstanding the section, see *Fontaine's Case* (1889), 41 Ch. D. 118, C. A. In like manner orders, interlocutors, and decrees made by the court in Scotland for or in the course of winding up a company are to be enforced in England and Ireland, and orders made by the court in Ireland for or in the course of winding up a company are to be enforced in England and Scotland, by the courts which would respectively have jurisdiction in respect of that company if registered in that part of the United Kingdom where the order is required to be enforced, and in the same manner in all respects as if the order had been made by those courts (Companies (Consolidation) Act, 1908, s. 180 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 122]). As to enforcing payment of calls in a winding up by the court in Scotland, see *ibid.*, s. 179 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 121], 181 (4) [Companies Act, 1866 (49 & 50 Vict. c. 23), s. 6]. An order of the Scotch or Irish court must, in order to be enforced in England, be made an order of the court having jurisdiction in this country (*Re Hollyford Copper Mining Co.* (1869), 5 Ch. App. 93; *Re City of Glasgow Bank* (1880), 14 Ch. D. 628). The application is by motion *ex parte* (*Re Scottish Pacific Coast Mining Co.*, [1886] W. N. 63).

(*d*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 180 (3) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 123]. The court could not formerly give leave to serve notice of orders or proceedings on persons out of the jurisdiction (*Re*

SECT. 16.  
Winding up  
by the  
Court.  
Appeals in  
general.

(ii.) Appeals.

929. Subject to rules of court, an appeal from any order or decision made or given in the winding up of a company by the court lies in the same manner and subject to the same conditions as an appeal from any order or decision of the court in cases within its ordinary jurisdiction (e). No appeal lies from an order allowing an extension of time for appealing from a judgment or order, or, without leave of the judge or the Court of Appeal, from any interlocutory order or interlocutory judgment made or given by a judge, except (*inter alia*) (1) where the liberty of the subject is concerned; (2) in case of granting or refusing an injunction or appointing a receiver; (3) in the case of any decision determining the claim of any creditor, or the liability of any contributory, or the liability of any director or other officer under the Companies Act, 1908, in respect of misfeasance or otherwise (f). An application for leave to appeal may be made *ex parte* or otherwise, as prescribed by rules of court (g). Subject as hereinafter mentioned, the practice on appeal from the winding-up judge is the same as in the case of any other judge of the Chancery Division.

Appeals from  
winding-up  
order.

930. An appeal against a winding-up order may be brought by a creditor or contributory who has appeared in the winding-up court or by the company itself. If the company is the only appellant, security for the costs of the appeal must be given (h), not out of the company's funds, but from an outside source, namely, by the directors or shareholders who are at the back of the appeal, and the security must be substantial (i).

An appeal from a winding-up order may be brought without

*Anglo-African Steamship Co.* (1886), 32 Ch. D. 348, C. A.; as to notice of an appointment to settle the list of contributories being served out of the jurisdiction, see *Re Newman (Nathan) & Co.* (1887), 35 Ch. D. 1, C. A.; *Re Liebig's (Baron) Cocoa and Chocolate Works, Ltd.*, [1888] W. N. 120. But any summons, order, or notice may now be directed to be served in a foreign country (E. S. C., Ord. 11, r. 8A).

(e) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 181 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 124]; R. S. C., Ord. 58, r. 9.

(f) Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 1; Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38.

(g) Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 1 (6).

(h) *Re Diamond Fuel Co.* (1879), 13 Ch. D. 400, C. A.; *Re Photographic Artists' Co-operative Supply Association* (1883), 23 Ch. D. 370, C. A. Contributories or creditors who have not appeared below cannot appeal without leave (*Re Securities Insurance Co.*, [1894] 2 Ch. 410, C. A.). Other interested persons have no right to appeal, but may be heard as *amici curiæ* (*Re Bradford Navigation Co.* (1870), 5 Ch. App. 600). As to the costs of an unsuccessful appeal against a winding-up order, see *Re National Savings Bank Association* (1866), 1 Ch. App. 547. As to payment by directors out of assets of costs incurred against the wishes of a number of shareholders and a minority of the board, see *Smith v. Manchester (Duke)* (1883), 24 Ch. D. 611.

(i) *Re Consolidated South Rand Mines Deep, Ltd.*, [1909] W. N. 66, C. A. Application for security must, except under special circumstances, be made before the appeal is in the paper for hearing (*Re Indian, Kingston and Sandhurst Mining Co.* (1882), 22 Ch. D. 83, C. A.). If notice of appeal has been given, but not set down, it is doubtful whether the court has such seisin of the appeal as to be able to order security.

SECT. 16.  
Winding up  
by the  
Court.

the leave of the court, as the order is not an interlocutory order or interlocutory judgment (k). For the purpose of being promptly heard, however, such an appeal is to be treated as an interlocutory appeal (l).

An appeal does not stay the proceedings except so far as the judge or the Court of Appeal orders (m). The Court of Appeal will not stay execution while there is default in complying with an order to give security for costs (n). Where a winding-up order is discharged on appeal, all proceedings taken under it are also discharged (o).

931. Whether the appeal is from the winding-up order itself or from an order or decision in the winding up, the time for appealing is, except by special leave of the Court of Appeal, fourteen days, calculated from the time at which the order is signed, entered, or otherwise perfected, or, in the case of a refusal of an application, from the date of refusal (p). The time is seldom extended (q). The appeal is by notice of motion, which must be served within the fourteen days, the notice being a fourteen days' notice in the case of an appeal from the winding-up order or a final order in the winding up (r), and in the case of interlocutory (s) orders in the winding up a four days' notice. The notice must be served on all parties directly affected by the appeal (t). The appeal must be entered before the day named in the notice for the hearing of the appeal, or, if that day falls in vacation, before the next day on which the court is sitting (u).

Time for  
appealing.

(k) *Re Stockton Iron Furnace Co.* (1879), 10 Ch. D. 335, 349, C. A.

(l) *Re Naval, Military and Civil Service Co-operative Society of South Africa*, [1903] W. N. 120, C. A.; and see *Re Allsopp (Samuel) & Sons, Ltd.*, [1903] W. N. 132, C. A.

(m) R. S. C., Ord. 58, r. 16. In some cases the court will order the advertisement of the winding-up order to be stayed pending an appeal from it.

(n) *Re Corporation of British Investors*, [1897] W. N. 36, C. A.

(o) *Re National Permanent Benefit Building Society, Ex parte Williamson* (1869), 5 Ch. App. 309, 314.

(p) R. S. C., Ord. 58, rr. 9, 15; *Re National Funds Assurance Co.* (1876), 4 Ch. D. 305, C. A.; *Re National Stores, Ltd.*, [1899] 2 Ch. 773.

(q) *Re Bastow (Samuel) & Co., Ex parte Bastow & Co.* (1867), 37 L. J. (CH.) 51; compare *Esdaile v. Payne* (1889), 40 Ch. D. 520, 533, C. A.; *Re Padstow Total Loss and Collision Assurance Association* (1882), 20 Ch. D. 137, C. A.; *Re New Calluo* (1882), 22 Ch. D. 484, C. A.

(r) R. S. C., Ord. 58, r. 3; *Re Stockton Iron Furnace Co.*, *supra*.

(s) *Ibid.*; and see *Re Madras Irrigation and Canal Co., Wood v. Madras Irrigation and Canal Co.* (1883), 23 Ch. D. 248, C. A.; *Re Reeves (Herbert) & Co.*, [1902] 1 Ch. 29, 33, C. A.; *Pheysey v. Pheysey* (1879), 12 Ch. D. 305, C. A.

(t) R. S. C., Ord. 58, r. 2. As to serving the official receiver, see *Re Webber, Ex parte Webber* (1889), 24 Q. B. D. 313, C. A. Where supporting creditors and contributories have been allowed sets of costs between them, unless it is sought to disturb that part of the order, notice of appeal need not be served on them, but letters should be sent informing them of the appeal, and that the order as to their costs is not intended to be affected. In that case a similar order as to their costs will be made if they appear on the appeal and it is unsuccessful. If, however, notice of appeal is given to them and the appeal is dismissed, they are entitled to separate sets of costs of appeal (*Re Ibo Investment Co.*, [1903] 2 Ch. 373, C. A.).

(u) *Re National Funds Assurance Co.*, *supra*; *Re Mansel, Rhodes v. Jenkins* (1878), 7 Ch. D. 711, C. A.; and see *Re Harker, Goodbarne v. Fothergill* (1879), 10 Ch. D. 613, C. A.

SECT. 16.  
Winding up  
by the  
Court.

Palatine and  
county  
courts.

Registrar.

Judge in  
chambers.

Official  
receiver.

**932.** Appeals from the palatine courts now lie to the Court of Appeal, whose decisions are subject to appeal to the House of Lords (*a*).

Any appeal from a county court in a winding-up matter must be made to a Divisional Court of the King's Bench Division, and the decision of the Divisional Court is final unless leave to appeal is given by that court or by the Court of Appeal (*b*).

**933.** An appeal from a decision of any registrar (*c*) is brought by moving before the judge to discharge the order, and not by appealing directly to the Court of Appeal or Divisional Court (*d*). In the High Court the application must be made within fourteen days from the date of the decision (*e*). Applications before the registrar may at any time be, and frequently are, adjourned by him to be heard before the judge either in court or chambers (*f*).

**934.** Where the winding-up judge makes an order in chambers, a motion to discharge it must be made before the judge himself in court within fourteen days. Unless this is done, or the judge gives a certificate that he does not desire further argument in court, the Court of Appeal will not entertain an appeal from the decision (*g*).

**935.** An appeal from the official receiver as such to the court may be brought (1) in respect of his decision as to the costs and expenses of any person incurred in and about the preparation, making, and verification of the statement of affairs (*h*); (2) in respect of his decision, as chairman of a meeting, whether a proof should be admitted for the purpose of voting (*i*); (3) in respect of his decision, as provisional liquidator, whether a proof should be

(*a*) Chancery of Lancaster Act, 1890 (53 & 54 Vict. c. 23), s. 4; Palatine Court of Durham Act, 1889 (52 & 53 Vict. c. 47), s. 11. As to the jurisdiction of these courts, see p. 392, *ante*.

(*b*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 120; Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 1 (5); *Re North Wales Gunpowder Co.*, [1892] 2 Q. B. 220, O. A.; *Re Ilkley Hotel Co.*, [1893] 1 Q. B. 248; *Re New Par Consols*, [1898] 1 Q. B. 573.

(*c*) Namely, the registrar of the High Court, or, where the winding up is in the district registry of Liverpool or Manchester, the district registrar, or where the winding up is in a county court, the registrar or one of the joint registrars, or a deputy registrar, or, in any court other than the High Court, the officer of the court whose duty it is to exercise in relation to a winding up the functions which in the High Court are exercised by a registrar or master (Companies (Winding-up) Rules, r. 2).

(*d*) This is certainly the case in the High Court; see *Re Pretoria Pietersburg Rail. Co., Ltd.*, [1904] 2 Ch. 170, O. A.; *Re Bryndu and Port Talbot Collieries, Ltd.*, [1904] W. N. 136. The practice is the same in actions transferred to the winding-up court where the registrar is acting as a master (Practice Note, [1905] W. N. 128).

(*e*) R. S. C., Ord. 58, r. 15.

(*f*) Companies (Winding-up) Rules, r. 7.

(*g*) *Re Pearce*, [1899] W. N. 114, O. A. As to an appeal from an order directing a public examination, see *Re National Stores, Ltd.*, [1900] 1 Ch. 27, O. A.

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 147 (4).

(*i*) Companies (Winding-up) Rules, r. 137; see *Re Canadian Pacific Colonization Corporation* (1891), 40 W. R. 40.

SECT. 16.  
Winding up  
by the  
Court

admitted for the purpose of dividend (*k*). Where he is liquidator, appeals from his decisions are regulated by the rules relating to appeals from the decisions of liquidators (*l*).

An appeal to the court from the official receiver as such must be brought within twenty-one days from the time when the decision or act appealed against is done, pronounced, or made (*l*). The appeal, in whatever court the winding up is pending, must be heard in open court (*m*), and is by motion, on at least two clear days' notice (*n*).

**936.** If any person is aggrieved by any act or decision of the liquidator (*o*), that person may apply to the court, and the court may confirm, reverse, or modify the act or decision complained of, and make such order in the premises as it thinks just (*p*). In particular, an appeal to the court is allowed from the liquidator's decision, as chairman of a meeting, as to whether a proof should be admitted for the purposes of voting or rejected (*q*), and from his decision as to rejection or admission of a proof for purposes of dividend (*r*). The appeal is brought in the High Court by summons in chambers, even when the official receiver is liquidator (*s*), and in other courts by motion, which must be heard in open court (*t*). The only case in which a certain time is limited for bringing an appeal is where it is from the rejection of a proof (*a*). The court may, on the application of a creditor or contributory, expunge or reduce a proof if the liquidator declines to interfere (*b*).

A person whose name has been finally settled on the list of contributories by the liquidator, whether he is also official receiver or not, may appeal to the court by summons within twenty-one days from the date of service on him of notice of settlement of the list (*c*).

(*k*) Companies (Winding-up) Rules, rr. 104, 108. Notice of the application to vary or reverse the decision must be given within twenty-one days from the date of service of the notice of rejection.

(*l*) *Ibid.*, r. 206.

(*m*) *Ibid.*, rr. 5 (1), 6 (1).

(*n*) *Ibid.*, r. 8 (1).

(*o*) This includes the official receiver when acting as liquidator or provisional liquidator (*ibid.*, rr. 2, 108).

(*p*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 158 (5) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 24]. The wording is taken from the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 90. As to who is a person aggrieved, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 37.

(*q*) Companies (Winding-up) Rules, r. 137.

(*r*) *Ibid.*, r. 104. The time for appealing is in this case twenty-one days from the date of service of the notice of rejection of the proof (*ibid.*).

(*s*) *Ibid.*, r. 5; *Re National Wholemeal Bread and Biscuit Co.*, [1892] 2 Ch. 457, which see, also, as to the costs of the appeal.

(*t*) Companies (Winding-up) Rules, rr. 6, 8 (1).

(*a*) See note (*k*), *supra*.

(*b*) Companies (Winding-up) Rules, r. 106; and see *ibid.*, r. 105.

(*c*) *Ibid.*, r. 81 (1). The official receiver, as liquidator or provisional liquidator, is not in any case personally liable to pay any costs of or in relation to an application to set aside or vary his act or decision settling the name of a person on the list of contributories (*ibid.*, r. 81 (2)). An ordinary liquidator seems to be treated in the same way; see *Salisbury-Jones and Dale's Case*, [1895] 1 Ch. 333, O. A.; *Smallpages and Brandon's Cases* (1885), 30 Ch. D. 598.

SECT. 16.  
Winding up  
by the  
Court.  
From Board  
of Trade.

**937.** There is no general right to appeal to the court from decisions of the Board of Trade, but in certain cases a right to appeal is expressly given. Where a liquidator has paid into the Companies Liquidation Account any money in his hands or under his control representing assets unclaimed or undistributed for six months after the date of their receipt, any person claiming to be entitled thereto may apply to the Board for payment, and he or any other person dissatisfied with the decision of the Board in respect of the claim may appeal to the High Court (*d*). When the Board grants or withholds the release of a liquidator, there is a right of appeal to the High Court (*e*). Appeals must be heard before the judge in open court. They are to be made by motion (*f*), and must be brought within twenty-one days from the time when the decision or act appealed against was done, pronounced, or made (*g*).

SUB-SECT. 15.—*Miscellaneous Practice and Procedure.*

(i.) *In General.*

Winding-up  
Rules, 1909.

**938.** The practice as regards the winding up of companies is, for the most part, regulated by the Companies (Winding-up) Rules, 1909 (*h*), which came into operation on April 1st, 1909 (*i*). The rules apply to the proceedings in every winding up which commenced on and after April 1st, 1909, and also, so far as practicable, and subject to any general or special order of the court, to all proceedings taken or instituted after that date in a winding up which commenced on or after January 1st, 1891. Rules which,

(*d*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 224 (6), (7) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 15 (5)].

(*e*) *Ibid.*, s. 157 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 22].

(*f*) Companies (Winding-up) Rules, rr. 5, 8.

(*g*) *Ibid.*, r. 206. The rules state that in courts other than the High Court appeals from the Board of Trade are to be heard in open court (*ibid.*, r. 6 (1)). The only right of appeal given by the Act is apparently to the High Court. But every court in England having winding-up jurisdiction has, for the purposes of that jurisdiction, all the powers of the High Court (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 131 (6)). As the Board of Trade acquiesced in the making of the rules, it may be assumed that it will submit to its decisions being subject to appeal to the palatine courts and county courts where those courts are exercising winding-up jurisdiction.

(*h*) The rules were made by the Lord Chancellor with the concurrence of the Board of Trade. Having been laid before Parliament as required by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), they must be judicially noticed, and they have effect as if enacted by that Act (*ibid.*, s. 237 (2)). The effect of this provision is that the rules have statutory effect, and, as long as they remain in force, cannot be questioned by any court (*Patent Agents (Institute) v. Lockwood*, [1894] A. C. 347); compare *Re East of England Banking Co.* (1868), 4 Ch. App. 14, 19. As to the adoption of the rules by the authority empowered to make rules for regulating the practice and procedure in the Chancery Court of the County Palatine of Lancaster, see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 237 (4). As to the power to make regulations as to fees in winding-up proceedings, see *ibid.*, s. 237 (3).

(*i*) Companies (Winding-up) Rules, r. 221. These rules revoked and annulled the rules of 1903, subject to the provision that such revocation and annulment was not to prejudice or affect anything done or suffered before April 1st, 1901, under any revoked rule or order and that no rule or practice annulled or repealed by the Rules of 1903 was to be revived by reason of the revocation and annulment in 1909 (*ibid.*, r. 220).

SECT. 16.  
Winding up  
by the  
Court.

however, from their nature and subject-matter are, or which by the headlines above the group in which they are contained or by their terms are made applicable only to the proceedings in a winding up by the court, do not apply to the proceedings in a voluntary winding up, or winding up under supervision (*h*).

**939.** The forms in the appendix to the Rules of 1909 where applicable, and where they are not applicable forms of the like character, with such variations as circumstances may require, must be used. Where the forms are applicable, any costs occasioned by the use of any other or more prolix forms are to be borne by or disallowed to the party using them, unless the court otherwise directs (*l*).

The Board of Trade may from time to time alter any forms which relate to matters of an administrative and not of a judicial character, or substitute new forms, such altered or substituted forms being published in the *London Gazette* (*m*).

**940.** The Board of Trade may also from time to time issue general orders or regulations for the purpose of regulating any matters under the Act of 1908, or the rules, which are of an administrative and not of a judicial character. Judicial notice is to be taken of any general orders or regulations printed by the King's printers and purporting to be issued under the authority of the Board (*n*).

Use of  
prescribed  
forms.

Board of  
Trade  
regulations.

(*k*) Companies (Winding-up) Rules, r. 1. In the Companies (Winding-up) Rules, unless the context or subject-matter otherwise requires, "the Act" means the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69); "the company" means a company which is being wound up, or against which proceedings to have it wound up have been commenced; "court" means the court which has jurisdiction to wind up the company; "creditor" includes a corporation, and a firm of creditors in partnership; "gazetted" means published in the *London Gazette*; "judge" means in the High Court the judge who for the time being exercises the jurisdiction of the High Court to wind up companies, and in any other court the judge thereof, or officer who exercises the powers of the judge thereof; "liquidator" includes an "official receiver" when acting as liquidator; "official receiver" includes any officer appointed by the Board of Trade to discharge the duties of official receiver under the Act; "palatine court" means one of the Chancery Courts of the Counties Palatine of Lancaster and Durham; "proceedings" means the proceedings in the winding up of a company under the Act; "registrar" means in the High Court any of the registrars in bankruptcy of the High Court, and any person who is appointed to fill the office of registrar under the rules, and, where a winding up of a company is in the District Registry of Liverpool or Manchester, means the district registrar; and in a county court where there are joint registrars, means either of such registrars, or a deputy registrar, and in any court other than the High Court, means the officer of the court whose duty it is to exercise in relation to a winding up the functions which in the High Court are exercised by a registrar or master; "the rules" means the Rules of 1909, and includes the prescribed forms; "sealed" means sealed with the seal of the court; "taxing officer" means the officer of the court whose duty it is to tax costs in the proceedings of the court under its ordinary jurisdiction. Words importing the masculine gender include females; words in the singular include the plural, and words in the plural include the singular. The expression "person" includes any body of persons corporate or unincorporate, while expressions referring to writing include printing, lithography, photography, and other methods of representing or reproducing words in a visible form (*ibid.*, r. 2).

(*l*) *Ibid.*, r. 3.

(*m*) *Ibid.*

(*n*) *Ibid.*, r. 215. In the High Court the registrar, and in the District



SECT. 16.

Winding up  
by the  
Court.Gazetting  
notices.(ii.) *Gazetting and Advertising.*

941. All notices subsequent to the making by the court of a winding-up order, in pursuance of the Act or the rules, requiring publication in the *London Gazette*, are to be gazetted by the Board of Trade (o).

Where any winding-up order is amended, and also in any case in which any matter which has been gazetted has been amended or altered, or in which a matter has been wrongly or inaccurately gazetted, the Board is to re-gazette such order or matter, with the necessary amendments and alterations, in the prescribed form, at the expense of the company's assets, or otherwise as the Board may direct (p).

Advertisements.

Whenever the *London Gazette* contains any advertisement relating to any winding-up proceedings, the official receiver or liquidator, as the case may be, is to file with the proceedings a memorandum referring to and giving the date of the advertisement (q). In the case of an advertisement in a local paper, he is to keep a copy of the paper, and a memorandum referring to and giving the date of the advertisement is to be placed on the file (r). For this purpose one copy of each local paper in which any advertisement is inserted is to be left with the official receiver or liquidator, as the case may be, by the person who inserts the advertisement (s). Any such memorandum is *prima facie* evidence that the advertisement to which it refers was duly inserted in the issue of the *Gazette* or newspaper mentioned in it (t).

(iii.) *Applications to the Court.*Matters  
heard in  
open court.

942. In the High Court, the following matters and applications must be heard before the judge in open court, namely: Petitions; public examinations (u); appeals from the Board of Trade, and from

Registries of the High Court at Liverpool and Manchester respectively the district registrars of the High Court, and in a court other than the High Court, the registrar must keep books according to the Forms in the Appendix to the Rules, and the particulars given under the different heads in such books are to be entered forthwith after each proceeding has been concluded; and the officers whose duty it is to keep the books are to make and transmit to the Board of Trade such extracts from their books, and to furnish the Board with such information and returns as it may from time to time require (Companies (Winding-up) Rules, r. 208). In all proceedings in or before the court, or any judge, registrar, or officer thereof, or over which the court has jurisdiction under the Act and rules, where no other provision is made by the Act or rules, the practice, procedure, and regulations, unless the court otherwise in any special case directs, is in the High Court to be in accordance with the Rules of the Supreme Court and practice of the High Court, and in a palatine court and county court in accordance, as far as practicable, with the existing rules and practice of the court in proceedings for the administration of assets by the court (*ibid.*, r. 218); compare *Re Pretoria Pietersburg Railway* (No. 2), [1904] 2 Ch. 359.

(o) Companies (Winding-up) Rules, r. 209 (1); and see *ibid.*, Form 103.

(p) *Ibid.*, r. 209 (2).

(q) *Ibid.*, r. 210 (1); and see *ibid.*, Form 104.

(r) *Ibid.*, r. 210 (2).

(s) *Ibid.*, r. 210 (3).

(t) *Ibid.*, r. 210 (4).

(u) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 175; and see p. 430, *ante*.

SECT. 16.

Winding up  
by the  
Court.

the official receiver when acting as official receiver and not as liquidator; applications to have the dissolution of companies declared void; applications by the Board of Trade with reference to pending liquidations (a); applications for the committal of any person to prison for contempt; such matters and applications as the judge may from time to time by any general or special orders direct to be heard before him in open court (b).

Private examinations of persons summoned before the High Court are to be held in court or in chambers as the court directs (c).

Every other matter or application under the Act of 1908, to which the rules apply, may be heard and determined in chambers (d).

943. In courts other than the High Court the following matters and applications to the court must be heard in open court, namely: Petitions; public examinations; applications in a winding up by or under the supervision of the court for directions to the liquidator to prosecute (e); applications to rectify the register; appeals from the official receiver and Board of Trade; appeals from any decision or act of the liquidator; applications relating to the admission or rejection of proofs; misfeasance proceedings; applications for the dissolution of companies declared void; applications for the committal of any person to prison for contempt; such matters and applications as the judge may from time to time by any general or special orders direct to be heard before him in open court (f); but any other matter or application may be heard and determined in chambers (g).

Applications  
in courts  
other than  
High Court.

Subject to the orders of the Lord Chancellor, the place of sitting of each county court having jurisdiction under the Act of 1908 is, for the purposes of such jurisdiction, to be the town and place in which the court holds its sittings for general business (h). Subject to the provisions of the Act of 1908, the times of the sitting of each court, other than the High Court, in winding-up matters are to be those which are appointed for the transaction of the general business of the court, unless the judge otherwise orders (i).

Sittings of  
county  
courts.

944. Every application in court, other than a petition, must be made by motion, notice of which must be served on every person against whom an order is sought, not less than two clear days before the day named in the notice or hearing the motion, which day must be one of the days appointed for the sittings of the court (k).

Motions.

(a) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 175; and see p. 455, *ante*.

(b) Companies (Winding-up) Rules, r. 5 (1).

(c) *Ibid.*, r. 5 (2); and see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 174; and p. 475, *ante*.

(d) Companies (Winding-up) Rules, r. 5 (3).

(e) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 217 (1); and p. 563, *post*.

(f) Companies (Winding-up) Rules, r. 6 (1).

(g) *Ibid.*, r. 6 (2).

(h) *Ibid.*, r. 9.

(i) *Ibid.*, r. 10.

(k) *Ibid.*, r. 8 (1).

SECT. 16.  
Winding up  
by the  
Court.  
Hearing in  
chambers.

**945.** Applications not required to be heard in court, as above mentioned, may be heard and determined in chambers (*l*).

All winding-up proceedings in the High Court must from time to time be attached to one or more of the registrars, who, together with the necessary clerks and officers, are, subject to the Act of 1908 and Rules, to act under the general or special directions of the judge (*m*).

In every cause or matter within the jurisdiction of the judge, whether by virtue of the Act, or by transfer, or otherwise, the registrar, in addition to his powers and duties under the Rules, has all the powers and duties of a master, registrar, or taxing master (*n*).

Powers of  
registrar.

Subject to the provisions of the Act and Rules, in every court the registrar may, under the general or special directions of the judge, hear and determine any application or matter which under the Act and Rules may be heard and determined in chambers. Any matter or application before the registrar may at any time be adjourned by him to be heard before the judge, either in chambers or in court. Any matter or application may, if the judge or, as the case may be, the registrar thinks fit, be adjourned from chambers to court, or from court to chambers (*o*).

Summons.

**946.** Every application in chambers must be made by summons, which, unless otherwise ordered, must be served on every person against whom an order is sought, and must require the person or persons to whom the summons is addressed to attend at the time and place named in the summons (*p*). Every summons in a winding-up matter in the High Court must be prepared by the applicant or his solicitor, and issued from the office of the registrar. A summons when sealed is deemed to be issued. The person obtaining the summons must leave in the registrar's office a duplicate, which must be stamped with the prescribed stamp and filed (*q*).

(iv.) *Attendance and Appearance of Parties.*

Persons  
attending  
proceedings.

**947.** Every person for the time being on the list of contributories, or whose proof has been admitted, is at liberty, at his own expense, to attend proceedings (*r*). He is also entitled, upon payment of the costs occasioned thereby, to have notice of all such proceedings as he by written request desires to have notice of. If the court is of opinion that his attendance upon any proceedings has occasioned any additional costs which ought not to be borne by the funds of

(*l*) Companies (Winding-up) Rules, rr. 5, 6.

(*m*) *Ibid.*, r. 4 (1). Every other registrar may act for and in place of such registrar as above mentioned in all proceedings under the Act of 1908 and Rules, including the holding of public examinations, and when so acting is deemed to be the registrar for the purposes of the Act and Rules (*ibid.*, r. 4 (2)).

(*n*) *Ibid.*, r. 4 (3).

(*o*) *Ibid.*, r. 7.

(*p*) *Ibid.*, r. 8 (2).

(*q*) *Ibid.*, r. 14.

(*r*) This does not include the examination before an examiner of a person suspected of having property of the company in his possession; such examination is strictly private (*Re Grey's Brewery Co.* (1883), 25 Ch. D. 400; *Re Norwich Equitable Fire Insurance Co.* (1884), 27 Ch. D. 515, C. A.).

the company, it may direct such costs, or a gross sum in lieu thereof, to be paid by him. Until he has paid them he will not be entitled to attend any further proceedings (*s*).

No creditor or contributory is entitled to attend any proceedings in chambers unless and until he has entered in a book, to be kept by the registrar for that purpose, his name and address, and the name and address of his solicitor (if any), and upon any change of his address or of his solicitor his new address, and the name and address of his new solicitor (*t*).

The court may from time to time appoint any one or more of the creditors or contributories to represent before the court, at the expense of the company, all or any class of the creditors or contributories, upon any question or in relation to any proceedings before the court, and may remove the person so appointed. If more than one person is so appointed to represent one class, the persons appointed must employ the same solicitor to represent them (*a*).

**948.** Where the attendance of the liquidator's solicitor is required on any proceeding in court or chambers, the liquidator need not attend in person, except in cases where his presence is necessary in addition to that of his solicitor, or the court directs him to attend (*b*).

SECT. 16.  
Winding up  
by the  
Court

Attendance  
of liquidator.

(v.) *Title, Sealing and Filing of Proceedings; Inspection of File.*

**949.** Every proceeding (*c*) in a winding-up matter must be dated, and, with any necessary additions, must be intituled as follows:—"In the — Court. Companies (Winding-up). In the Matter of the Companies (Consolidation) Act, 1908"—with the name of the matter to which it relates (*d*).

The first proceeding in every winding-up matter must have a distinctive number assigned to it in the office of the registrar, and all subsequent proceedings in the same matter must bear the same number (*e*).

Title of  
proceedings.

Distinctive  
number.

**950.** Every officer of a court who receives any document to which an adhesive stamp is affixed must immediately deface the stamp. No such document is to be filed or delivered until the

Defacing  
stamps.

(*s*) Companies (Winding-up) Rules, r. 152 (1). A contributory is entitled not merely to attend the cross-examination by the official liquidator of a person claiming to be a creditor, but also to cross-examine the claimant himself (*Re Brompton and Longtown Rail. Co.* (1871), L. R. 11 Eq. 428).

(*t*) Companies (Winding-up) Rules, r. 152 (3).  
(*a*) *Ibid.*, r. 152 (2). As to the costs of such a representative, see *Re Overend, Gurney and Co., Ex parte Oakes and Peake* (1867), L. R. 3 Eq. 576, 634; *Re International Life Assurance Society, McIver's Claim* (1870), 5 Ch. App. 424, 427.

(*b*) Companies (Winding-up) Rules, r. 153.  
(*c*) All proceedings must be written or printed, or partly written or partly printed, on paper of the size of thirteen inches in length and eight inches in breadth, or thereabouts, and must have a stitching margin; but no objection is to be allowed to any proof or affidavit on account only of its being written or printed on paper of other size (*ibid.*, r. 12).

(*d*) *Ibid.*, r. 11 (1). Numbers and dates may be indicated by figures (*ibid.*).

(*e*) *Ibid.*, r. 11 (2).

SECT. 16.  
Winding up  
by the  
Court.

Sealing.

Filing.

Inspection  
of file.

Board of  
Trade and  
official  
receiver.

stamp has been defaced; and it is the duty of the party presenting or receiving it to see that the defacement has been duly made (*f*).

951. All orders, summonses, petitions, warrants, process of any kind (including notices when issued by the court), and office copies in any winding-up matter must be sealed (*g*).

952. All petitions, affidavits, summonses, orders, proofs, notices, depositions, bills of costs and other proceedings in the High Court in a winding-up matter must be kept and remain on record in the registrar's office. Subject to the directions of the court, they must be placed in one continuous file, and no proceeding in any winding-up matter is to be filed in the Central Office (*h*).

In courts other than the High Court a file of proceedings in every winding-up matter is to be kept, on which, subject to the directions of the court, all petitions, affidavits, summonses, orders, proofs, notices, depositions, and other proceedings in the matter are to be placed and remain of record as far as possible in continuous order (*i*).

953. Every person who has been a director or officer of a company which is being wound up, and every duly authorised officer of the Board of Trade, is entitled, free of charge, and every contributory and every creditor whose claim or proof has been admitted, is entitled on payment of a fee of 1s. for each hour or part of an hour occupied, at all reasonable times, to inspect the file of proceedings and to take copies or extracts from any document therein, or to be furnished with such copies or extracts at a rate not exceeding 4d. per folio of seventy-two words (*k*).

In every court all office copies of petitions, affidavits, depositions, papers and writings, or any parts thereof, required by the official receiver or any liquidator, contributory, creditor, officer of a company, or other person entitled thereto, must be provided by the registrar. The copies must, except as to figures, be fairly written out at length, and be sealed and delivered out without any unnecessary delay, and in the order in which they have been bespoken (*l*).

Where, in the exercise of their functions under the Act of 1908 or Rules, the Board or the official receiver requires to inspect or use the file, the registrar must (unless it is at the time required for use in court or by him), on request, transmit the file to the Board or official receiver, as the case may be (*m*).

(*f*) Companies (Winding-up) Rules, r. 21. The stamp is to be defaced in the High Court in such manner as the Commissioners of Inland Revenue may from time to time direct, and in any other court by writing, partly on the stamp and partly on the document, the name of the matter, or in such other manner as the Commissioners of Inland Revenue may from time to time direct (*ibid.*).

- (*g*) *Ibid.*, r. 13.  
(*h*) *Ibid.*, r. 16.  
(*i*) *Ibid.*, r. 17.  
(*k*) *Ibid.*, r. 19.  
(*l*) *Ibid.*, r. 18.  
(*m*) *Ibid.*, r. 20.

(vi.) Evidence.

954. Where any company is being wound up, all books and papers of the company and of the liquidators are, as between the contributories of the company, to be *prima facie* evidence of the truth of all matters purporting to be therein recorded (*n*).

955. Any affidavit may be sworn in Great Britain or Ireland, or elsewhere within the dominions of His Majesty, before any court, judge, or person lawfully authorised to take and receive affidavits, or before any of His Majesty's consuls or vice-consuls in any place outside His Majesty's dominions. All courts, judges, justices, commissioners, and persons acting judicially, are to take judicial notice of the seal or stamp or signature (as the case may be) of any such court, judge, person, consul, or vice-consul, attached, appended, or subscribed to any such affidavit, or to any other document to be used for the purposes of the winding-up (*o*).

956. Judges of English county courts who sit at places more than twenty miles from the General Post Office, the judge exercising the bankruptcy jurisdiction of the High Court in Ireland, the assistant barristers and recorders in Ireland, and the sheriffs of counties in Scotland, are to be commissioners for the purpose of taking evidence where a company is wound up in any part of the United Kingdom. The court may refer the whole or any part of the examination of any witnesses under the Act of 1908 to any such commissioner, although he is out of the jurisdiction of the court that made the winding-up order. In addition to any powers which he might lawfully exercise as a judge of a county court, judge of the High Court, assistant barrister, or recorder, or sheriff, he has, in the matter so referred to him, all the same powers of summoning and examining witnesses, of requiring the production or delivery of documents, of punishing defaults by witnesses, and of allowing costs and expenses to witnesses, as the court which made the

(*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 220 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 154]. The term "books and papers" includes accounts, deeds, writings and documents (*ibid.*, s. 285). The section applies whether the winding up is compulsory under supervision or voluntary (*Re Kent Coalfields Syndicate*, [1898] 1 Q. B. 754, C. A.). A contributory may adduce evidence to show that the books are not correct, but the burden of showing that they are incorrect lies on him (*Arnot's Case* (1887), 36 Ch. D. 702, 712, C. A.; *Re Great Northern Salt and Chemical Works, Ex parte Kennedy* (1890), 44 Ch. D. 472, 483). The register of members is *prima facie* evidence of the matters directed or authorised to be inserted therein (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 33); see p. 151, *ante*. Entries in the minute book may be sufficient admission of the liability of the company to pay a claim (*Re Teignmouth and General Mutual Shipping Association, Martin's Claim* (1872), L. R. 14 Eq. 148).

(*o*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 228 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 128]; and see R. S. C., Ord. 38, r. 6. If any person, on examination on oath authorised under the Act of 1908 or in any affidavit or deposition in or about the winding up of any company, or otherwise in or about any matter arising under the Act, wilfully and corruptly gives false evidence, he is liable to the penalties for wilful perjury (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 218 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 169]). As to perjury generally, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 490 *et seq.*

SECT. 16.  
Winding up  
by the  
Court.

Swearing  
affidavits.

Commis-  
sioners to  
take evidence

SECT. 16.  
Winding up  
by the  
Court.

Examination  
in Scotland.

winding-up order. The examination so taken is to be returned or reported to the court which made the order in such manner as it directs (p).

957. The winding-up court may direct the examination in Scotland of any person for the time being in Scotland, whether a contributory of the company or not, in regard to the trade, dealings, affairs, or property of the company, or of any contributory, so far as the company may be interested therein by reason of his being a contributory. The order or commission to take the examination is to be directed to the sheriff of the county in which the person to be examined is residing or happens to be for the time. The sheriff is to summon him to appear before him, at a time and place to be specified in the summons, for examination on oath as a witness or as a haver (q), and to produce any books or papers called for which are in his possession or power. The sheriff may take the examination either orally or on written interrogatories, and is to report the same in writing in the usual form to the court. With the report he must transmit the books and papers produced, if the originals are required and specified by the order or commission, or otherwise copies or extracts authenticated by him. If any objection is stated to the sheriff by the witness, either on the ground of his incompetency as a witness, or as to the production required, or on any other ground, the sheriff may, if he thinks fit, report the objection to the court, and suspend the examination of the witness until it has been disposed of by the court (r).

(vii.) *Inspection of Books and Papers.*

Order by  
court.

958. After an order for a winding up by or subject to the supervision of the court, the court may make such order as it thinks just for inspection by creditors and contributories of the company of its books and papers (s). The power to order inspection, however, only applies to books and papers in its possession or power (t); it does not empower the court to decide any question of right against third parties who possess the books and claim a right to possession (u).

Statutory  
right.

The rights conferred upon members and creditors of a company, or persons who are neither creditors nor members, by statute or

(p) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 226 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 126].

(q) A "haver" means a possessor of writings who is cited for the purpose of their production (Bell's Dictionary of the Law of Scotland, 3rd ed., Vol. I, p. 442; Green's Encyclopædia of Scots Law, Vol. III., p. 107).

(r) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 227 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 127]. Failure to appear or refusal to be examined or to make the production required is dealt with according to the law of Scotland (*ibid.*). The sheriff and witnesses are entitled to the usual fees and allowances according to the law and practice of Scotland (*ibid.*).

(s) *Ibid.* [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 156]; and see *Re Imperial Land Co. of Marseilles*, [1882] W. N. 173.

(t) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 221 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 156].

(u) *Re North Brazilian Sugar Factories* (1887), 37 Ch. D. 83, C. A.

the regulations of the company, to inspect its register of shares or mortgages, ceases when the winding up commences, and a creditor or contributory can then only obtain inspection by order of the court (w). Under the usual order to inspect and take copies, the applicant can take copies himself without paying for them (x).

An order for inspection will only be made on good cause being shown (a). Where winding up is for the purposes of reconstruction, the court has a discretion to refuse the order if the articles do not permit shareholders to inspect. Inspection is always refused if the applicant requires it to enable him or other persons to establish claims for their personal benefit against directors or promoters (b).

(viii.) *Service of Proceedings.*

959. Any notice, summons, or other documents, other than those of which personal service is required, may be sent by prepaid post letter to the last known address of the person to be served, and is considered as served at the time that it ought to be delivered in the due course of post by the post office, and notwithstanding it may be returned by the post office (c).

No service is to be deemed invalid by reason of the omission of the name or any of the names other than the surname of the person to be served from the document containing his name, provided the court is satisfied that in other respects the service has been sufficient (d).

960. It is the duty of the high bailiff of a county court to serve such orders, summonses, petitions, and notices as the court may require him to serve; to execute warrants and other process; to attend any sittings of the court (but not sittings in chambers); and to do and perform all such things as may be required of him by the court. Except where the court in any particular proceeding by order specially directs, no order, summons, petition, or

SECT. 16.  
Winding up  
by the  
Court.

Grounds of  
order.

Notice,  
summons etc.

Ir. county  
court.

(w) *Re Yorkshire Fibre Co.* (1870), L. R. 9 Eq. 650; *Re Birmingham Banking Co., Ex parte Brinsley* (1866), 36 L. J. (CH.) 150; *Re Kent Coalfields Syndicate*, [1898] 1 Q. B. 754, C. A.; *Somerset v. Land Securities Co.*, [1897] W. N. 29. As to such right of inspection, see pp. 152, 365, *ante*.

(x) *Re Arauco Co.*, [1899] W. N. 134.

(a) *Re Joint-Stock Discount Co., Ex parte Buchanan* (1866), 15 W. R. 99; *Re Imperial Land Co. of Marseilles*, [1882] W. N. 173. The same rule applied in the Stannaries Court (*Re West Devon Great Consols Mine* (1884), 27 Ch. D. 106, C. A.). An order may be made for inspection on the cross-examination of an officer of the company; but such inspection will be limited to the scope of the cross-examination (*Re Emma Silver Mining Co.* (1875), 10 Ch. App. 194; *Re Lisbon Steam Tramways Co.*, [1875] W. N. 54).

(b) *Morgan's Case* (1884), 23 Ch. D. 620; *Re Metropolitan and Provincial Bank, Ex parte Davis* (1868), 16 W. R. 668. Where the winding up is not for reconstruction, the clause in the articles is ineffectual (*Re Birmingham Banking Co., Ex parte Brinsley, supra*).

(c) Companies (Winding-up) Rules, r. 23 (1). A notice of intention to make a call may be served out of the jurisdiction; but orders and proceedings in the winding up may not be so served (*Re General International Agency Co.* (1867), 15 W. R. 973; *Re Anglo-African Steamship Co.* (1886), 32 Ch. D. 348, C. A.).

(d) Companies (Winding-up) Rules, r. 23 (2).

**SECT. 16.** notice need be served by a bailiff or officer of the court which is not specially by the Act or rules required to be so served (e).

**Winding up by the Court.**

**Drawing up orders.**

**961.** Every order, whether made in court or in chambers, in the winding up of a company is to be drawn up by the registrar, unless in any proceeding, or classes of proceedings, the judge or registrar who makes the order directs that no order need be drawn up. In this case the note or memorandum of the order, signed or initialled by the judge or the registrar making the order, is sufficient evidence of the order having been made (f).

(ix.) *Orders.*

(x.) *Extending Time; Irregularity.*

**Power of court.**

**962.** The court may, in any case in which it shall see fit, extend or abridge the time appointed by the rules, or fixed by any order of the court, for doing any act or taking any proceeding (g).

No proceeding under the Act of 1908 or Rules is to be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of that court (h).

No defect or irregularity in the appointment or election of a receiver, liquidator, or member of a committee of inspection will vitiate any act done by him in good faith (i).

(xi.) *Arrests and Commitments.*

**Warrant.**

**963.** A warrant of arrest, or any other warrant issued under the Act of 1908 and Rules, may be addressed to such officer of the court, or such high bailiff or officer of any county court, whether such county court has jurisdiction to wind up or not, as the court may in each case direct (j).

**Prison to be used.**

Where a warrant for arrest is issued, the prison, which must be named in the warrant of arrest, to which the person is to be committed must, unless the court otherwise orders, be the prison used by the court in cases of orders of commitment made in the exercise of the court's ordinary jurisdiction (k).

**Execution of warrant.**

Where a warrant for arrest has been issued by a court other than the High Court, the high bailiff, or other officer of the court to whom the warrant is addressed, may send it to the registrar of any other court (other than the High Court) within the ordinary jurisdiction or district of which the person to be committed then

(e) Companies (Winding-up) Rules, r. 22.

(f) *Ibid.*, r. 15. As to enforcement of orders, see p. 546, *ante*.

(g) *Ibid.*, r. 216; see *Re Reversionary Interest Society*, [1892] W. N. 60; *Re Brin's Oxygen Co.*, [1899] W. N. 44.

(h) Companies (Winding-up) Rules, r. 217 (1); compare *Re Land and Sea Telegraph Co.* (1870), 18 W. R. 1150; *Re City and County Bank* (1875), 10 Ch. App. 470, 477; *Re Army and Navy Hotel* (1886), 31 Ch. D. 644.

(i) Companies (Winding-up) Rules, r. 217 (2).

(j) *Ibid.*, r. 211.

(k) *Ibid.*, r. 212.

is or is believed to be, for execution by the high bailiff or other proper officer of his court (l).

**964.** The person arrested under a warrant of commitment issued under any provision of the Act of 1908 or Rules must, unless he is a person ordered to be privately or publicly examined, or an absconding contributory (m), be imprisoned in the prison of the court within the ordinary jurisdiction of which he is apprehended for the time mentioned in the warrant, unless he is sooner discharged by the court issuing the warrant, or otherwise by law (n).

If he is a person ordered to be privately or publicly examined, or an absconding contributory (m), the governor of the prison must produce him before the court as it may from time to time direct, and safely keep him until such time as the court otherwise orders, or he is otherwise discharged by law. Where he is conveyed to a prison other than the prison ordinarily used by the court issuing the warrant, the court may order him to be transferred to the last-mentioned prison (o).

(xii.) *Disposal of Company's Books and Papers.*

**965.** When a company has been wound up by or under the supervision of the court and is about to be dissolved, the books and papers of the company and of the liquidators may be disposed of in such way as the court directs. After five years from the dissolution no responsibility rests on the company, or the liquidators, or any person to whom the custody of the books and papers has been committed, by reason of the same not being forthcoming to any person claiming to be interested therein (p).

The Board of Trade may, at any time during the progress of the liquidation, on the application of the liquidator or the official receiver, direct that such of the books, papers, and documents of the company or of the liquidator as are no longer required for the purpose of the liquidation may be sold, destroyed, or otherwise disposed of (q).

(xiii.) *Prosecutions.*

**966.** If it appears to the court in the course of a winding up by or subject to the supervision of the court that any past or present

(l) Companies (Winding-up) Rules, r. 213.

(m) *Ibid.*, r. 66; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 174, 176.

(n) Companies (Winding-up) Rules, r. 214 (1).

(o) *Ibid.*, r. 214 (2).

(p) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 222 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 155]. At any time before documents have been disposed of, a liquidator may be ordered to produce them, if in his custody, though the company may have been dissolved (*London and Yorkshire Bank v. Cooper* (1885), 15 Q. B. D. 473, C. A.).

(q) Companies (Winding-up) Rules, r. 175 (2). In the case of banking companies the books should not be hastily destroyed, as they are evidence under the Bankers' Books Evidence Act, 1879 (42 & 43 Vict. c. 11), even when in the custody or control of successors to the bank (*Asylum for Idiots v. Handynoides* (1906), 22 T. L. R. 573, C. A.); see title BANKERS AND BANKING, Vol. I., pp. 644 *et seq.*

**SECT. 16.** Winding up by the Court.

**Imprisonment**

**Production of prisoner.**

**Direction of the court.**

**Direction of Board of Trade.**

**Officers and other members.**

**SECT. 16.**  
Winding up  
by the  
Court.

director (*r*), manager, officer, or member of the company has been guilty of any offence in relation to the company for which he is criminally responsible (*s*), the court may, on the application of any person interested in the winding up, or of its own motion, direct the liquidator to prosecute for the offence, and may order the costs and expenses to be paid out of the assets of the company (*a*). The application in the High Court is by summons in chambers (*b*); but in other courts the application is by motion in open court (*c*).

Considerations guiding the court.

In order to determine whether leave ought to be given to prosecute a director, and whether the costs of prosecution ought to be paid out of the assets, the court will look at the question from the point of view of an individual, and will consider whether it would be the duty of a good citizen, even at a loss to himself, to institute and carry on proceedings to punish the criminal. It is not necessary to find that the facts are so plain that a conviction must ensue. The proportion of creditors who support and oppose the application, and the effect which will be produced upon the estate by payment of costs, will be taken into consideration, but not the personal advantage of the individual, nor motives of vengeance against him, nor pecuniary benefits to be obtained for the creditors or shareholders. The fact that the law officers of the Crown have refused to allow the public prosecutor to proceed is not necessarily irrelevant (*d*). Leave to commence a prosecution may be refused on the ground of want of funds (*e*), but the refusal will not prevent the Treasury from undertaking the prosecution.

Indemnity against bail.

Where criminal proceedings as regards a company are pending, and bail is given on behalf of a prisoner, an indemnity given against liability in respect of the bail is illegal (*f*).

(xiv.) *Costs.*

In the Supreme Court.

**967.** The general principles applicable to the costs of proceedings in the Supreme Court (*g*) apply to the costs of winding-up proceedings (*h*). Subject to any express statutory provisions and to the Rules of the Supreme Court, the costs are in the discretion of the court or judge, and the court or judge has full power to determine by whom and to what extent they are to be paid (*i*).

(*r*) To convict a person of offences as a director under the Larceny Act, 1861 (24 & 25 Vict. c. 96), ss. 81, 83, it must be proved that he was properly appointed a director (*R. v. Atkins* (1900), 64 J. P. 361); see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 655 *et seq.*

(*s*) As to these offences, see pp. 311 *et seq.*, *ante*.

(*a*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 217 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 167].

(*b*) Companies (Winding-up) Rules, r. 5. It is, of course, *ex parte*.

(*c*) *Ibid.*, rr. 6, 7.

(*d*) *Re London and Globe Finance Corporation*, [1903] 1 Ch. 728; and see *Re Denham & Co.* (1884), 53 L. J. (OH.) 1113.

(*e*) *Re Eupion Fuel and Gas Co.*, [1875] W. N. 10; see also *Re Northern Counties Bank* (1883), 31 W. R. 546. As to the admissibility of depositions at the trial, see *R. v. Coote* (1873), L. R. 4 P. C. 599.

(*f*) *Consolidated Exploration and Finance Co. v. Musgrave*, [1900] 1 Ch. 37.

(*g*) As to costs generally, see title PRACTICE AND PROCEDURE.

(*h*) *Re Appleton, French and Scrafton, Ltd.*, [1905] 1 Ch. 749.

(*i*) Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 5. This provision does not alter the law with respect to a judge's discretion as to costs, or with respect to

**SECT. 16.**  
Winding up  
by the  
Court.

In a county court all costs properly incurred in a winding up by the court are to be allowed on the lower scale in Appendix N to the Rules of the Supreme Court, and costs are to be taxed by the registrar in person (*k*).

Allowance of payment.

**968.** No payments in respect of bills or charges of solicitors, managers, accountants, auctioneers, brokers, or other persons (other than payments for costs and expenses incurred and sanctioned with reference to the statement of affairs, and payments of bills which have been taxed and allowed under orders made for the taxation thereof), are to be allowed out of the assets of the company without proof that they have been considered and allowed by the registrar. The taxing officer must satisfy himself before passing such bills or charges that the employment of the solicitor or other person in respect of the matters mentioned in them has been duly sanctioned. The official receiver, however, when acting as liquidator, may, without taxation, pay and allow the costs and charges of any person other than a solicitor employed by him, where they are within the scale usually allowed by the court and do not exceed the sum of £2, subject to the Board of Trade requiring them to be taxed by the taxing officer (*l*).

Taxation of bills.

**969.** Every solicitor, manager, accountant, auctioneer, broker or other person employed by an official receiver or liquidator in a winding up by the court must, on request by the official receiver or liquidator (to be made a sufficient time before the declaration of a dividend), deliver his bill of costs or charges to the official receiver or liquidator for the purpose of taxation. If he fails to do so within the time stated in the request, or such extended time as the court allows, the liquidator is to declare and distribute the dividend without regard to his claim, and, subject to any order of the court, the claim is to be forfeited (*m*).

If the costs or charges in a winding up by the court are incurred prior to the appointment of a liquidator, the bill must be lodged with the official receiver, and if incurred after such appointment, with the liquidator. The official receiver or the liquidator, as the case may be, is to lodge the bill with the proper taxing officer (*n*), who is then to give notice of an appointment to tax it, in a winding up by the court to the official receiver, and in every winding up

the powers of the Court of Appeal in dealing with that discretion; it merely brings within the ambit of the discretion certain cases in which it was doubtful whether costs were in the judge's discretion (*Civil Service Co-operative Society v. General Steam Navigation Co.*, [1903] 2 K. B. 756, 765, O. A.). As to the priority of costs in winding up, see p. 523, *ante*. As to the liquidator's costs, see p. 449, *ante*.

(*k*) Companies (Winding-up) Rules, r. 184.

(*l*) *Ibid.*, r. 187 (2). The rule does not apply to or affect costs which, in legal proceedings by or against a company in winding up by the court, are ordered by the court in which such proceedings are pending, or a judge thereof, to be paid by the company or the liquidator, or the rights of the person to whom such costs are payable (*ibid.*, r. 187 (3)).

(*m*) *Ibid.*, r. 177. For the form of request, see *ibid.*, Form 89. As to the costs of drawing bills of costs, see *Re National Bank of Wales*, [1902] 2 Ch. 412; *Re Mercantile Lighterage Co.*, [1906] 1 Ch. 491.

(*n*) Companies (Winding-up) Rules, r. 179.



**SECT. 16.**  
**Winding up**  
**by the**  
**Court.**

to the liquidator, and to the person to or by whom it is to be paid (*o*). A copy of the bill must also, on application of either the official receiver or the liquidator, be furnished on payment at the rate of 4*d.* per folio, which payment is charged on the assets of the company. The official receiver is to call the attention of the liquidator to any items which, in his opinion, ought to be disallowed or reduced, and may attend or be represented on the taxation (*p*).

Certificate  
of official  
receiver or  
liquidator.

**970.** Where the bill is payable out of the assets of the company, a certificate in writing, signed by the official receiver or liquidator, as the case may be, must be produced to the taxing officer on the taxation, setting forth whether any, and if so what, special terms of remuneration have been agreed to, and in the case of the bill of costs of a solicitor, a copy of the resolution or other authority sanctioning the employment (*q*).

Certificate of  
taxation.

On the taxation being completed, the taxing officer is to issue to the person presenting his bill for taxation his allowance or certificate of taxation, and the bill, together with the allowance or certificate, must be filed with the registrar (*r*).

Review.

**971.** Where any bill of costs, charges, fees or disbursements which are payable out of the assets of the company to any solicitor, manager, accountant, auctioneer, broker or other person has been taxed by a registrar of a court other than the High Court, the Board of Trade may require the taxation to be reviewed by the taxing officer of the High Court (*s*). In such a case the Board, upon giving notice to the person whose bill has been taxed, must apply to such taxing officer to appoint a time for the review, and give the person whose bill is to be reviewed notice of the time appointed. The registrar whose taxation is to be reviewed must forward the bill to the taxing officer (*t*). The Board may appear upon the review (*a*) and the taxing officer is to review the taxation and certify the result (*b*).

If, upon the review, the bill is allowed at a lower sum than that allowed on the original taxation, the amount disallowed must (if the bill has been paid) be repaid to the official receiver or the liquidator, or other person entitled. The certificate of the taxing officer is a sufficient authority to entitle the person to whom the amount disallowed ought to be repaid to demand it from the person liable to repay it (*e*).

(*o*) Companies (Winding-up) Rules, r. 178.

(*p*) *Ibid.*, r. 180. The official receiver may be heard on the taxation (*Re Nash & Sons, Ex parte Crofton, Craven, and Worthington*, [1896] 1 Q. B. 13, 19).

(*q*) Companies (Winding-up) Rules, r. 183.

(*r*) *Ibid.*, r. 182; and see *ibid.*, Form 90.

(*s*) *Ibid.*, r. 185 (1). The provision apparently applies to the costs of persons employed by the liquidator only, not to persons litigating with him; compare *Re Hunt, Ex parte Board of Trade*, [1898] 1 Q. B. 287 (a bankruptcy case).

(*t*) Companies (Winding-up) Rules, r. 185 (2), (3).

(*a*) *Ibid.*, r. 185 (4).

(*b*) *Ibid.*, r. 185 (2).

(*c*) *Ibid.*, r. 185 (4). As to cases on the similar rule in bankruptcy, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 128.

The costs of and incidental to the review are to be paid out of the assets of the company, or otherwise as the taxing officer or the court directs, provided that the cost of the attendance of a principal is not to be allowed if in the opinion of the taxing officer he could have been sufficiently represented by his London agent (*d*).

**SECT. 16.**  
**Winding up**  
**by the**  
**Court.**

**972.** Any person, whether a party to, or affected by, any proceeding, desiring to apply for an order that he be allowed his costs, or any part of them, incident to such proceeding, must, if his application is not made at the time of the proceeding, serve notice of his intended application on the official receiver in a winding up by the court, and in every winding up on the liquidator. The official receiver (if any) and the liquidator may appear on the application and object thereto. No costs of or incident to the application are to be allowed to the applicant, unless the court is satisfied that the application could not have been made at the time of the proceeding (*e*).

Service of  
notices on  
official  
receiver or  
liquidator.

SUB-SECT. 16.—*Dissolution of Company.*

**973.** When the affairs of a company have been completely wound up, the court makes an order that the company be dissolved from the date of the order, and it is dissolved accordingly (*f*). The order must be reported by the liquidator to the Registrar of Joint Stock Companies, who makes in his books a minute of the dissolution (*g*).

Order to  
dissolve  
company.

It would seem that even a company incorporated by Act of Parliament for public purposes may be dissolved under this provision (*h*), though possibly only after public rights have been transferred or extinguished by another Act (*i*).

**974.** The dissolution puts an end to the existence of the company (*k*). Unless and until it has been set aside, it prevents any proceedings being taken against promoters, directors, or officers of the company, in respect of any misfeasance or breach of trust (*l*), or a creditor proving a debt against the company (*m*). When the company is dissolved, the statutory duty of the liquidator towards the creditors and contributories is gone; but if he has committed a breach of his duty to any creditor by distributing the assets

Effect of  
dissolution.

(*d*) Companies (Winding-up) Rules, r. 185 (5).

(*e*) *Ibid.*, r. 181.

(*f*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 172 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 111].

(*g*) *Ibid.*, s. 172 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 112]. A liquidator making default is liable to a fine not exceeding £5 for every day during which he is in default (*ibid.*, s. 172 (3) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 113]).

(*h*) *Re Bradford Navigation Co.* (1870), L. R. 10 Eq. 331, 341.

(*i*) See *ibid.*, affirmed (1870) 5 Ch. App. 600, 603.

(*k*) *Salton v. New Beeston Cycle Co.*, [1900] 1 Ch. 43. As to the effect of continuing obligations, see, however, *Re Haytor Granite Co.* (1865), 1 Ch. App. 77; *Tolhurst v. Associated Portland Cement Manufacturers* (1900), [1902] 2 K. B. 660, 678, C. A., affirmed without reference to this point, [1903] A. C. 414.

(*l*) *Coxon v. Gorst*, [1891] 2 Ch. 73.

(*m*) *Re Westbourne Grove Drapery Co.* (1878), 39 L. T. 30.

without complying with the requirements of the Act of 1908 he is liable in damages to the creditor (n).

A judgment obtained against a company after its dissolution is invalid, and the solicitor acting for the company is liable personally to pay the plaintiff's costs of the action from the date of the dissolution and consequent revocation of his authority (o). After dissolution, however, the court has jurisdiction to make an order upon an application made but not heard before the dissolution (p).

Where a company is dissolved, its personal property, including a right against a bankrupt's estate in respect of a debt, vests in the Crown as *bona vacantia* (q). The beneficial interest in personal chattels held on trust for the company also vests in the Crown (r); but if property is vested in the company as a trustee, the Crown recognises any equitable interests in the property (s).

A lease to the company does not, however, vest in the Crown. Where no contract disposing of it has been entered into, the reversion is accelerated, the land reverting to the lessor, and if a surety has guaranteed payment of the rent during the term, his liability determines with the lease (t). Similarly, an interest in fee reverts on dissolution in the grantor (a). Where the company is dissolved before it has conveyed property, whether freehold or leasehold, to a purchaser, in pursuance of a contract under which it has received the purchase money, an appointment of a new trustee and a vesting order will be made under the Trustee Act, 1893 (b).

(n) *Pulford v. Devenish*, [1903] 2 Ch. 625.

(o) *Yonge v. Toynbee*, [1910] 1 K. B. 215, C. A., disapproving *Salton v. New Beeston Cycle Co.*, [1900] 1 Ch. 43, where the solicitor was ordered to pay the plaintiff's costs, as between solicitor and client, from the date when he knew, or by using due diligence might have known, that the company was dissolved.

(p) *Re Crookhaven Mining Co.* (1866), L. R. 3 Eq. 69; *Whiteley Exerciser, Ltd. v. Gamage*, [1898] 2 Ch. 405.

(q) *Re Higginson and Dean, Ex parte A.-G.*, [1899] 1 Q. B. 325; as to whether a debt to a company is extinguished by its dissolution, see *ibid.*, and title CORPORATIONS, Vol. VIII., p. 401.

(r) *Ibid.*

(s) *Hodge v. A.-G.* (1839), 3 Y. & C. (EX.) 342; *A.-G. for Trinidad and Tobago v. Bourne*, [1895] A. C. 83, P. C.; *Re Ruddington Land*, [1909] 1 Ch. 701, 706.

(t) *Hastings Corporation v. Letton*, [1903] 1 K. B. 378, where PHILLIMORE, J., said that estates and interests in land did not vest in the Crown on the dissolution of a corporation; and that whether the interest was in fee simple, or for a term, the property then reverted to the grantor. As to leaseholds, compare *Pryce-Jones v. Williams*, [1902] 2 Ch. 517; and see title CORPORATIONS, Vol. VIII., p. 401.

(a) *Hastings Corporation v. Letton*, *supra*, at p. 387.

(b) 56 & 57 Vict. c. 53; *Re General Accident Assurance Corporation, Ltd.*, [1904] 1 Ch. 147; *Re No. 12, Cable Road, Hoylake, Cheshire*, [1904] W. N. 8; *Re Mills (Richard) & Co. (Brierly Hill), Ltd.*, [1905] W. N. 36; *Re No. 9, Bomore Road*, [1906] 1 Ch. 359; *Re Ruddington Land*, *supra*; see *contra*, *Re Taylor's Agreement Trusts*, [1904] 2 Ch. 737 (patents). As to the Crown being served, see *Re Ruddington Land*, *supra*. Having regard to *Hastings Corporation v. Letton*, *supra*, it would seem that in such a case the legal estate reverts to the grantor subject to the equitable rights of the purchaser, and that the vesting order should divest the grantor of the legal interest. As to objection to a title on the ground of a legal estate outstanding in a dissolved company, see *Pryce-Jones v. Williams*, *supra*.

975. Where a company has been dissolved, the court may, at any time within two years of the date of the dissolution, on an application being made for the purpose by the liquidator, or by any other person who appears to the court to be interested, make an order, upon such terms as the court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved (c). It is the duty of the applicant, within seven days after the making of the order, to file an office copy of it with the Registrar of Joint Stock Companies, and if the applicant fails so to do he is liable to a fine not exceeding £5 for every day during which the default continues (d).

Where a corporation is revived after dissolution, its rights prior to dissolution are not affected (e).

976. A company which is being wound up may also be dissolved by being struck off the register by the registrar when no liquidator is acting and its affairs are fully wound up (f).

#### SECT. 17.—Voluntary Winding up.

##### SUB-SECT. 1.—Companies which may Wind up Voluntarily.

977. The following companies may be wound up voluntarily (g), namely: (1) A company formed and registered under the Act of 1908 (h); (2) an existing company (i)—that is to say, a company formed and registered under the Joint Stock Companies Acts (k), or the Companies Act, 1862 (l); (3) a company registered but not formed under the Joint Stock Companies Acts or the Companies Act, 1862 (m); (4) an unlimited company registered under the Companies Act, 1879 (n), as a limited company (o); (5) a company registered under Part VII. of the Act of 1908, although the registration has taken place with a view to the company being wound up (p),

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 223 (1) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 31 (2)]. As to setting aside the dissolution, or making a winding-up order after it, on the ground of fraud before 1907, see *Re Pinto Silver Mining Co.* (1878), 8 Ch. D. 273, C. A.; *Re London and Caledonian Marine Insurance Co.* (1879), 11 Ch. D. 140, C. A.; and compare *Re Schooner Pond Coal Co.*, [1858] W. N. 70.

(d) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 223 (2) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 31 (2)].

(e) *Colchester Corporation v. Seaber* (1766), 3 Burr. 1866; *Re Higginson and Dean, Ex parte A.-G.*, [1899] 1 Q. B. 325, 331.

(f) See p. 610, *post*.

(g) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 182 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 129].

(h) *Ibid.*, s. 285.

(i) *Ibid.*

(k) See p. 37, *ante*.

(l) 25 & 26 Vict. c. 89.

(m) Companies (Consolidation) Act, 1908 (8 Edw. 7, 69), s. 246.

(n) 42 & 43 Vict. c. 76.

(o) Companies (Consolidation) Act, 1908, s. 247.

(p) *Ibid.*, s. 249 (1); *Southall v. British Mutual Life Assurance Society* (1871), 6 Ch. App. 614; and see *Re London Indianrubber Co.* (1866), 1 Ch. App. 329; *Re Beaujolais Wine Co.* (1867), 3 Ch. App. 15; *Re Torquay Bath Co.* (1863), 32 Beav. 581. Registration between petition and order for winding up an

SECT. 16.  
Winding up  
by the  
Court.

Power to  
declare  
dissolution  
void.

Dissolution  
by striking  
off register.

What  
companies  
may wind up  
voluntarily.

SECT. 17. but not an unregistered company (g); (6) a building society under the supervision of the court (r); (7) an industrial and provident society (s).

SUB-SECT. 2.—*In what Events Voluntary Winding up may take place.*

Requisites for voluntary winding up.

978. A company may be wound up voluntarily (1) when the period (if any) fixed for duration by its articles expires, or the event (if any) occurs on the occurrence of which the articles provide that it is to be dissolved, and the company in general meeting has passed a resolution requiring it to be wound up voluntarily (t); (2) if the company resolves by special resolution (u) that it be wound up voluntarily; (3) if the company resolves by extraordinary resolution (a) stating that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up (b). Creditors have no voice as to whether a company should be wound up voluntarily; but they may under an order of the court obtain a certain amount of control over the proceedings (c). The members' power to wind up voluntarily cannot be excluded by any provision in the articles, except to the extent of precluding certain shareholders or classes of shares from the right of voting at all (d).

SUB-SECT. 3.—*Meetings and Resolutions for Winding up.*

Ordinary resolution.

979. An ordinary resolution alone is required for winding up a company because the time for its duration has expired, or the event on which it is to be dissolved has happened. Where only an ordinary resolution has been passed, there is no power to make a supervision order (e).

Extra-ordinary resolution.

980. An extraordinary resolution will only place a company in voluntary liquidation where it is to the effect that the company is

unregistered company is of no effect (*Re Hercules Insurance Co.* (1871), L. R. 11 Eq. 321).

(g) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 268 (1) (ii). Practically all companies which can be wound up by the court, except unregistered companies, can wind up voluntarily; see *Re Torquay Bath Co.* (1863), 32 Beav. 581.

(r) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 32; *Andrews v. Swansea Cambrian Benefit Society* (1880), 44 L. T. 106; see title BUILDING SOCIETIES, Vol. III., p. 394.

(s) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 58; see title INDUSTRIAL, PROVIDENT AND SIMILAR SOCIETIES.

(t) Articles of association do not, as a rule, contain any provision as to the duration of the company, or mention any event on the happening of which the company is to be dissolved.

(u) As to special resolutions, see p. 259, ante.

(a) As to extraordinary resolutions, see *ibid.*

(b) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 182 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 129].

(c) See p. 572, post.

(d) See *Ellis v. Dadson* (1891), 60 L. J. (CH.) 353; *British Water Gas Syndicate, Ltd. v. Notts and Derby Water Gas Co., Ltd.*, [1889] W. N. 204; *Welton v. Saffery*, [1897] A. C. 299; *Re Peveril Gold Mines, Ltd.*, [1898] 1 Ch. 122, C. A.; *Baring-Gould v. Shurpington Combined Pick and Shovel Syndicate*, [1899] 2 Ch. 80, C. A.; *Payne v. Cork Co., Ltd.*, [1900] 1 Ch. 308; and p. 82 ante.

(e) See p. 594, post.

insolvent and should be wound up; in that case only one extraordinary general meeting is necessary (f). A special resolution requires two meetings, and is necessary where the company is not in a position to resolve that winding up is due to insolvency (g), as, for instance, where it is desirable to reconstruct the company, or there is no further use in continuing its existence.

Notices of meetings must be given, and the meetings must be held, in the manner pointed out by the articles (h). A resolution for voluntary winding up is not invalid by reason of its being passed contemporaneously with resolutions for a reconstruction scheme which are invalid (i). Where, however, notice is given of resolutions for voluntary winding up, the appointment of a liquidator, and the approval of a reconstruction, and a resolution for winding up only is passed, the resolution may be void, on the ground that there was no good notice to pass it, except as part of a general scheme (k). A resolution, on going into winding up, that a sum of money is to be distributed amongst officers and servants of the company is invalid, if the money is given as a gratuity, and not as remuneration for past or future services (l).

A copy of the special or extraordinary resolution must be sent in

(f) See pp. 259 *et seq.*, ante. The notice convening the meeting must inform the members clearly that it is proposed to pass such resolution (*Re Bridport Old Brewery Co.* (1867), 2 Ch. App. 191; *Re Silkstone Fall Colliery Co.* (1875), 1 Ch. D. 38, C. A.). A notice stating that a resolution in the terms of s. 182 (3) of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), will be proposed is sufficient (*Stone v. City and County Bank* (1877), 3 C. P. D. 282, C. A.).

(g) See pp. 259 *et seq.*, ante.

(h) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 69 (6). A special resolution has been held good although shareholders abroad got less than the number of days' notice prescribed by the articles (*Re Union Hill Silver Co.* (1870), 22 L. T. 400). Where the articles so provide notice of both the meetings required for a special resolution may be given by one document (*Re North of England Steamship Co.*, [1905] 2 Ch. 15, C. A.). The notices summoning the meetings must be issued by authority of a resolution of the board of directors (*Re Haycraft Gold Reduction and Mining Co.*, [1900] 2 Ch. 230; *Re Wyoming (State) Syndicate*, [1901] 2 Ch. 431). But the want of authority may be waived by the presence of all those who have a right to vote (*R. v. Hill* (1825), 4 B. & C. 426). Where a winding-up petition is pending it is a contempt of court to issue a circular to the shareholders containing misrepresentations with intent to obtain the passing of a voluntary winding-up resolution and thereby mislead the court as to the real view of the shareholders (*Re Parsonage (Septimus) & Co.*, [1901] 2 Ch. 424). As to the declaration of the chairman being conclusive, see *Re Hadleigh Castle Gold Mines, Ltd.*, [1900] 2 Ch. 419; *Arnot v. United African Lands, Ltd.*, [1901] 1 Ch. 518, C. A.; *Re Carral (New) Mines, Ltd.*, [1902] 2 Ch. 498; compare *Young v. South African and Australian Exploration and Development Syndicate*, [1896] 2 Ch. 268.

(i) *Thomson v. Henderson's Transvaal Estates, Ltd.*, [1908] 1 Ch. 765, C. A.; *Re Irrigation Co. of France, Ex parte Fox* (1871), 6 Ch. App. 176; *Cleeve v. Financial Corporation* (1873), L. R. 16 Eq. 363; compare *Stone v. City and County Bank* (1877), 3 C. P. D. 282, 307, 313, C. A.

(k) *Re Teede and Bishop, Ltd.* (1901), 70 L. J. (CH.) 409, as explained in *Thompson v. Henderson's Transvaal Estates, Ltd.*, *supra*; compare *Re Gutta Percha Corporation*, [1900] 2 Ch. 665, 670.

(l) *Stroud v. Royal Aquarium and Summer and Winter Garden Society* (1903), 19 T. L. R. 656.

SECT. 17. Voluntary Winding up.

Special resolution.

Notice of meeting.

**SECT. 17. Voluntary Winding up.** print to the registrar within fifteen days (*m*), and the company must give notice of the special or extraordinary resolution by advertisement in the *London Gazette* (*n*).

**SUB-SECT. 4.—Liquidators.**

(i.) *Appointment.*

Liquidator appointed by the company.

**981.** The company in general meeting must appoint one or more liquidators for the purpose of winding up its affairs and distributing its assets (*o*). Unless and until an effective resolution to wind up voluntarily has been passed, the company cannot appoint a liquidator. Thus, a resolution that a certain person shall be liquidator, passed at the first meeting where a special resolution is passed, is inoperative until confirmed at the subsequent meeting (*p*). A liquidator may, however, be appointed at the general meeting at which a special resolution is confirmed, or an extraordinary resolution is passed, without any special notice being given that a resolution to appoint a liquidator will be proposed (*q*). If notice is given that a certain person will be proposed at the meeting for the office of liquidator, and the motion for that purpose fails, the meeting may appoint another person (*r*). The resolution to wind up usually proceeds to appoint the liquidator; but the notice sometimes mentions that the appointment will be part of the business of the meeting. When there is a question as to the validity of the appointment of a sole liquidator, the court will appoint him (*s*).

Delegation of appointment to creditors.

**982.** A company about to be, or in course of being, wound up voluntarily may, by extraordinary resolution, delegate to its creditors, or to any committee of them, the power of appointing liquidators or any of them, and of supplying vacancies among them, or enter into any arrangement with respect to the powers to be exercised by the liquidators, and the manner in which they are to be exercised. Any act done by creditors in pursuance of any such delegated power has the same effect as if it had been done by the company (*t*).

Creditors' rights as to appointment.

**983.** The liquidator appointed by the company must, within seven days from his appointment, send notice by post to all persons who appear to him to be its creditors that a meeting of creditors

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 70 (1).

(*n*) *Ibid.*, s. 185 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 132].

(*o*) *Ibid.*, s. 186 (ii.) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 133].

(*p*) *Re Indian Zoedone Co.* (1884), 26 Ch. D. 70, C. A.; *Re London and Australian Agency Co.* (1873), 22 W. R. 45; *Re Petersburg and Viborg Gas Co., Ex parte Hartmont* (1875), 33 L. T. 637.

(*q*) *Re Welsh Flannel and Tweed Co.* (1875), L. R. 20 Eq. 360; *Re Overend, Gurney & Co., Oakes v. Turquand and Harding* (1867), L. R. 2 H. L. 325, 355.

(*r*) *Re Trench Tubeless Tyre Co., Bethell v. Trench Tubeless Tyre Co.*, [1900] 1 Ch. 408, 410, C. A.; *contra, Re Stearic Acid Co.* (1863), 11 W. R. 980.

(*s*) *Re Indian Zoedone Co.*, *supra*.

(*t*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 190 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 135]. This power has been seldom, if ever, exercised.

**SECT. 17. Voluntary Winding up.**

will be held on a date, not being less than fourteen nor more than twenty-one days after his appointment, and at a place and hour, to be specified in the notice. He must also advertise notice of the meeting once in the *London Gazette* and once at least in two local newspapers circulating in the district where the registered office or principal place of business of the company was situate (*a*). At the meeting the creditors are to determine whether an application shall be made to the court for the appointment of any person as liquidator in the place of or jointly with the liquidator appointed by the company, or for the appointment of a committee of inspection. If the creditors so resolve, an application may be made accordingly to the court at any time, not later than fourteen days after the date of the meeting, by any creditor appointed for the purpose at the meeting (*b*).

**984.** On any such application the court may make an order, either for the removal of the liquidator appointed by the company and for the appointment of some other person as liquidator, or for the appointment of some other person to act as liquidator jointly with the liquidator appointed by the company, or for the appointment of a committee of inspection, either together with or without any such appointment of a liquidator, or such other order as, having regard to the interests of the creditors and contributories, may seem just, and no appeal lies from the order. The court is to make such order as to the costs of the application as it may think fit. If it is of opinion that, having regard to the interests of the creditors in the liquidation, there were reasonable grounds for the application, it may order the costs of the application to be paid out of the assets of the company, notwithstanding that the application is dismissed or otherwise disposed of adversely to the applicant (*c*).

Court's power on creditor's application.

(ii.) *Powers and Duties.*

**985.** The liquidator must, within twenty-one days after his appointment, file with the registrar a notice of his appointment in the form prescribed by the Board of Trade. If he fails to do so he is liable to a fine not exceeding £5 for every day during which the default continues (*d*).

Filing notice of appointment.

**986.** The liquidator may, without the sanction of the court, exercise all powers by the Act of 1908 given to the liquidator in a winding up by the court (*e*). In particular, he may exercise the

Powers of voluntary liquidator.

(*a*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 188 (1) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 27 (1)].

(*b*) *Ibid.*, s. 188 (2). The application may be made by originating summons, which should be served on the liquidator. It is usual to appoint an additional liquidator, and give the two or either of them liberty to apply generally.

(*c*) *Ibid.*, s. 188 (3), (4), (5).

(*d*) *Ibid.*, s. 187 [Companies Act, 1907 (7 Edw. 7, c. 50), s. 26].

(*e*) *Ibid.*, s. 186 (iv.) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 133]. As to the powers which in a winding up by the court may be exercised by the liquidator, see p. 446, *ante*. An agreement for sale of the company's property is *intra vires* (*Re Bank of South Australia* (No. 2), [1895] 1 Ch. 578, C. A.); and this is so also in a winding up under supervision (*Re Colonial and General Gas Co.*, [1867] W. N. 42; *Re Sankey Brook Coal Co., Re Badley and Bramall* (1871), L. R. 12 Eq. 472).

SECT. 17.  
Voluntary  
Winding up.

powers of the court under the Act of 1908 of settling a list of contributories, and of making calls; he must pay the debts of the company, applying its property in satisfaction of its liabilities *pari passu*, and, subject thereto, must, unless the articles of association otherwise provide, distribute its property amongst its members, according to their rights and interests in the company, and adjust the rights of the contributories among themselves (*f*).

He has power to sanction the continuance of the powers of the directors, which cease on his appointment (*g*). He is an officer of the company, and as such must pay out of the company's assets the stamp duty on any unfiled contract for the allotment of shares for a consideration other than cash, and must file the contract (*h*).

He may also, with the sanction of an extraordinary resolution of the company, pay any classes of creditors in full, and make certain compromises and arrangements (*i*). With the sanction of a special resolution, he may enter into and carry into effect an agreement for a reconstruction or amalgamation (*k*).

Powers where  
several  
liquidators.

987. When several liquidators are appointed, the statutory powers of a liquidator may be exercised by such one or more of them as may be determined at the time of their appointment. In default of such determination, two at least must act (*l*); and they cannot delegate their powers generally to one of themselves, although all concur in making the delegation (*m*). When one of two liquidators dies, the survivor cannot act alone, and a new liquidator must be appointed (*n*).

Summoning  
meetings of  
company.

988. The liquidator may summon general meetings of the company for the purpose of obtaining its sanction by special or extraordinary resolution, or for any other purposes he may think

(*f*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 186 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 133]. Notice of the settlement of the list of contributories is usual, but not necessary, and absence of notice is no defence to an action for calls (*Brighton Arcade Co. v. Dowling* (1868), L. R. 3 C. P. 175, 187; compare *Re London Bank of Scotland*, [1867] W. N. 114). Fully-paid shareholders are "contributories" in a voluntary winding up (*Re Anglesea Colliery Co.* (1866), L. R. 2 Eq. 379). A call made to adjust the rights of contributories *inter se*, after all debts and costs are provided for, is valid (*ibid.*).

(*g*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 133]. Before his appointment sanction may be given by a general meeting of the company (*Tadd's Case*, [1893] 3 Ch. 450).

(*h*) *Re X Co., Ltd.*, [1907] 2 Ch. 92.

(*i*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 214 [Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 159, 160; Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 12 (1) (3)]; and pp. 602 *et seq.*, *post*.

(*k*) See p. 584, *post*. A compromise with a creditor of the company, without the assent of a meeting, is valid, if not set aside (*Cycle Makers' Co-operative Supply Co. v. Sims*, [1903] 1 K. B. 477).

(*l*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 186 (vii.) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 133].

(*m*) *Re London and Mediterranean Bank, Ex parte Birmingham Banking Co.* (1868), 3 Ch. App. 661; *Re London and Mediterranean Bank, Ex parte Agra and Masterman's Bank* (1871), 6 Ch. App. 206; *Re London and Mediterranean Bank, Ltd., Ex parte London and South-Western Bank* (1867), 36 L. J. (CH.) 807.

(*n*) *Re Metropolitan Bank and Jones* (1876), 2 Ch. D. 366.

fit (*o*). In the event of the winding up continuing for more than one year, he must summon a general meeting at the end of the first year from the commencement of the winding up, and of each succeeding year, or as soon thereafter as may be convenient, and must lay before the meeting an account of his acts and dealings and of the conduct of the winding up during the preceding year (*p*).

SECT. 17.  
Voluntary  
Winding up

(iii.) Remuneration.

989. The company in general meeting may fix the remuneration to be paid to the liquidator or liquidators (*q*).

Voluntary  
liquidator's  
remuneration

Each case as to the allowance of a voluntary liquidator's remuneration by the court must be considered with regard to its own particular circumstances (*r*). Where the resolution for winding up is set aside as invalid, and the company is afterwards ordered to be wound up, the liquidator is not entitled to be paid anything for his services as such, either under the Act of 1908 (*s*) or on a *quantum meruit*. He is, however, entitled to reasonable remuneration as regards any work done by him which has been useful to the company for business purposes unconnected with the voluntary liquidation, or which has been used by the official receiver and liquidator with full knowledge of the facts (*t*).

990. In the absence of any express agreement the solicitor to a voluntary liquidator has no claim for the payment of his costs against the liquidator personally. His claim is against the assets of the company only (*a*); but his costs are payable in priority to the liquidator's remuneration (*b*).

Solicitor's  
costs.

(iv.) Accounts.

991. The only accounts which, under the Act of 1908, the liquidator in a voluntary winding up is required to keep are (1) the account which he is required to make up when the affairs of the company are fully wound up (*c*); (2) the account of his acts and dealings and of the winding up, which, if the winding up continues for more than a year, he must at the end of each year lay

Accounts of  
voluntary  
liquidator.

(*o*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 194 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 139].

(*p*) *Ibid.*, s. 194 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 139].

(*q*) *Ibid.*, s. 186 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 133]. If the remuneration is not fixed by the company in general meeting, the liquidator or a contributory may apply by summons, and have it fixed by the Companies Winding-up Registrar. As to the priority of the remuneration, see p. 581, *post*.

(*r*) *Re Amalgamated Syndicates, Ltd.*, [1901] 2 Ch. 181. As to the charges allowed for letter writing, see *ibid.*

(*s*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 149 (10) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 67].

(*t*) *Re Allison, Johnson and Foster, Ltd., Ex parte Birkenshaw*, [1904] 2 K. B. 327.

(*a*) *Re Trueman's Estate, Hooke v. Piper* (1872), L. R. 14 Eq. 278.

(*b*) *Re Massey, Re Freehold Land and Brickmaking Co.* (1870), L. R. 9 Eq. 367. As to the solicitor's lien, see p. 525, *ante*; *Re Rapid Road Transit Co.*, [1909] 1 Ch. 96.

(*c*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 195 (1); see p. 592, *post*.

SECT. 17.  
Voluntary  
Winding up.

before a general meeting of the company (*d*); and (3) the statements which he must send to the registrar when the winding up is not concluded within a year after its commencement (*e*). Since he is, however, agent of the company, though not strictly a trustee for its creditors or contributories (*f*), and as such under a liability to account at reasonable times, the court may at any time order him to bring in an account on an application by a creditor or contributory (*g*).

(v.) *Vacancies; Removal and Appointment of new Liquidator.*

Filling up  
vacancies.

992. If a vacancy occurs in the office of liquidator appointed by the company, by death, resignation, or otherwise, the company in general meeting may, subject to any arrangement with its creditors, fill the vacancy. A general meeting for the purpose may be convened by any contributory or, if there were more liquidators than one, by the continuing liquidators. The meeting must be held in the manner prescribed by the articles, or determined by the court on application by any contributory or by the continuing liquidators (*h*).

The court may, on the application of a contributory, appoint a liquidator if from any cause whatever there is no liquidator acting (*i*).

## Removal.

993. The court may, on cause shown, remove a liquidator and appoint another liquidator (*k*). It has also power to remove a liquidator on an application in pursuance of a resolution of creditors at their statutory meeting (*l*) and to appoint another liquidator in

(*d*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 194 (2).

(*e*) *Ibid.*, s. 224 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 15]; see p. 455, *post*. The provisions of the section apply to a voluntary liquidation (*Re Stock and Share Auction and Banking Co., Re Spiral Wood Cutting Co., Re Hull Land Property and Investment Co.*, [1894] 1 Ch. 736); and rr. 192, 193 of the Companies (Winding-up) Rules apparently empower the Board of Trade to require a voluntary liquidator to submit, at any time, a verified account of the sums received and paid by him. As to what are undistributed assets within the section, see *Re Land Mortgage Bank of Florida*, [1898] 1 Ch. 444.

(*f*) *Knowles v. Scott*, [1891] 1 Ch. 717; compare *Pulsford v. Devenish*, [1903] 2 Ch. 625.

(*g*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 193; *Wright's Case* (1870), 5 Ch. App. 437.

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 189 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 140]. The "arrangement with creditors" is the arrangement referred to in *ibid.*, s. 190; see p. 572, *ante*. There seems to be no power for the company to fill up vacancies in the office of a voluntary liquidator who has been appointed by the court. As to the appointment of a liquidator on a supervision order, where the shareholders have not made the appointment, see *Re London Quays and Warehouses Co.* (1868), 3 Ch. App. 394.

(*i*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 186 (viii.) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 141]. An additional liquidator has been appointed in one case (*Re Sunlight Incandescent Gas Lamp Co.*, [1900] 2 Ch. 728). As to the grounds for removing a liquidator, see p. 461, *ante*.

(*k*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 186 (viii.) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 141]. The distribution of circulars seeking for support to an application for removal will not be restrained by the court (*Re New Gold Coast Exploration Co.*, [1901] 1 Ch. 860). A voluntary liquidator may be removed on the ground of his not being in a sufficiently independent position (*Re Chartered Gold Fields, Ltd.* (1909), 26 T. L. R. 132).

(*l*) See p. 573, *ante*.

SECT. 17.  
Voluntary  
Winding up.

his place, if he is willing to retire (*m*). The application can only be made by a contributory, or a liquidator, or a creditor (*n*). Where a contributory applies to remove the liquidator and to restrain him from employing any solicitor other than the one then acting, the court will order a meeting to be called to consider the question of change of solicitor (*o*). A lunatic liquidator may be removed (*p*). A liquidator may appeal from an order removing him (*q*); but the removal is a matter of judicial discretion, and if that has been exercised according to law, the Court of Appeal has no power to interfere (*r*).

SUB-SECT. 5.—*Commencement and Consequences of Voluntary Winding up.*

994. A voluntary winding up commences at the time of the passing of the resolution authorising the winding up (*s*), that is to say, at the date of the passing of the extraordinary resolution, or the date of the confirmatory resolution in the case of a special resolution (*t*). The date of commencement is not altered by a supervision order being made; but it is altered by a compulsory winding-up order being made (*a*), whether a supervision order has been made or not.

Commence-  
ment of  
winding up.

995. Where a company goes into voluntary winding up its corporate state and corporate powers, notwithstanding anything to the contrary in its articles, continue until it is dissolved. The company must, however, from the commencement of the winding up cease to carry on its business, except so far as may be required for its beneficial winding up (*b*). Contracts with a company which are not required for its beneficial winding up are not, however, illegal as between the company and the other contracting party (*c*).

Consequences  
of voluntary  
winding up.

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 186 (ix.); *Re New De Kaap, Ltd.*, [1908] 1 Ch. 589.

(*n*) *Re Sheppey Portland Cement Co.* (1892), 68 L. T. 83.

(*o*) *Re Coopers, Ltd.* (1897), 14 T. L. R. 144, C. A.

(*p*) *Re North Molton Mining Co.* (1886), 54 L. T. 602.

(*q*) *Re Eyton (Adam), Ltd., Ex parte Charlesworth* (1887), 36 Ch. D. 299, C. A.

(*r*) *Re Urmston Grange Steamship Co.* (1901), 17 T. L. R. 553, C. A.; compare *Re Pooley, Ex parte Sheard* (No. 1) (1880), 16 Ch. D. 107, C. A. (a bankruptcy case).

(*s*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 183 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 130].

(*t*) *Weston's Case* (1868), 4 Ch. App. 20; *Dawes' Case* (1868), L. R. 6 Eq. 232.

(*a*) See p. 419, *ante*.

(*b*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 184 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 131]. This may cause inconvenience where a company sells its business to another company which is not a private company, as the new company itself cannot commence business for some time; see p. 262, *ante*. But the liquidator, or the company in general meeting, may sanction the continuance of the directors' powers to carry on the business; see *ibid.*, s. 186 (iii.); and p. 578, *post*. From the commencement of winding up a company's existence continues solely for the purpose of the winding up, and not for another purpose, such as an amalgamation (*Re London, Bombay and Mediterranean Bank, Ltd., Drew's Case* (1867), 36 L. J. (CH.) 785, 789).

(*c*) *Bateman v. Ball* (1887), 56 L. J. (Q. B.) 291, not dissented from in *Hire Purchase Furnishing Co. v. Richens* (1887), 20 Q. B. D. 387, 389, C. A., where it was held that, assuming that such contracts were illegal, the onus of proving that the contract was not required for the beneficial winding up of the company lies in the person affirming the illegality.



SECT. 17.  
Voluntary  
Winding up.

Effect of  
winding up  
on contract  
of service.

Transfer of  
shares.

The decisions are conflicting as to whether a voluntary winding up operates as a dismissal of the company's servants (*d*).

The voluntary winding-up, even if for the purpose of reconstruction only, may cause a forfeiture of a lease to the company (*e*).

The passing of a resolution for voluntary winding up does not, *per se*, cause the powers of the directors to cease; but on the appointment of a liquidator all their powers cease, except so far as the company in general meeting, or the liquidator, sanctions the continuance thereof (*f*). A general meeting may elect directors, and sanction the exercise by them of any powers which they possessed before the company went into liquidation (*g*).

996. Every transfer of shares, except transfers made to or with the sanction of the liquidator, and every alteration in the status of the members of the company (*h*) made after the commencement of the winding up, is void (*i*). The liquidator may, without the sanction of the court, sanction, absolutely or conditionally (*j*), transfers during the liquidation, and the power to sanction a transfer involves the power to alter the register of members (*k*). When successive transfers are sanctioned by the liquidator, the

(*d*) In *Midland Counties District Bank, Ltd. v. Attwood*, [1905] 1 Ch. 357, it was held that the servants were not dismissed; but compare *Shirreff's Case* (1872), L. R. 14 Eq. 417; *Re Forster & Co., Ex parte Schumann* (1887), 19 L. R. Ir. 240.

(*e*) *Horsey Estate, Ltd. v. Steiger*, [1899] 2 Q. B. 79, C. A.; *Pannell v. City of London Brewery Co.*, [1900] 1 Ch. 496; *Fryer v. Ewart*, [1902] A. C. 187.

(*f*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 186 (iii.) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 133]. A transfer registered between the passing and confirming of a resolution for winding up is unaffected (*Re Ottoman Co., Ltd., Hornby's (Admiral) Case* (1868), 16 W. R. 1164).

(*g*) *Ladd's Case*, [1893] 3 Ch. 450; compare *Hirsch & Co. v. Burns* (1897), 77 L. T. 377, H. L.

(*h*) As to the meaning of these words, see *Taylor, Phillips and Richards' Cases*, [1897] 1 Ch. 298, 306, C. A.; *Baye's Case* (1868), L. R. 5 Eq. 420. The execution of a transfer without the liquidator's sanction is void but not illegal, and an action may lie for refusal to execute a transfer although the sanction has not been obtained (*Bielerman v. Stone* (1867), L. R. 2 C. P. 504).

(*i*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 205 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 131].

(*j*) *Taylor, Phillips, and Richards' Cases*, [1897] 1 Ch. 298, C. A. As to rectification where transfers are executed before the winding up, see *Re Violet Consolidated Gold-Mining Co.* (1899), 68 L. J. (Ch.) 535. The power of rectification given by s. 32 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), is exercisable in any of the cases therein mentioned whether the company is in liquidation or not, and in a liquidation the power is not limited to rectification for the purposes of settling the list of contributories; and where the rectification is by placing the name of a transferee on the register as on a day prior to the passing of the winding-up resolution, the validity of the notices of the meetings is not affected (*Re Sussex Brick Co.*, [1904] 1 Ch. 598, C. A., where the winding up was voluntary, but the order was made by the court). As to proofs by shareholders who have obtained rectification on the ground of misrepresentation, see *Re British Gold Fields of West Africa*, [1899] 2 Ch. 7, C. A. It is doubtful whether a shareholder can in any circumstances repudiate his shares after a resolution to wind up has been passed (*Stone v. City and County Bank* (1897), 3 C. P. D. 282, 298, 299, C. A.). As to damages against the liquidator for not allotting shares which the company has agreed to allot at a future date, see *Hirsch & Co. v. Burns & Co.* (1897), 77 L. T. 377, H. L.

(*k*) *Cleve v. Financial Corporation* (1873), L. R. 16 Eq. 363. As to transfers of shares to the liquidator, see *Vining's Case* (1870), 6 Ch. App. 96.

ultimate transferee only is liable to contribute as a present member, the transferor and prior transferees being liable as past members (*l*).

Where after liquidation commenced a person buys shares and has them transferred with the liquidator's assent to a person who is an infant, and the infant subsequently transfers them with the liquidator's assent to another infant, the original purchaser cannot be placed on the list of contributories, as there is no contractual relation between him and the company (*m*). The right to transfer debentures is not affected by the winding up (*n*).

A valid forfeiture of shares before the commencement of the winding up cannot be cancelled by the liquidator (*o*),

SUB-SECT. 6.—Creditors.

997. All debts and claims provable in a winding up by the court (*p*) are provable in a voluntary winding up; and where the company is insolvent the bankruptcy rules (*q*) similarly apply (*r*).

The same priorities as to the rights of the Crown, and in respect of rates and taxes, wages of clerks, and workmen's compensation, apply as in the case of a compulsory winding up (*s*), except that the date up to which the amounts are to be calculated is the date of the commencement of the voluntary winding up, whether a compulsory order is or is not subsequently made, and that the priority in respect of workmen's compensation does not apply where the voluntary winding up is merely for the purpose of reconstruction or amalgamation (*t*).

Subject to the commencement of the winding up being different, the same rules apply as regards set-off and secured creditors (*a*). The liquidator may, with the sanction of an extraordinary resolution, pay any classes of creditors in full (*b*).

998. The Rules of 1909 as to proof of debts, for the most part, apply in the case of a voluntary winding up (*c*). There is, however,

(*d*) *Taylor, Phillips, and Richards' Cases*, [1897] 1 Ch. 298, C. A.

(*m*) *Re National Bank of Wales, Ltd., Massey and Giffin's Case*, [1907] 1 Ch. 582. A transfer to an infant who does not come of age till the winding up has commenced may be avoided by the liquidator (*Castello's Case* (1869), L. R. 8 Eq. 504); *Symon's Case* (1870), 5 Ch. App. 298.

(*n*) *Re Goy & Co., Ltd., Farmer v. Goy & Co., Ltd.*, [1900] 2 Ch. 149. As to the equities against the transferor prevailing against the transferee, see *Re Palmer's Decoration and Furnishing Co.*, [1904] 2 Ch. 743; *Re Rhodesia Goldfields, Ltd., Partridge v. Rhodesia Goldfields, Ltd.*, [1910] W. N. 7.

(*o*) *Dawes' Case* (1868), L. R. 6 Eq. 232.

(*p*) See p. 508, *ante*.

(*q*) See p. 512, *ante*.

(*r*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 206, 207.

(*s*) See p. 516, *ante*.

(*t*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 209.

(*a*) See pp. 515, 519, *ante*. As to cross-claims for debt and misfeasance claims by companies in liquidation, see *Re Leeds and Hanley Theatres of Varieties, Ltd.*, [1904] 2 Ch. 45. As to cross-claims between two companies in liquidation in respect of money lent and calls in arrear, see *Re Auriferous Properties, Ltd.* (1), [1898] 1 Ch. 691.

(*b*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 214 (1)(i.) [Companies Act, 1862, (25 & 26 Vict. c. 89), s. 159].

(*c*) For the rules, see Companies (Winding-up) Rules, rr. 89—92, 94—100,

SECT. 17.  
Voluntary  
Winding up.

Transfer  
to infant.

Proof of  
debts.

Priorities.

Application  
of rules.

**SECT. 17.**  
**Voluntary**  
**Winding up.**

no provision that every creditor must prove his debt unless the court otherwise directs, as in the case of a compulsory winding up. The voluntary liquidator need not, therefore, require every creditor to prove; but he may, unless otherwise ordered by the court, fix a day on which creditors are to prove or be excluded. In that case he must give notice in writing of the day so fixed by advertisement, and also to the last known address or place of abode of each person who to his knowledge claims to be a creditor and whose claim has not been admitted (*d*). So long as a company is in voluntary liquidation, interest continues to accrue on debts carrying interest, and creditors can prove for interest accrued after the passing of the winding-up resolution (*e*); but if a supervision order is made, then the creditors cannot prove for interest accrued after the passing of the winding-up resolution, unless there is a surplus remaining over after the other liabilities of the company have been discharged (*f*).

Security  
for costs.

**999.** Where a person resident out of the jurisdiction applies for a declaration that he is entitled to prove, the court can order him to give security for costs (*g*).

**SUB-SECT. 7.—Contributories.**

Settling list.

**1000.** In a voluntary winding up the same persons are contributories, and are under the same liability in that capacity, as in the case of a winding up by order of the court (*h*). The liquidator may exercise the powers of the court of settling a list of contributories and of making calls, and may adjust the rights of contributories among themselves (*i*).

The Act contemplates the making out of a list of contributories, which is to be *prima facie* evidence of the liability of the persons named therein to be contributories (*j*). The list of contributories ought to comprise not only all persons properly on the register, but also all those who, although not on it, ought to be put on it (*k*). If the liquidator thinks a person ought to be on the list, he

subject as therein respectively pointed out; and as to the rules applicable in voluntary winding up to the admission and rejection of proofs, see Companies (Winding-up) Rules, rr. 102—106; see p. 521, *ante*. As to a landlord being restrained from distraining on the ground that he is entitled to prove for rent, see *Re Harpur's Cycle Fittings Co.*, [1900] 2 Ch. 731; compare *Re Carriage Co-operative Supply Association, Ex parte Clemence* (1883), 23 Ch. D. 154.

(*d*) Companies (Winding-up) Rules, r. 102; see p. 507, *ante*.

(*e*) *Re East of England Banking Co.* (1868), 4 Ch. App. 14. But, in the case of an insolvent company the bankruptcy rules apply, and no claim can be sustained for interest subsequent to a judgment (*Re Salt (Thomas) & Co., Ltd.*, [1908] W. N. 63).

(*f*) *Re Imperial Land Co. of Marseilles, Ex parte Colborne and Strawbridge* (1870), L. R. 11 Eq. 478, 499.

(*g*) *Re Pretoria Pietersburg Rail. Co.* (No. 2), [1904] 2 Ch. 359.

(*h*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 123—128, which are not in terms confined to winding up by the court. The provisions of the Act with respect to winding up apply, unless the contrary appears, to the winding up of a company in any mode (*ibid.*, s. 122).

(*i*) *Ibid.*, s. 186 (v.).

(*j*) *Ibid.*, s. 186 (vi.).

(*k*) *Taylor, Phillips, and Richards' Cases*, [1897] 1 Ch. 298, 308, C. A.

**SECT. 17.**  
**Voluntary**  
**Winding up.**

should put him on and leave him to apply to get off, and should not himself apply to the court for a declaration of liability and an order for payment (*l*). The rules relating to the list of contributories do not apply to a voluntary winding up (*m*); but the practice in a winding up by the court (*n*) should be followed as closely as is practicable.

**1001.** If the voluntary liquidator makes a call (*o*) on contributories, he can apply by summons for a balance order (*p*) against those contributories who do not pay, directing them to pay to him the amount of the call. Although a contributory may not up to that time have raised any objection to his name being placed on the list, he may on the hearing of the application resist the call on the ground that his name has been improperly included. The liquidator may also obtain an order to enforce any calls made by the directors before the winding up commenced (*q*). Where an action for calls has been brought before winding up, to which set-off has been pleaded as a defence, but there has been no judgment, no allowance can be made, on the liquidator applying for a balance order, by way of set-off against the amount of calls (*r*). Where the liquidator in such a case settles the defendant on the list of contributories, and, after giving notice to discontinue the action, applies for a balance order, this application will not be stayed until he pays the taxed costs of the action, but the amount of taxed costs will be allowed out of the moneys recovered by him (*s*). A person whose name is settled by a voluntary liquidator on the list of contributories is liable for any calls made by the latter, even although the contributory has received no notice that he has been settled on the list (*t*).

**SUB-SECT. 8.—Distribution of Assets.**

**1002.** The liquidator is appointed for the purpose, *inter alia*, of distributing the assets of the company (*u*), which are to be applied (1) in payment of all costs, charges, and expenses properly incurred in the voluntary winding up (including the remuneration of the liquidator) which are payable in priority to all other claims (*a*);

Application  
of assets.

(*l*) *Re Cornwall Brick, Tile, and Terra Cotta Co.*, [1893] W. N. 9.

(*m*) See Companies (Winding-up) Rules, rr. 77—82, which form a group headed "List of Contributories in a winding up by the court."

(*n*) See p. 492, *ante*.

(*o*) As to the enforcement of calls by a receiver in the name of the liquidator, see *Fowler v. Broad's Patent Night Light Co.*, [1893] 1 Ch. 724; *Harrison v. St. Etienne Brewery Co.*, [1893] W. N. 108; *Re Westminster Syndicate, Ltd.*, [1908] W. N. 236; and p. 500, *ante*.

(*p*) See p. 502, *ante*.

(*q*) *Stone v. City and County Bank* (1877), 3 C. P. D. 282, C. A.

(*r*) *Re Hiram Maxim Lamp Co.*, [1903] 1 Ch. 70.

(*s*) *Re United Service Association*, [1901] 1 Ch. 97.

(*t*) *Brighton Arcade Co. v. Dowling* (1868), L. R. 3 C. P. 175, 187; compare *Re London Bank of Scotland*, [1867] W. N. 114.

(*u*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 186 [Companies Act, 1862, (25 & 26 Vict. c. 89) s. 133]. The assets include uncalled capital (*Webb v. Whiffin* (1872), L. R. 5 H. L. 711, 724).

(*a*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 196 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 144]. If an order is made continuing a voluntary winding up under supervision, the costs of the voluntary liquidator

SECT. 17. (2) in satisfaction of the company's liabilities *pari passu*; and  
 Voluntary (3) unless the articles otherwise provide, in distribution among the  
 Winding up. members according to their rights and interests in the company (b).

SUB-SECT. 9.—*Applications to the Court.*

Powers of  
 the court.

1003. Where a company is being wound up voluntarily, the liquidator (c), or any contributory or creditor, may apply to the court having jurisdiction to wind up the company (d) to determine any question arising in the winding up, or to exercise, as respects the enforcing of calls or any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court (e). The court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks just (f). The application (g) may be made by motion or originating summons (h). Applications may be transferred to another court having winding-up jurisdiction (i).

incurred prior to such order have priority over the petitioner's costs of obtaining the supervision order (*Re New York Exchange Co.*, [1893] 1 Ch. 371); compare *Re Sanitary Burial Association*, [1900] 2 Ch. 289, C. A., where the voluntary liquidator's costs were held to be postponed to the taxed costs of the petitioner, and of the liquidator's solicitor, and to any further costs of work properly done by the solicitor by the authority of the liquidator subsequently to the supervision order. As to the costs of drawing bills of costs, see *Re National Bank of Wales*, [1902] 2 Ch. 412.

(b) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 186 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 133]; see *Elkins v. Capital Guarantee Society* (1900), 16 T. L. R. 423, C. A., where the balance of a fund set apart for payment of bondholders, whose bonds were not payable until fifty years had elapsed, had not been claimed for over ten years after advertisements, and the court refused to order the unclaimed balance to be paid to the liquidator on behalf of the shareholders. But an order may be made excluding from the benefit of a scheme sanctioned by the court all bondholders who do not accept it within a limited time (*Saragoessa and Mediterranean Rail. Co. v. Collingham*, [1904] A. C. 159, reversing *Collingham v. Stoper*, [1901] 1 Ch. 769, C. A.).

(c) The liquidator may apply for the determination of any question fairly arising in the liquidation (*Re Central de Kaap Gold Mines*, [1899] W. N. 216, 235); but the practice now is only to answer specific questions. Claims for damages will not be decided on such an application (*Crawford v. McCulloch*, [1909] S. C. 1063).

(d) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 285; and see p. 391, *ante*. In *Re Alexandra Printing Ink Co., Ltd.* (1868), 18 L. T. 18, it was held that where an action had been instituted under a voluntary winding up, any other proceedings in the same matter should be in the same court.

(e) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 193 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 138; Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 25]. As to the object of this provision, see *Rance's Case* (1870), 6 Ch. App. 104, 114, 115.

(f) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 193 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 138].

(g) As to the rules applicable to a voluntary winding up, see Companies (Winding-up) Rules, r. 1; and p. 553, *ante*.

(h) *Re New Terras Tin Mining Co.*, [1894] 2 Ch. 344; *Re Union Bank of Kingston-upon Hull* (1880), 13 Ch. D. 808, and see p. 554, *ante*. Under the rules of 1862, the application was only to be made by summons if the judge so directed, but the direction could be given on the hearing of a summons issued without any previous direction (*Re British Envelope Manufacturing Co.*, [1885] W. N. 84).

(i) See p. 541, *ante*.

1004. An order may be made for a private examination (k); but a voluntary liquidator is not entitled to an order as of right; he must satisfy the court that it is just and beneficial that an order for examination should be made (l).

On an application to obtain relief where there has been non-compliance with the statutory requirements on the issue of shares not paid for in cash (m), the applicant ought to give the liquidator, in good time, information to enable him to decide whether he should oppose (n).

Where it appears that promoters, directors, or other officers have been guilty of misfeasance, proceedings may be taken as in the case of a winding up by the court (o).

1005. In the event of a voluntary winding up taking place, a transaction which would be deemed a fraudulent preference in the bankruptcy of an individual is invalid against the company, the passing of the resolution for voluntary winding up being deemed to correspond with the act of bankruptcy in the case of an individual, unless the winding up is placed under supervision or superseded by a compulsory winding up, in each of which cases the date of the petition is substituted (p).

SUB-SECT. 10.—*Staying and Restraining Proceedings and Staying Winding up.*

1006. The passing of resolutions for voluntary winding up does not, like an order for winding up by or under supervision of the court, stay any proceedings, or invalidate executions or distresses, or prevent actions or other proceedings being brought or continued against the company without the leave of the court (q). On application, however, the court (r) has jurisdiction to stay any action (s), proceeding, attachment, distress or execution (t) against the company, or its estate or effects, upon such terms as it thinks fit. Until the stay is granted, a creditor may commence or continue any action or proceeding, or put in force any attachment, distress, execution or analogous proceeding; and, therefore, a

(k) Under Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 174; see p. 474, *ante*.

(l) *Heiron's Case* (1880), 15 Ch. D. 139, C. A.; and see *Re Gold Co.* (1879), 12 Ch. D. 77, C. A.

(m) See p. 180, *ante*.

(n) *Stephenson's Case*, [1900] 2 Ch. 442.

(o) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 215; see p. 478, *ante*.

(p) *Ibid.*, s. 210; see p. 544, *ante*; *Re Russell Hunting Record Co.*, [1910] W. N. 142.

(q) See pp. 420, 534, *ante*.

(r) In this case the court in which the action is pending (*Currie v. Consolidated Kent Collieries Corporation*, [1906] 1 K. B. 134). In the case of a distress the court is the one having jurisdiction to wind up the company (*Re Roundwood Colliery Co.*, *Lee v. Roundwood Colliery Co.*, [1897] 1 Ch. 373).

(s) *Re Keynsham Co.* (1863), 33 Beav. 123; *Harrison v. Mortgage Insurance Corporation* (1893), 10 T. L. R. 141; see also *Re Hermann Loog, Ltd.* (1887), 36 Ch. D. 502; *Re Rio Grande Do Sul Steamship Co.* (1877), 5 Ch. D. 282, C. A.

(t) *Re Thurso New Gas Co.* (1889), 42 Ch. D. 486; *Re Sablonière Hotel Co.* (1866), L. R. 3 Eq. 74; *Westbury v. Twigg & Co.*, [1892] 1 Q. B. 77; *Re Roundwood Colliery Co.*, *Lee v. Roundwood Colliery Co.*, *supra*, at p. 381; *Re Poole Firebrick and Blue Clay Co.* (1873), L. R. 17 Eq. 268, which see as to the terms on which an execution will be stayed.

SECT. 17.  
 Voluntary  
 Winding up.

Application  
 for relief.

Misfeasance.

Fraudulent  
 preference.

Effect of  
 winding-up  
 resolutions  
 on outside  
 litigation.

Sect. 17. liquidator may obtain a supervision order to protect him against actions which are threatened, and so save the expense of applying for the stay or restraint of proceedings against the company (u).

Voluntary Winding up.

Discretion of the court.

In the case of a voluntary winding up the onus lies on the liquidator of showing that an action against the company should be stayed. The court has a discretion, and will not stay the action where there is a dispute as to the liability, although, if the liability is admitted, and there is a mere dispute as to the amount, the matter should be determined in the liquidation (a). Where an action is pending against the company when the winding up commences, and the liquidator disputes the claim and is unsuccessful at the trial, the plaintiff is entitled to have the costs paid in full out of the company's assets (b).

Staying winding up.

Where a company is in voluntary liquidation, the court having jurisdiction to wind up the company has power to make an order staying all proceedings in the winding up (c).

SUB-SECT. 11.—Reconstruction and Amalgamation.

(i.) In General.

Meaning of "reconstruction" and "amalgamation."

1007. Neither "reconstruction" nor "amalgamation" has any definite legal meaning. Each word is a commercial and not a legal term, and as a commercial term has no exact definite meaning. Where an undertaking is being carried on by a company, and is in substance preserved and transferred, not to an outsider, but to another company, consisting substantially of the same shareholders, with a view to its being continued by the transferee company, that is a reconstruction. It is none the less a reconstruction because all the assets do not pass to the new company, and all the shareholders of the transferor company are not shareholders in the transferee company, and the liabilities of the transferor company are not taken over by the transferee company. To constitute amalgamation there must be a blending of substantially two or more existing undertakings into one undertaking, the shareholders of each blending company becoming substantially the shareholders in the company which holds the blended undertakings. There may be amalgamation either by the transfer of two or more undertakings to a new company, or by the transfer of one or more undertakings to an existing company. It is not necessary that a resolution for winding up should refer to reconstruction or amalgamation in order to constitute a winding up for the purpose of reconstruction or amalgamation; but the purpose of the winding up may be gathered from the whole of the circumstances which result in reconstruction or amalgamation (d).

(u) *Re Zoedone Co.* (1883), 53 L. J. (CH.) 465.

(a) *Currie v. Consolidated Kent Collieries Corporation, Ltd.*, [1906] 1 K. B. 134, C. A.

(b) *Re Wenborn & Co.*, [1905] 1 Ch. 413.

(c) *Re Condes Co. of Chili* (1892), 36 Sol. Jo. 593; *Re Steamship "Tilian" Co.* (1888), 36 W. R. 347; *Re Schanschieff Electric Battery Syndicate, Ltd.*, [1888] W. N. 166; *Re Steamship Chigwell, Ltd.* (1888), 4 T. L. R. 308.

(d) *Re South African Supply and Cold Storage Co., Wild v. Same Co.*, [1904] 2 Ch. 268. Both words have since been adopted by the legislature; see

1008. A clause in a company's memorandum of association giving power to sell all its assets and all its undertaking and to distribute the proceeds does not enable such a sale and distribution to be made without regard to the statutory provisions (e). Nor can a company limited by shares effectually provide, as part of its constitution, by its memorandum and articles, that in a specified event a member shall either submit to a liability in excess of the limit of liability on his shares, or be dispossessed of his status as a member (f).

Sect. 17. Voluntary Winding up.

Reconstruction under memorandum powers.

Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 5 (6); Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 209 (1); see also *Hooper v. Western Counties and South Wales Telephone Co.* (1892), 68 L. T. 78 (reconstruction); *Wall v. London and Northern Assets Corporation*, [1898] 2 Ch. 469, C. A.; *Re Bank of Hindustan, China and Japan, Higgs's Case* (1865), 2 Hem. & M. 657; *New Zealand Gold Extraction Co. (Newbery-Vautin Process) v. Peacock*, [1894] 1 Q. B. 622, C. A.; *Re Empire Assurance Corporation, Ex parte Bagshaw* (1867), L. R. 4 Eq. 341, 349; *Imperial Bank of China, India and Japan v. Bank of Hindustan, China and Japan* (1868), L. R. 6 Eq. 91; *Re Borax Co., Foster v. Borax Co.*, [1899] 2 Ch. 130, 135; *Greenwich Pier Co. v. Thames River Conservators* (1905), 21 T. L. R. 669 (amalgamation). As to amalgamation of assurance companies, see p. 633, *post*. As to arrangements and compromises, see p. 602, *post*.

(e) Namely, those contained in the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 192; see p. 586, *post*.

(f) *Bisgood v. Henderson's Transvaal Estates, Ltd.*, [1908] 1 Ch. 743, C. A.; compare *Payne v. Cork Co., Ltd.*, [1900] 1 Ch. 308. The case may be different where the sale is of part of the assets only; see *Wall v. London and Northern Assets Corporation, supra*. It had been usual for many years for companies to state, in their memoranda of association, that one of the objects was to sell the undertaking or any part thereof for any consideration, and in particular for shares or other securities of any other company having similar objects. Such a power was held to be valid, even when the whole of the company's assets were sold, and the winding up, which is required before the proceeds of the sale can be distributed amongst the shareholders, was not resolved upon at the same time (*Cotton v. Imperial and Foreign Agency and Investment Corporation*, [1892] 3 Ch. 454). Hence, dissentient members under the provision for which s. 192 (3) of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), is substituted were deprived of any rights which they would have possessed on a statutory reconstruction to have their interests paid for. The fact that a resolution for voluntary winding up was passed at the time when the sale was sanctioned was held to be immaterial (*Doughty v. Lomagunda Reefs, Ltd.*, [1902] 2 Ch. 837; and see *Re Paterson, Laing and Bruce, Ltd.* (1902), 18 T. L. R. 515). It was further held that unless there was something in the memorandum or articles to qualify the meaning of the word "shares" a company could, under its memorandum power of sale, accept partly-paid shares in another company (*Mason v. Motor Traction Co., Ltd.*, [1905] 1 Ch. 419). Where the memorandum expressly gave power to sell for fully or partly paid shares, the Court of Appeal, without deciding that such a power was illegal, held that an agreement with another company which provided for the distribution of the partly-paid shares of the purchasing company among the shareholders of the selling company, and the proceeds of sale of the shares not taken up being applied in reduction of the purchase-money, was not within the power (*Manners v. St. David's Gold and Copper Mines, Ltd.*, [1904] 2 Ch. 593, C. A.). An agreement, under which the proceeds of the partly-paid shares unclaimed were to be distributed rateably amongst the members who might have claimed them, was also held to be *ultra vires* (*Bisgood v. Nile Valley Co., Ltd.*, [1906] 1 Ch. 747). In a somewhat similar case the agreement was held to be valid (*Fuller v. White Feather Reward, Ltd.*, [1906] 1 Ch. 823). But the Court of Appeal in *Bisgood v. Henderson's Transvaal Estates, Ltd.*, *supra*, subsequently approved *Bisgood v. Nile Valley Co., Ltd.*, *supra*, and overruled *Cotton v. Imperial and Foreign Agency and Investment Corporation, supra*, and *Fuller v. White Feather Reward, Ltd.*, *supra*.

SECT. 17.  
Voluntary  
Winding up.  
Statutory  
reconstruction.

**1009.** Where a company is proposed to be, or is in course of being, wound up altogether voluntarily, and the whole or part of its business or property is proposed to be transferred or sold to another company, the liquidator of the transferor company may, with the sanction of a special resolution of that company, conferring on him either a general authority or an authority in respect of any particular arrangement, receive, in compensation or part compensation for the transfer or sale, shares, policies, or other like interests in the transferee company, for distribution among the members of the transferor company, or may enter into any other arrangement whereby the members of the transferor company may, in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the transferee company. Any such sale or arrangement is binding on the members of the transferor company (g).

The statutory power of sale is in addition to any powers conferred on the company under its regulations, and may be exercised although *ultra vires* of the company (h). The making of a supervision order does not take away the power (i), and it may be subsequently exercised without the sanction of the court (j). The sale binds both the shareholders and the creditors of the transferor company (k), though mortgagees may be entitled under the terms of their mortgage to prevent a sale of its assets (l).

Special  
resolution.

**1010.** A special resolution sanctioning a transfer is not invalid because it is passed before or concurrently with a resolution for winding up the company, or for appointing liquidators. If, however, an order is made within a year for winding up the company by or subject to the supervision of the court, the special resolution is not valid unless sanctioned by the court (m). The sanction of the court must

(g) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 192 (1), (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 161].

(h) *Clinch v. Financial Corporation* (1868), L. R. 5 Eq. 450, 472, affirmed (1868) 4 Ch. App. 117, 121, 123; *Nicholl v. Eberhardt Co.* (1889), 61 L. T. 489, C. A. But the new company must have power under its memorandum to accept the transfer (*Pulbrook v. New Civil Service Co-operation* (1877), 26 W. R. 11). As to the powers of unincorporated companies under deeds of settlement to transfer their undertaking, see *Re Era Assurance Society, Ex parte Williams, Ex parte Anchor Assurance Co.* (1860), 30 L. J. (CH.) 137; *Kearns v. Leaf* (1864), 1 Hem. & M. 681; *Ernest v. Nicholls* (1857), 6 H. L. Cas. 401; *Doman's Case* (1876), 3 Ch. D. 21, C. A.; *Re Argus Life Assurance Co.* (1888), 39 Ch. D. 571.

(i) *Re Imperial Mercantile Credit Association* (1871), L. R. 12 Eq. 504; *Re Cambrian Mining Co.* (1882), 48 L. T. 114.

(j) *Wright's Case* (1870), 5 Ch. App. 437.

(k) *Re City and County Investment Co.* (1879), 13 Ch. D. 475, C. A.

(l) *Re Borax Co., Foster v. Borax Co.*, [1899] 2 Ch. 130; compare *Re Vivian (H. H.) & Co., Ltd., Metropolitan Bank of England and Wales, Ltd. v. Vivian (H. H.) & Co., Ltd.*, [1900] 2 Ch. 654.

(m) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 192 (5) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 161]. A supervision order is sometimes obtained in order to obtain the court's sanction (*Re New Flagstaff Mining Co.*, [1889] W. N. 123); and a compulsory order will be made, when a scheme appears unfair, in order that the scheme may not be carried through without the court's sanction (*Re Consolidated South Rand Mines Deep, Ltd.*, [1909] 1 Ch. 491).

SECT. 17.  
Voluntary  
Winding up.

be obtained at or after the making of the winding-up or supervision order, and cannot be previously obtained in the voluntary winding up (n). When a voluntary winding-up resolution states that, for the purpose of effecting the amalgamation or reconstruction, the company is wound up voluntarily, the winding-up resolution is not rendered invalid by reason of the intended amalgamation or reconstruction being *ultra vires* (o).

A special resolution is invalid unless the notice convening the first meeting distinctly states that it is intended to proceed under the statutory provision (p). It is invalid so far as it authorises the liquidator to pay for the underwriting of the shares of the transferee company out of the assets of the transferor company (q) unless the statutory requirements as to underwriting are complied with (r).

When  
invalid.

**1011.** Under the statutory power the transferor company can only sell to another company (s). If, however, such company is a corporate body, it is immaterial in what way it has been incorporated, so long as it is a company as defined by the Act of 1908 (t). A sale to a person who intends to re-sell at a profit to a company is invalid (u); but a sale to an agent or trustee for a company to be formed may be within the section (w).

Transferee  
company.

**1012.** The agreement for sale may validly provide that the transferor company shall call up its unpaid capital and transfer the amount so realised to the transferee company (a), or that shares in

Incidents of  
agreement.

(n) *Re Callao Bis Co.* (1889), 42 Ch. D. 169, C. A. In the case of life assurance companies the court's sanction is always required (*Life Assurance Companies Act, 1870* (33 & 34 Vict. c. 61), s. 14); and see *Assurance Companies Act, 1909* (9 Edw. 7, c. 49), s. 13; and p. 634, *post*.

(o) *Cleve v. Financial Corporation* (1873), L. R. 16 Eq. 363; *Stone v. City and County Bank* (1877), 3 C. P. D. 282, C. A.

(p) *Imperial Bank of China, India and Japan v. Bank of Hindustan, China and Japan* (1868), L. R. 6 Eq. 91; *Re Irrigation Co. of France, Ex parte Fox* (1871), 6 Ch. App. 176, 193; compare *Re Teede and Bishop, Ltd.*, [1901] W. N. 52.

(q) *Re Canning Jarrah Timber Co. (Western Australia), Ltd.*, [1900] 1 Ch. 708, C. A.

(r) *Barrow v. Parings Mines (1909), Ltd.*, [1909] 2 Ch. 658. As to underwriting shares, see p. 92, *ante*.

(s) *Bird v. Bird's Patent Deodorizing and Utilizing Sewage Co.* (1874), 9 Ch. App. 358.

(t) This does not include a foreign company (*Thomas v. United Butter Cos. of France*, [1909] 2 Ch. 484). As to cases before the Act, see *Re Irrigation Co. of France, Ex parte Fox* (1871), 6 Ch. App. 176, 192. As to the companies which are within the section, see p. 36, *ante*; and s. 285 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69). An unregistered company can, by registering under the Act of 1908, avail itself of the reconstruction section (*Southall v. British Mutual Life Assurance Society* (1871), 6 Ch. App. 614).

(u) *Re Hester & Co.* (1875), 44 L. J. (CH.) 757, 759, C. A.

(w) *Ibid.*; *Re Canning Jarrah Timber Co. (Western Australia), Ltd.*, *supra*.

(a) *New Zealand Gold Extraction Co. (Newbery-Vautin Process) v. Peacock*, [1894] 1 Q. B. 622, 630, C. A.; *Re Bank of South Australia* (2), [1895] 1 Ch. 578, C. A.; but the agreement cannot validly provide for a call to be made on the shares of the transferor company in case its assets do not realise a specified amount (*Clinch v. Financial Corporation* (1868), 4 Ch. App. 117).

**SECT. 17.**  
**Voluntary**  
**Winding up.**

the transferee company shall be allotted either to the liquidator, or directly to the members of the transferor company, and as either partly or fully paid up. A liability to pay cash, however, cannot be imposed on the members of the transferor company by allotting them shares credited as partly paid up, except with their consent (b). If they accept such shares they become liable for the amount not credited as paid on them, the shareholder sometimes being required to make a payment of parts of the amount on application and on allotment (c).

**Rights of**  
**members.**

A member of the transferor company, even if he has not served notice of dissent, cannot be compelled to accept shares in the transferee company; but if he has served no such notice he is not entitled to receive compensation for his interest in the transferor company (d).

**Compensa-**  
**tion to**  
**directors.**

The agreement for sale is not invalid because it provides that part of the purchase-money shall be paid to the directors and secretary of the transferor company, as compensation for loss of office (e).

**Payment by**  
**instalments**  
**etc.**

The court has no power to authorise a sale to a transferee company in consideration of its agreeing to pay the creditors of the transferor company by instalments (f). Nor can it authorise an agreement or resolution compelling the members of the transferor company to pay a premium upon the shares of the transferee company (g).

An agreement that the members of one company shall, in

(b) See *Re City and County Investment Co.* (1879), 13 Ch. D. 475, 482, C. A.; *Re Imperial Mercantile Credit Association* (1871), L. R. 12 Eq. 504; *Simpson v. Palace Theatre, Ltd.* (1893), 69 L. T. 70, C. A. For the form of scheme, see *Postlethwaite v. Port Phillip and Colonial Gold Mining Co.* (1889), 43 Ch. D. 452.

(c) *Weston v. New Guston Co.* (1889), 1 Meg. 225, 352, C. A.; affirmed (1891) 64 L. T. 815, H. L.; *Postlethwaite v. Port Phillip and Colonial Gold Mining Co.*, *supra*; *Burdett-Coutts v. True Blue (Hannan's) Gold Mine*, [1899] 2 Ch. 616, C. A. Where the shares are to be taken as partly paid, the agreement should provide for the allotment being made directly to the members of the old company so as to free the liquidator from any liability. A shareholder may be required to elect within a reasonable time whether he will accept such shares (*Zuccani v. Nacupai Gold Mining Co.* (1889), 61 L. T. 176, C. A.).

(d) *Re Bank of Hindustan, China and Japan, Ex parte Los* (1865), 34 L. J. (CH.) 609; *Re Bank of Hindustan, China and Japan, Higgs's Case* (1865), 2 Hem. & M. 657; *Re Bank of Hindustan China and Japan, Martin's Case* (1865), 2 Hem. & M. 669; *Re Empire Assurance Corporation, Ex parte Bagshaw* (1867), L. R. 4 Eq. 341; *Re London, Bombay and Mediterranean Bank, Drew's Case* (1867), 36 L. J. (CH.) 785; see p. 591, *post*.

(e) *Southall v. British Mutual Life Assurance Society* (1871), 6 Ch. App. 614; compare *Kaye v. Croydon Tramways Co.*, [1898] 1 Ch. 358, C. A. The proposed payment must be fully disclosed to the shareholders (*Tiersen v. Henderson*, [1899] 1 Ch. 861; compare *Normandy v. Ind Coope & Co., Ltd.*, [1908] 1 Ch. 84. As to gratuities to officers and servants, see p. 220, *ante*. As to agreements providing for a distribution other than in accordance with the rights of members, see *Griffith v. Paget* (1877), 5 Ch. D. 894; 6 Ch. D. 511; *Postlethwaite v. Port Phillip and Colonial Gold Mining Co.*, *supra*; *Simpson v. Palace Theatre, Ltd.*, *supra*.

(f) *Re General Exchange Bank* (1867), 15 W. R. 477.

(g) *Imperial Bank of China, India and Japan v. Bank of Hindustan, China and Japan* (1868), L. R. 6 Eq. 91.

exchange for their shares therein, take shares in another company is chargeable with *ad valorem* duty (h).

The consideration for the sale must be distributed among the members of the selling company in proportion to their rights and interests, under its regulations, in the assets of the company remaining after payment of its liabilities. The persons prejudicially affected by any other mode of distribution can only be bound by their individual consents (i). Where the liquidator disposes of all the shares in the transferee company without reserving any for a member of the transferor company who is entitled thereto, the court has no jurisdiction to award the member damages in the winding up of the transferor company (k). Nor can the question as to the validity of the sale be decided in the winding-up proceedings, but only in an action instituted by a non-assenting shareholder suing on behalf of himself and all other shareholders (l).

(ii.) *Rights of Dissident Members.*

**1013.** If any member of the transferor company, who has not voted in favour of the special resolution at either of the meetings held to pass and confirm the same, expresses his dissent in writing addressed to the liquidator, and left at the registered office of the company within seven days after the confirmation of the resolution, he may require (m) the liquidator either to abstain from carrying the resolution into effect, or to purchase his interest at a price to be determined by agreement or by arbitration in the prescribed manner (n). A notice of dissent served before the confirmatory

**SECT. 17.**  
**Voluntary**  
**Winding up.**

**Distribution**  
**of proceeds.**

**Notice of**  
**dissent.**

(h) *Chesterfield Brewery Co. v. Inland Revenue Commissioners*, [1899] 2 Q. B. 7. (i) *Griffith v. Paget* (1877), 6 Ch. D. 511; *Postlethwaite v. Port Phillip and Colonial Gold Mining Co.* (1889), 43 Ch. D. 452; *Simpson v. Palace Theatre, Ltd.* (1893), 69 L. T. 70; *Re Lake View Extended Gold Mine (Western Australia), Ltd.*, [1900] W. N. 429; *Re North West Argentine Railway*, [1900] 2 Ch. 882, where WRIGHT, J. in fact repudiated his former decision in *Re Beeston Pneumatic Tyre Co.*, [1898] W. N. 34.

(k) *Re Hill's Waterfall Estate and Gold Mining Co.*, [1896] 1 Ch. 947. (l) *Re Imperial Bank of China, India and Japan* (1866), 1 Ch. App. 339, 347, 348; *Re International Life Assurance Society* (1868), 20 L. T. 433; *Clinch v. Financial Corporation* (1868), L. R. 5 Eq. 450; *Bird v. Bird's Patent Deodorizing and Utilizing Sewage Co.* (1874), 9 Ch. App. 358; compare *Re City and County Investment Co.* (1879), 13 Ch. D. 475, C. A.; *Re Hester & Co.* (1875), 44 L. J. (CH.) 757, C. A. As to adding the transferee company as a party, see *Doughty v. Lomagunda Reefs, Ltd.*, [1903] 1 Ch. 673, C. A.

(m) The requisition must be contained in the notice of dissent (*Re Union Bank of Kingston-upon-Hull* (1880), 13 Ch. D. 808). Where the registered office of the company is abroad the notice given to the liquidator in England within the requisite term is sufficient (*Brailey v. Rhodesia Consolidated, Ltd.* (1910), 129 L. T. 10).

(n) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 192 (3) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 161]. As to the clauses to be inserted in the reconstruction or amalgamation agreement to provide funds to pay dissentients, see *Re Hester & Co.*, *supra*. For the purposes of arbitration the provisions of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), with respect to the settlement of disputes by arbitration, are incorporated with the Act of 1908, and in the construction of those provisions the Act of 1908 is deemed to be the special Act, and "the company" means the transferor company, and any appointment by the incorporated provisions directed to be made under the hand of the secretary, or any two of the directors, may be made under the hand of the liquidator, or if there is more than one liquidator, then



SECT. 17.  
Voluntary  
Winding up.

meeting, and not objected to or returned within a month, is valid (o).

An article of association providing that the sum payable to a dissentient member shall be such sum as the liquidator can obtain by selling the shares to which the dissentient member, but for his dissent, would have been entitled does not constitute an agreement as to the price to be paid to dissentient members (p). An article which purports to authorise what may be done under the Act, but omits the proviso in favour of dissentient shareholders, is invalid (q).

Amount  
payable.

1014. Interest is not payable on the amount awarded until payment is demanded in writing; but from that time it is payable at the rate of 4 per cent. until payment (r). In practice, the price to be paid in shares by the transferee company is disregarded on the arbitration, and the value of a dissentient member's interest depends on the nature of the reconstruction (s). A commission to examine witnesses abroad may be granted in order to ascertain the value of the assets (t). The court will not, however, allow a shareholder to examine officers of the company in order to obtain evidence for use on the arbitration (u).

If the liquidator elects to purchase the member's interest, the liquidator must raise the purchase-money and pay it in such manner as may be determined by special resolution before the company is dissolved (w). Unless provision is made to satisfy money payable to a dissentient member, an injunction will be granted to restrain the liquidator from parting with the assets without providing for his claim (a).

A dissentient member is not entitled to have his name omitted from the list of contributories, although he transfers his shares to the liquidator (b); but the transfer relieves him from liability as to the costs of the liquidation (c).

of any two or more of them (*ibid.*, s. 192 (6) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 162]; but if the articles of association provide for arbitration between the company and its members, either that or the statutory mode of arbitration may be resorted to (*De Rosaz v. Anglo-Italian Bank* (1869), L. R. 4 Q. B. 462); see title ARBITRATION, Vol. I., pp. 439 *et seq.*; see p. 601, *post*.

(o) *Re London and Westminster Bread Co.* (1890), 59 L. J. (CH.) 155.  
(p) *Baring Gould v. Sharpington Combined Pick and Shovel Syndicate*, [1899] 2 Ch. 80, C. A.

(q) *Payne v. Cork Co., Ltd.*, [1900] 1 Ch. 308; *Re Irrigation Co. of France, Ex parte Fox* (1871), 6 Ch. App. 176.

(r) *Re United States Direct Cable Co.* (1879), 48 L. J. (CH.) 665.

(s) *Re Mysore West Gold Mining Co.* (1889), 42 Ch. D. 535.

(t) *Ibid.*

(u) *Re British Building Stone Co., Ltd.*, [1908] 2 Ch. 450; nor can the books of the company be examined by the dissentient to see whether acceptance of the offer would be for his advantage (*Morgan's Case* (1884), 28 Ch. D. 620).

(w) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 192 (4) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 161].

(a) *Re Hester & Co.* (1875), 44 L. J. (CH.) 757; [1875] W. N. 179, C. A.; *Baring Gould v. Sharpington Combined Pick and Shovel Syndicate, supra*; *Payne v. Cork Co., Ltd.*, [1900] 1 Ch. 308.

(b) *Re Imperial Land Co. of Marseilles, Ex parte Jeaffreson* (1870), L. R. 11 Eq. 109; *Vining's Case* (1870), 6 Ch. App. 96; *Part's Case* (1870), L. R. 10 Eq. 622.

(c) *Re Marine Investment Co., Ex parte Poole's Executors* (1873), 8 Ch. App. 702, 710.

Where a scheme is eminently unfair, a dissentient minority may stop it by obtaining a compulsory winding-up order (d).

1015. If a member who has not dissented but has not expressly or impliedly assented to the sale declines to accept his proportion of the shares payable by the transferee company, he cannot be compelled to accept them (e); but he obtains nothing (f) unless they are allotted and sold by the liquidator, in which case he is entitled to the net proceeds of sale (g).

1016. A special resolution directing shares in the purchasing company to be offered to members of the old company, and fixing a reasonable limit of time for acceptance, is *intra vires* (h). In the absence of such a stipulation a reasonable time must be allowed, and if the time is not reasonable the members are not bound thereby (i).

1017. A proper contract with regard to the fully or partly paid shares in the new company, and a return of the allotments, must be filed (k). A contract for sale does not create a contractual relation between a member of the transferor company and the new company, and if he applies for shares in the new company in pursuance of the scheme, he may withdraw his offer before it is accepted (l). The new company is in no sense the servant or agent of the transferor company, and is not bound by injunctions granted against it (m).

1018. Where, under a contract made prior to the reconstruction scheme being sanctioned, the purchaser is entitled to be registered as transferee of shares in the old company, and the vendor obtains the allotment of the shares in the new company, to which the owner of such shares is entitled under the scheme, the allottee is a trustee of them for the purchases, although he has delayed registration of the transfer (n).

(d) *Re Consolidated South Rand Mines Deep, Ltd.*, [1909] 1 Ch. 491.

(e) See note (d), p. 588, *ante*.

(f) *Weston v. New Guston Co.* (1889), 1 Meg. 225, 352, C. A.; affirmed (1891) 64 L. T. 815, H. L.; *Zuccani v. Nacupai Gold Mining Co.* (1889), 61 L. T. 176, C. A.

(g) *Re Lake View Extended Gold Mine (Western Australia), Ltd.*, [1900] W. N. 44.

(h) *Postlethwaite v. Port Phillip and Colonial Gold Mining Co.* (1889), 43 Ch. D. 452; *Burdett Coutts v. True Blue (Hannan's) Gold Mine*, [1899] 2 Ch. 616, C. A.; compare *Nicholl v. Eberhardt Co.* (1889), 59 L. J. (CH.) 103, C. A.

(i) *Zuccani v. Nacupai Gold Mining Co., supra*; *Re South Australian Petroleum Fields, Ltd.*, [1894] W. N. 189.

(k) As to filing contracts and returns, see p. 179, *ante*. Where a reconstruction has been carried out by forming a new company with the same name, which takes over all the liabilities of the transferor company, payments made by the former to a creditor of the latter who dealt with the former under the belief that he was continuing to deal with the transferor company must be applied in discharge of debts of the old company, and not of those due to him by the transferee company (*Re Taurine Co., Anning and Cobb's Claim* (1878), 38 L. T. 53).

(l) *Wallace's Case*, [1900] 2 Ch. 671.

(m) *Boech v. Simms Manufacturing Co.* (1909), 25 T. L. R. 419.

(n) *Rooney v. Stanton* (1900), 17 T. L. R. 28, C. A.

SECT. 17.  
Voluntary  
Winding up.

Member  
neither  
assenting nor  
dissenting.

Time  
limit for  
acceptance.

Filing.

Allotment  
to wrong  
person.

## SECT. 17.

## Voluntary Winding up.

Prosecution by liquidator.

SUB-SECT. 12.—*Prosecution of Delinquent Directors and Others.*

1019. If it appears to the liquidator in the course of a voluntary winding up that any past or present director, manager, officer, or member of the company has been guilty of any offence in relation to the company for which he is criminally responsible, the liquidator, with the previous sanction of the court, may prosecute the offender. All expenses properly incurred by him in the prosecution are payable out of the assets of the company in priority to all other liabilities (o).

SUB-SECT. 13.—*Disposal of Books.*

Disposal of books.

1020. When a company has been wound up voluntarily and is about to be dissolved, the books and papers of the company and of the liquidator may be disposed of in such way as the company by extraordinary resolution directs. After five years from the dissolution no responsibility rests on the company, or the liquidator, or any person to whom the custody of the books and papers has been committed, by reason of their not being forthcoming to any person claiming to be interested (p). If, after the dissolution, any documents remain in the custody of the liquidator, he may be ordered to produce them (q).

SUB-SECT. 14.—*Dissolution of Company.*

General meeting of the company.

1021. In the case of every voluntary winding up, as soon as the affairs of the company are fully wound up, the liquidator must make up an account of the winding up, showing how it has been conducted and how the property of the company has been disposed of. He must then call a general meeting of the company for the purpose of laying before it the account and giving any explanation that may be required (r). The meeting must be called by advertisement in the *London Gazette*, specifying the time, place, and object, and published one month at least before the meeting (s).

Notice of meeting to registrar.

Within one week after the meeting, the liquidator must make a return to the registrar of the holding of the meeting, and of its date. In default of so doing, he is liable to a fine not exceeding £5 for every day during which the default continues (t). The registrar on receiving the return is forthwith to register it, and on the expiration of three months from the registration of the return the company is deemed to be dissolved (a). The court may, however, on the application of the liquidator or of any other person who appears to be interested, make an order

(o) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 217 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 168]; see pp. 564, 581, *ante*.

(p) *Ibid.*, s. 222 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 155].

(q) *London and Yorkshire Bank v. Cooper* (1885), 15 Q. B. D. 473, C. A.

(r) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 195 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 142].

(s) *Ibid.*, s. 195 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 142].

(t) *Ibid.*, s. 195 (3) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 143; Companies Act, 1907 (7 Edw. 7, c. 50), s. 50; Sched. III.].

(a) *Ibid.*, s. 195 (4) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 143; Companies Act, 1907 (7 Edw. 7, c. 50), Sched. III.].

deferring the date at which the dissolution is to take effect for such time as it thinks fit (b).

The person on whose application such an order is made must within seven days after the making of the order file with the registrar an office copy of the order. If he fails so to do he is liable to a fine not exceeding £5 for every day during which the default continues (c).

1022. If proceedings are instituted against the company after the date of the registration of the liquidator's return, but before the expiration of three months from that date, the court has, in certain cases, jurisdiction to make an order against the company, even although the hearing does not take place until after the expiration of the three months (d). The court has no jurisdiction after dissolution to make a winding-up order except perhaps where the dissolution proceedings are invalidated by fraud (e); but it may set aside the dissolution (f).

Even after dissolution the liquidator is liable in damages for breach of his statutory duty to a creditor or contributory by distributing the assets without providing for his debt or claim, after taking proper steps to ascertain it (g).

SUB-SECT. 15.—*Superseding Voluntary Winding up.*

1023. The voluntary winding up of a company does not bar the right of any creditor, whether his debt accrued before or after the commencement of the voluntary winding up (h), or contributory, to have it wound up by the court, if the court is of opinion that the rights of the creditor or contributories, as the case may be, will be prejudiced by a voluntary winding up (i). Where the court

(b) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 195 (4) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 31 (1)]. Before the Act of 1907 there was no power to make an order directly extending the time, but the court could do so indirectly by staying all proceedings in the winding up (*Re Eastern Investment Co., Ltd.*, [1905] 1 Ch. 352).

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 195 (5) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 31 (3)]. As to the effect of dissolution, see p. 592, *ante*; *Re London and Caledonian Marine Insurance Co.* (1879), 11 Ch. D. 140, C. A.; *Re Schooner Pond Coal Co.*, [1888] W. N. 70. As to *bona vacantia*, see also *Cunnack v. Edwards*, [1896] 2 Ch. 679, C. A.; *Re Printers and Transferrers Amalgamated Trades Protection Society*, [1899] 2 Ch. 184; *Brown v. Dale* (1878), 9 Ch. D. 78; *Re Bond, Panes v. A.-G.*, [1901] 1 Ch. 15.

(d) *Whiteley Exerciser, Ltd. v. Gamage*, [1898] 2 Ch. 405; *Re Crookhaven Mining Co.* (1866), L. R. 3 Eq. 69; compare *Salton v. New Beeston Cycle Co.*, [1900] 1 Ch. 43.

(e) *Re Pinto Silver Mining Co.* (1878), 8 Ch. D. 273, 282, C. A.

(f) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 223 [Companies Act, 1907 (7 Edw. 7, c. 50), s. 31].

(g) *Pulsford v. Devenish*, [1903] 2 Ch. 625.

(h) *Re Bank of South Australia* (2), [1895] 1 Ch. 578, 595, C. A., doubting *Re Bank of South Australia*, [1894] 3 Ch. 722, where it was held that there was no jurisdiction to make a supervision order on the petition of a creditor whose debt was incurred after the voluntary winding up commenced.

(i) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 197 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 145]; see p. 416, *ante*. It is immaterial whether the resolution for voluntary winding up is passed before or after the presentation of the winding-up petition (*Re New York Exchange, Ltd.* (1888),

SECT. 17.

Voluntary Winding up.

Effect of dissolution.

Procedure.

**SECT. 17.**  
**Voluntary Winding up.**

orders the company to be wound up by the court, it may, if it thinks fit, by the same or any subsequent order, provide for the adoption of all or any of the proceedings in the voluntary winding up (j). Such proceedings are not, however, invalidated by reason of the court not adopting them (k).

Alternative to super-session.

Instead of making a winding up order, an order may be made for continuing the voluntary winding up under the supervision of the court (l).

The existence of a voluntary winding up is not a strong reason against a compulsory order where the resolution for voluntary winding up has been passed with a specific object, such as reconstruction, which has failed (m). The fact that a winding-up resolution has been passed in breach of faith towards a creditor is an important factor in determining whether there should be a compulsory order (n).

**SECT. 18.—Winding up under the Supervision of the Court.**

**SUB-SECT. 1.—In General.**

**1024.** The court cannot order the voluntary winding up of a company to be continued under the supervision of the court unless there is in existence a valid resolution for voluntary winding up (o). The jurisdiction is now confined to cases where the resolution is a special or extraordinary one, in which case the court

Where supervision order may be made.

39 Ch. D. 415, C. A.). S. 145 of the Companies Act, 1862 (25 & 26 Vict. c. 89), only in terms prevented the voluntary winding up being a bar where the rights of a creditor were prejudiced; but even then a contributory could petition (*Re Gold Co.* (1879), 11 Ch. D. 701, C. A.); and orders were made where creditors supported the petition (*Re Bishop (E.) & Sons, Ltd.*, [1900] 2 Ch. 254; and see *Re Vron Colliery Co.* (1885), 20 Ch. D. 442, C. A.), or where the resolution was passed fraudulently (*Re Gold Co.*, *supra*), or by the votes of members whose conduct required investigation (*Re Varieties, Ltd.*, [1893] 2 Ch. 235; *Re West Surrey Tanning Co.* (1866), L. R. 2 Eq. 737); or where the court was satisfied that the voluntary winding up was existing under circumstances likely to prejudice the shareholders (*Re National Distribution of Electricity Co., Ltd.*, [1902] 2 Ch. 34, C. A.). Compare *Re Bank of Gibraltar and Malta* (1865), 1 Ch. App. 69; and see *Re National Debenture and Assets Corporation*, [1891] 2 Ch. 505, C. A.; *Re New York Exchange, Ltd.* (1888), 39 Ch. D. 415; *Re West Hartlepool Ironworks Co.* (1875), 10 Ch. App. 618. The decision in *Re Greenwood & Co.*, [1900] 2 Q. B. 306, that an order for the compulsory winding up of a company already in liquidation, although it would benefit the petitioner, ought not to be made unless it would be in the interest of the general body of the creditors, is more than doubtful. The fact that the voluntary liquidator is the nominee of the shareholders may be sufficient of itself to satisfy the court that the rights of the creditors will be prejudiced (*Re Medical Battery Co.*, [1894] 1 Ch. 444, 448; *Re Tramway Wheel Plant and General Foundry Co.*, [1873] W. N. 160). Where the company has no assets except uncalled capital, and the voluntary liquidator will not make calls, the creditors are clearly prejudiced (*Re Bank of South Australia* (2), [1895] 1 Ch. 578, C. A.).

(j) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 146 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 146].

(k) *Thomas v. Patent Lionite Co.* (1881), 17 Ch. D. 250, C. A.; *Cleve v. Financial Corporation* (1873), L. R. 16 Eq. 363.

(l) See *infra*.

(m) *Re Gutta Percha Corporation*, [1900] 2 Ch. 665.

(n) *Re A. B. Cycle Co.* (1902), 19 T. L. R. 84.

(o) *Re Bridport Old Brewery Co.* (1867), 2 Ch. App. 191; *Re Patent Floor-Cloth*

**SECT. 18.**  
**Winding up under the Supervision of the Court.**

may make an order that the voluntary winding-up shall continue, but subject to such supervision of the court, and with such liberty for creditors, contributories, or others, to apply to the court, and generally on such terms and conditions as the court thinks just (p).

The courts having jurisdiction to make supervision orders are the same as those having jurisdiction to make compulsory orders (q).

**SUB-SECT. 2.—Petition and Procedure thereon.**

**1025.** Every petition for the winding up of a company subject to the supervision of the court must be in the prescribed form, with such variations as circumstances require (r). The practice with regard to presenting petitions and making orders is practically the same as that on application for a compulsory order down to and including the completion of the order (s).

Petition for order.

For the purpose of giving jurisdiction to the court over actions, the petition is deemed to be a petition for winding up by the court (t). If an action by the company is continued with leave after the supervision order, and judgment is given for the defendant with costs, the costs are payable in full even if the order giving leave is silent on the subject (u).

**1026.** The Act of 1908 is silent as to the persons who may apply to the court to make a supervision order; but such persons as may apply for a compulsory order are entitled to apply for a supervision order, namely, the company itself, or any creditor or contributory. A person who has merely a claim for unliquidated damages against

Who may apply.

*Co.* (1869), L. R. 8 Eq. 664; *Re Sheffield Mortgage and Estates Co.*, [1887] W. N. 218; *Re Caloric Engine and Siren Fog Signals Co.* (1885), 52 L. T. 846; *Re Teede and Bishop, Ltd.*, [1901] W. N. 52.

(p) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 199 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 147, varied]. The Companies Act, 1862 (25 & 26 Vict. c. 89), gave jurisdiction to make a supervision order whenever a resolution had been passed to wind up voluntarily, and a company can resolve so to wind up in some cases by an ordinary resolution (see p. 570, *ante*). There seems to be now no jurisdiction to make a supervision order where an ordinary resolution has been passed requiring a company to be wound up because the period fixed for its duration has expired, or the event has occurred on the happening of which it is to be dissolved.

(q) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 285; and see p. 392, *ante*.

(r) Companies (Winding-up) Rules, r. 25, but the prescribed forms (4 and 5) are petitions for compulsory orders. The petition should state that the resolution for voluntary winding up was duly passed on a certain date, and should state the terms of it.

(s) See pp. 398 *et seq.*, *ante*.

(t) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 200 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 148]; see pp. 420, 534, *ante*. The court has power to stay proceedings in the voluntary winding up; see p. 584, *ante*.

(u) *Re London Drapery Stores, Ltd.*, [1898] 2 Ch. 684. As to the priority of liquidator's and other costs, see *New York Exchange Co.*, [1893] 1 Ch. 371; *Re Sanitary Burial Association*, [1900] 2 Ch. 289

SECT. 18.  
Winding up  
under the  
Supervision  
of the Court.

the company cannot petition either for a compulsory or for a supervision order (*w*). The liquidator of a company in voluntary liquidation can, in pursuance of the powers conferred on him in the voluntary winding up, apply to the court for a supervision order (*a*).

Service.

**1027.** The petition, unless presented by the company, must be served on the company as in the case of a petition for a compulsory order, and also upon the voluntary liquidator (*b*). Where presented by the company, it should not be served on the liquidator, and the costs of service on him and his appearance are not allowed (*c*).

Hearing.

Where a creditor petitions for a compulsory winding-up order, but at the hearing asks only for a supervision order, the court cannot make a compulsory order, although requested to do so by a majority of the creditors (*d*). The court has full discretion to grant or refuse a supervision order; but it may, in deciding between a winding up by the court and a winding up subject to supervision, in the appointment of liquidators, and in all other matters relating to the winding up subject to supervision, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence (*e*). A supervision order will not, as a

(*w*) *Re Pen-y-Van Colliery Co.* (1877), 6 Ch. D. 477; *Re Milford Docks Co., Lister's Petition* (1883), 23 Ch. D. 292. The question whether the debt of a creditor was incurred before or after the voluntary liquidation commenced seems to be immaterial; see *Re Bank of South Australia* (2), [1895] 1 Ch. 578, C. A.; compare *Re Bank of South Australia*, [1894] 3 Ch. 722.

(*a*) *Re Hooker's Cream Milk Co.* (1879), 23 Sol. Jo. 231. Probably the court would not now, as a rule, accede to such an application unless supported by the creditors, if the company was insolvent, or by the contributories, if the company was solvent, even if it would in any case make an order on the petition of the liquidator alone; but in *Re Zoedone Co.* (1883), 53 L. J. (CH.) 465, an application by a voluntary liquidator, though opposed by contributories, was granted.

(*b*) Companies (Winding-up) Rules, r. 28; compare *Re Petroleum Co.* (1866), 15 L. T. 169. If the petition is by the liquidator alone the company must be served (*Re Panonia Leather Cloth Co.* (1865), cited 13 W. R. 1015, n.).

(*c*) *Re Chester (Edward) & Co.* (1903), 52 W. R. 189.

(*d*) *Re Chepstow Bobbin Mills Co.* (1887), 36 Ch. D. 563; followed by BYRNE, J., in an unreported case. As to making a compulsory order on a petition for a supervision order, see *Re Electric and Magnetic Co.*, [1881] W. N. 98.

(*e*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 201 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 149]. Supervision orders were made in *Re Owen's Patent Wheel, Tire and Axle Co.* (1873), 29 L. T. 672; *Re West Hartlepool Ironworks Co.* (1875), 10 Ch. App. 618; *Re Trowbridge Water Supply Co.* (1868), 18 L. T. 115; *Re New York Exchange, Ltd.* (1888), 39 Ch. D. 415, C. A., where a petition was presented before the resolution to wind up voluntarily was passed. As to ascertaining the wishes of creditors and contributories by summoning meetings, see ss. 145, 219 of the Act of 1908; *Re Beaujolais Wine Co.* (1867), 3 Ch. App. 15; *Re Electrical Engineering Co.* (1891), 64 L. T. 658; *Re Bishop (E.) & Sons, Ltd.*, [1900] 2 Ch. 254; *Re Hermann Lichtenstein & Co.* (1907), 23 T. L. R. 424. After the passing of the Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), supervision orders were not so frequently made as theretofore, but were often accepted as a compromise when the petition was by a creditor for a compulsory order; and although up to 1901 the creditor could not

rule, be made on the petition of a contributory unless the resolution to wind up has been passed by fraud, or undue influence, or a creditor appears in support of the petition (*f*).

The liquidator, and not the company, ought to appear at the hearing (*g*).

**1028.** The supervision order may direct that the voluntary winding up shall be continued subject to such supervision, and with such liberty for creditors, contributories, or otherwise to apply to the court and generally on such terms and conditions as the court thinks just. In practice, however, the order is in the following form, namely: (1) that the voluntary winding up of the company shall be continued, but subject to the supervision of the court;

apply to the court in a voluntary winding up (see Companies Act, 1862 (25 & 26 Vict. c. 89), s. 138), winding up under supervision was a form of liquidation approved by the winding-up court (*Re Land Securities Co.* (1894), 1 Mans. 369, where a supervision order was made, the liquidator undertaking with all due diligence to investigate and report to the court whether in his opinion an examination of the officers of the company, or any of them, before the court should be ordered, and the order giving liberty to any creditor or contributory to attend and examine and providing that if the report should be against examination, any creditor or contributory should be at liberty to apply for such an order). The Companies Act, 1900 (63 & 64 Vict. c. 48), s. 25, enabled any creditor of the company to apply to the court in a voluntary winding up, and shortly afterwards supervision orders were made by consent (*Re Cheque Bank, Ltd.*, *Re New London Discount Co., Ltd.*, *Re London and Globe Finance Corporation*, reported in Practice Note, [1901] W. N. 14, where the winding-up judge said that in future he should not be disposed to allow the costs of a winding-up order unless it could be shown that there was some sufficient reason for making the order). The advantages of a supervision order still remaining are that the petition for it gives jurisdiction to stay actions against the company (see p. 595, *ante*), the order automatically stays them (Companies (Consolidation) Act, 1903 (8 Edw. 7, c. 69), ss. 142, 147, 203; see p. 600, *post*), the cost of a separate application to stay is saved, and the liquidator has to make quarterly reports and submit his remuneration and costs for taxation as provided by the usual form of supervision order (see *infra*).

(*f*) *Re Bank of Gibraltar and Malta* (1865), 1 Ch. App. 69; *Re Gold Co.* (1879), 11 Ch. D. 701, C. A.; *Re London and Mercantile Discount Co.* (1865), L. R. 1 Eq. 277; *Re Beaujolais Wine Co.* (1867), 3 Ch. App. 15. A supervision order has been made, on a shareholder's petition, where the only reason for making it was that in a proposed sale of the company's assets the representatives of the new company were much the same persons as those who controlled the liquidation (*Donald v. Eglinton Chemical Co., Ltd.* (1900), 2 F. (Ct. of Sess. 402); but it has been refused where the only ground for it was allegations of misconduct by the voluntary liquidator (*Re Star and Garter Hotel Co.*, [1873] W. N. 74; *Re Imperial Bank of China, India and Japan* (1866), 1 Ch. App. 339; *Re Yorkshire Fibre Co.* (1870), L. R. 9 Eq. 650). For other cases in which a supervision order has been made on a shareholder's petition, see *Re Oriental Commercial Bank* (1866), 15 L. T. 8; *Re Imperial Mercantile Credit Association, Ex parte Coleman, M'Andrew, Doyle and Figdor*, [1866] W. N. 257; *Re Prince of Wales Slate Quarry Co.* (1868), 18 L. T. 77; *Re General International Agency Co.* (1865), 13 W. R. 363. Where a resolution for voluntary winding up has been passed irregularly, a contributory aware of the circumstances should not at once present a petition, but should procure another meeting to be called to consider the circumstances (*Re London Flour Co.* (1868), 19 L. T. 136, C. A.).

(*g*) *Re Hall (A. W.) & Co.*, [1885] W. N. 190; *Re Mont de Piété of England*, [1892] W. N. 166.

SECT. 18.  
Winding up  
under the  
Supervision  
of the Court.

Form of  
order.

SECT. 18.  
Winding up  
under the  
Supervision  
of the Court.

(2) that any of the proceedings under the voluntary winding up may be adopted as the court shall think fit; (3) that the voluntary liquidator shall on a named day, and thenceforth every three months, file with the registrar a report in writing as to the position of, and the progress made with, the winding up of the company, and with the realisation of the assets thereof, and as to any other matters connected with the winding-up, as the court may from time to time direct; (4) that no bills of costs, charges or expenses, or special remuneration of any solicitor employed by the liquidator, or any remuneration, charges or expenses of such liquidator, or of any manager, accountant, auctioneer, broker, or other person, shall be paid out of the assets of the company, unless such costs, charges, expenses, or remuneration shall have been taxed or allowed by the registrar; (5) that all such costs, charges, expenses, and remuneration be taxed and ascertained accordingly; (6) that the costs of the petitioner and of persons appearing at the hearing shall be dealt with as directed; and (7) that the creditors, contributories, and liquidator of the company, and all other persons interested, are to be at liberty to apply generally as there may be occasion (*h*).

The court may, however, by directions as to a committee of inspection, make a supervision order, which has in many respects the effect of a compulsory winding-up order (*i*).

The court may by the supervision order appoint an additional liquidator (*k*).

Advertising  
order.

1029. A supervision order must, before the expiration of twelve days from the date thereof, be advertised by the petitioner once in the *London Gazette*, and must be served on such persons (if any), and in such manner, as the court directs (*l*).

SUB-SECT. 3.—Commencement of Winding up.

1030. Where a supervision order is made, the winding up is

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 199; Companies (Winding-up) Rules, Form 16. The form is founded on *Re Civil Service Brewery Co.*, [1893] W. N. 5; *Re Waterproof Materials Co.*, [1893] W. N. 18; *Re Pritchard, Offor & Co.*, [1893] W. N. 153; and *Re Horner & Co.*, [1898] W. N. 159. The petitioner's costs have priority over the costs of the voluntary liquidator previously incurred (*Re Sanitary Burial Association*, [1900] 2 Ch. 289, C. A.).

(*i*) *Re Watson & Sons, Ltd.*, [1891] 2 Ch. 55. In one case the order was that the liquidator should conduct the winding up subject to such restrictions as an official liquidator would in a voluntary winding up be subject to, except so far as the court might, on application for that purpose, modify or dispense with such restrictions in any case or class of cases (*Re London Quays and Warehouses Co.* (1868), 3 Ch. App. 394).

(*k*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 202 (1); see p. 600, *post*.

(*l*) Companies (Winding-up) Rules, r. 41 (2). Where, owing to delay in drawing up the order, the advertisement cannot be made in time, leave to post-date the order may be given (*Re East Cumbrian Gold Mining Co.* (1865), 12 L. T. 587; *Re Warland Commercial Co.*, [1876] W. N. 279); but only in the presence of all parties (*Re Disderi & Co.* (1868), 18 L. T. 870). The advertisement is notice to all the world and operates as notice of discharge to the

SECT. 18.  
Winding up  
under the  
Supervision  
of the Court.

deemed to commence at the time of the passing of the resolution for a voluntary winding up, and not at the date of the presentation of the petition (*m*). Where after petition presented a provisional liquidator is appointed, and before the petition is heard an extraordinary resolution for voluntary winding up is passed, and at the hearing a supervision order is made, the winding up commences, not as from the date of the petition, but as from the date of the passing of the resolution (*n*), and if the voluntary winding-up is brought about by special resolution, the winding up commences at the date of the confirmatory resolution passed at the second meeting (*o*). The making of a supervision order does not alter the date of the commencement of the voluntary winding up (*p*). If the proceedings are superseded by a compulsory winding-up order, the date of commencement of the winding up is altered to the date of the filing of the petition for a compulsory order (*q*).

The date of the petition for a supervision order is, however, when a supervision order has been made, the date to be regarded in computing the three months in case of a fraudulent preference (*r*). As regards rates, taxes, wages, and compensation to workmen, the date to be regarded is the date of the commencement of the winding up (*s*).

SUB-SECT. 4.—Consequences of Supervision Order.

1031. After the making of a supervision order the liquidator may, subject to any restrictions imposed by the court, exercise all his powers, without the sanction or intervention of the court, in the same manner as if the company were being wound up altogether voluntarily (*t*).

Liquidator's  
powers.

1032. The supervision order is, with certain exceptions, deemed to be an order for winding up by the court for all purposes, including

company's servants on the day when the order is made (*Chapman's Case* (1866), L. K. 1 Eq. 347); compare p. 578, *ante*.

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 183 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 130]; *Weston's Case* (1868), 4 Ch. App. 20; *Hodgkinson v. Kelly* (1868), L. R. 6 Eq. 496; *Re Imperial Land Co. of Marseilles, Ex parte Colborne and Strawbridge* (1871), L. R. 11 Eq. 478, 499; *Re Colonial Trusts Corporation, Ex parte Bradshaw* (1879), 15 Ch. D. 465, 470; *Re Dry Docks Corporation of London* (1888), 39 Ch. D. 306, C. A.; *Re West Cumberland Iron and Steel Co.* (1889), 40 Ch. D. 361; and see p. 419, *ante*.

(*n*) *Re West Cumberland Iron and Steel Co.*, *supra*; compare *Re Colonial Trusts Corporation, Ex parte Bradshaw, supra*.

(*o*) *Weston's Case, supra*; *Re Emperor Life Assurance Society* (1885), 31 Ch. D. 78; *Dawes' Case* (1868), L. R. 6 Eq. 232; *Re Ottoman Co., Hornby's Case* (1868), 37 L. J. (CH.) 929; *Re Imperial Land Co. of Marseilles, Ex parte Colborne and Strawbridge, supra*; compare *Re Hydraulic Tube-Drawing and Steel Ordnance Co.* (1868), 16 W. R. 572.

(*p*) See *Re Dry Docks Corporation of London, supra*; and the cases cited, *supra*.

(*q*) See p. 419, *ante*.

(*r*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 210; see p. 544, *ante*.

(*s*) *Ibid.*, s. 209 (5).

(*t*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 203 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 151]; see p. 573, *ante*.

Time of  
commence-  
ment.

SECT. 19.  
Winding up  
under the  
Supervision  
of the Court.

Consequences  
of order.

the staying of actions and other proceedings (*u*) the making and enforcement of calls, and the exercise of all other powers (*x*). The following provisions of the Act of 1908 do not apply, namely: those relating to a statement of affairs being submitted (*y*); to any report or further report being made by the official receiver (*a*); to the appointment or remuneration of or other matters relating to a liquidator (except that the acts of a liquidator are to be valid notwithstanding any defects that may afterwards be discovered in his appointment or qualification) (*b*); to the summoning of first meetings of creditors and contributories, and appointing liquidators, or the official receiver becoming liquidator (*c*); to the liquidator giving facilities to the official receiver (*d*); to payments by the liquidator into the Companies Liquidation Account while the winding up is going on (*e*); to the general audit of a liquidator's account by the Board of Trade (*f*); to the books to be kept by a liquidator (*g*); to the release of a liquidator (*h*); to the general control of the liquidator by creditors, contributories, and the committee of inspection (*i*); to the general control of the Board of Trade over liquidators (*k*); to the committee generally (*l*); to the appointment of a special manager (*m*); to the settlement of the list of contributories in a compulsory winding up (*n*); to the general rules which may be made for enabling a liquidator to exercise certain powers of the court (*o*); or to public examinations (*p*).

The liquidator may, on the application of a contributory, be ordered to bring in an account (*q*).

SUB-SECT. 5.—Appointment and Removal of Liquidators.

**1033.** Where an order is made for a winding up subject to supervision, the court may, by the same or any subsequent order, appoint an additional liquidator (*r*), and if the company, in passing a resolution for a voluntary winding up, has omitted to

(*u*) See p. 420, *ante*.

(*x*) The liquidator may enter into an arrangement for sale of the assets to another company for shares therein (*Wright's Case* (1870), 5 Ch. App. 437).

(*y*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 147.

(*a*) *Ibid.*, s. 148.

(*b*) *Ibid.*, s. 149.

(*c*) *Ibid.*, s. 152.

(*d*) *Ibid.*, s. 153.

(*e*) *Ibid.*, s. 154.

(*f*) *Ibid.*, s. 155.

(*g*) *Ibid.*, s. 156.

(*h*) *Ibid.*, s. 157.

(*i*) *Ibid.*, s. 158.

(*k*) *Ibid.*, s. 160.

(*l*) *Ibid.*, s. 159.

(*m*) *Ibid.*, s. 161.

(*n*) *Ibid.*, s. 163.

(*o*) *Ibid.*, s. 173.

(*p*) *Ibid.*, s. 175. But the court can, of its own motion, direct an examination under *ibid.*, s. 174 (*Re Land Securities Co.*, [1894] W. N. 91); see p. 474, *ante*.

(*q*) *Wright's Case*, *supra*.

(*r*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 202 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 150].

SECT. 18.  
Winding up  
under the  
Supervision  
of the Court.

appoint any liquidator, may appoint a liquidator by the supervision order (*s*).

An additional liquidator appointed by the court has the same powers, is subject to the same obligations, and in all respects stands in the same position as if he had been appointed by the company in the voluntary winding up (*a*). Where the voluntary liquidator has not given security, an additional liquidator appointed by the court in supervision proceedings is required to give security (*b*).

The court may remove any liquidator appointed by the court, or continued under the supervision order, and fill any vacancy occasioned by removal, death, or resignation (*c*).

SECT. 19.—Arrangements and Compromises.

SUB-SECT. 1.—Before Winding up.

(i.) Arbitrations.

**1034.** A company may by writing under its common seal agree to refer and may refer to arbitration, in accordance with the Railway Companies Arbitration Act, 1859 (*d*), any existing or future difference between itself and any other company or person (*e*). Companies parties to the arbitration may delegate to the arbitrator power to settle any terms or to determine any matter capable of being lawfully settled or determined by the companies themselves, or by their directors or other managing body (*f*).

The Arbitration Act, 1889 (*g*), applies to every arbitration under any Act passed before or after the Act of 1889, as if the arbitration were pursuant to a submission, except in so far as the Act of 1889 is inconsistent with the Act regulating the arbitration or with any rules or procedure authorised or recognised by that Act (*h*).

(*s*) *Re London Quays and Warehouses Co.* (1868), 3 Ch. App. 394.

(*a*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 202 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 150].

(*b*) *Re Hampshire Land Co.*, [1894] 2 Ch. 632; see *Re European Bank, Ex parte Paul* (1870), 19 W. R. 268, where such security was not required from a substituted liquidator.

(*c*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 202 (3) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 150, varied and extended]. Under *ibid.*, s. 186 (ix.) the court may, on due cause shown, remove a liquidator and appoint another liquidator; and due cause must be shown when the voluntary winding up is continued under supervision; see also *Re Montrotier Asphaltic and Cement Concrete Paving Co.* (1874), 22 W. R. 895; *Re Scotch Granite Co.* (1867), 17 L. T. 533; *Re Old Wheel Neptune Mining Co.* (1864), 2 De G. J. & Sm. 348, C. A.; *Re United Merthyr Collieries Co.*, [1867] W. N. 99; and compare *Re Devonshire Silkstone Coal Co.*, [1878] W. N. 71, 173, C. A.

(*d*) 22 & 23 Vict. c. 59; see title RAILWAYS AND CANALS. All the provisions of the Act apply to such arbitrations; and in the construction of those provisions "the companies" shall include companies under the Act of 1908 [Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 119 (3) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 73]].

(*e*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 119 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 72].

(*f*) *Ibid.*, s. 119 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 72].

(*g*) 52 & 53 Vict. c. 49.

(*h*) *Ibid.*, s. 24; see title ARBITRATION, Vol. I., pp. 439, 492, 493.

Power of  
court.



SECT. 19.  
Arrangements and Compromises.

Effect of compromise.

**1040.** A general compromise of claims upon contributories as a class may be sanctioned (e), but not so as to be binding on an unwilling minority (f). A compromise with contributories on the A list does not release contributories on the B list (g), or affect the liability of other contributories on the A list (h).

A compromise by a voluntary liquidator of a claim by the company against a third party is, if not set aside, binding on the company although entered into without the sanction of an extraordinary resolution (i).

A power to compromise rights presupposes some dispute about them or difficulties in enforcing them (k). A compromise, however, is good if both parties *bonâ fide* believe that there is a question in dispute, although it may not really be doubtful (l).

(iii.) Arrangements binding on Minorities.

General scheme of arrangements.

**1041.** Where a compromise or arrangement is proposed between any company liable to be wound up under the Act of 1908 (m) and its creditors or any class of them, or between the company and its members or any class of them (n), the court may, on the application in a summary way of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the court directs (o). If a majority in number representing

(e) *Bank of Hindustan, China and Japan v. Eastern Financial Association* (1869), L. R. 2 P. C. 489; *Re Smith, Knight & Co.* (1868), 37 L. J. (CH.) 864; see *Re Commercial Bank Corporation of India and the East* (1869), L. R. 8 Eq. 241.

(f) *Re Albert Life Assurance Co.* (1871), 6 Ch. App. 381.

(g) *Re Accidental Death Insurance Co.* (1878), 7 Ch. D. 568; *Roberts v. Crowe* (1872), L. R. 7 C. P. 629.

(h) *Re Barned's Bank, Helbert v. Banner* (1871), L. R. 5 H. L. 28; *Hudson's Case* (1871), L. R. 12 Eq. 1; *Nevill's Case* (1870), 6 Ch. App. 43.

(i) *Cyclemakers' Co-operative Supply Co. v. Sims*, [1903] 1 K. B. 477.

(k) *Mercantile Investment and General Trust Co. v. International Co. of Mexico* (1891), cited [1893] 1 Ch. 484, n., 489, n., C. A.; *Sneath v. Valley Gold, Ltd.*, [1893] 1 Ch. 477, 494, C. A.

(l) *Lucy's Case* (1853), 4 De G. M. & G. 356, C. A.; and see *Mother Lode Consolidated Gold Mines v. Hill* (1903), 19 T. L. R. 341; *Parry v. Liverpool Malt Co.*, [1900] 1 Q. B. 339.

(m) As to schemes of arrangement by railway companies, see *Railway Companies Act, 1867* (30 & 31 Vict. c. 127), ss. 6—22; and title RAILWAYS AND CANALS.

(n) As to classes, see *Re Dominion of Canada Freehold Estate and Timber Co.* (1886), 55 L. T. 347, 352.

(o) *Companies (Consolidation) Act, 1908* (8 Edw. 7, c. 69), s. 120 (1), (3) [Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104), s. 2, as extended by *Companies Act, 1900* (63 & 64 Vict. c. 48), s. 24, and *Companies Act, 1907* (7 Edw. 7, c. 50), s. 38]. Before the Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104), a single creditor could, without reason, or for his own benefit, prevent a meritorious scheme from being adopted; see *Re Dominion of Canada Freehold Estate and Timber Co.* (1886), 55 L. T. 347, 351. The Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104), was confined to cases of and related to liquidation, and in effect provided an alternative or substitute, in cases where it was applicable, for the ordinary method

SECT. 19.  
Arrangements and Compromises.

Procedure.

three-fourths in value of those present, either in person or by proxy, at the meeting agree to any compromise or arrangement, the compromise or arrangement is, if sanctioned by the court, binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company (p).

**1042.** The application for an order to summon meetings is made by originating summonses, and the proposed compromise or arrangement should be made an exhibit to the affidavit in support of the scheme. The order directing a meeting to be summoned usually appoints some one—the liquidator, for instance—to act as chairman of the meeting, and directs him to report the result of it to the court, and also directs what advertisements are to be issued. Where a class of creditors to be summoned consists of holders of bearer securities, the only practicable method of summoning them is to give public notice of the meeting by advertisement in selected newspapers. Where the company is not in winding up, and a petition for winding up is not pending, the court cannot, after ordering meetings to be summoned and before approving the scheme, stay an execution on a judgment recovered before the order (q).

**1043.** The forms of any advertisements, notices, and proxy papers that may be required are settled in the chambers of the winding-up court. The proxy papers used must be in the special form approved by the court (r). For the purposes of a meeting of any particular class proxies can only be given to members of that class (s). Where, in the case of a company being wound up, the official receiver is acting as liquidator, foreign creditors may be authorised to give proxies to a person named by him, and to deposit them at a place named by him in the foreign country. Proxies so given are valid, and may be used at the meeting, particulars of them being telegraphed to the chairman of the meeting (t).

Where there are several classes of creditors or contributories, and the scheme does not affect the rights of some particular class, it is not the practice, nor is it necessary, for notice of any meeting to be sent to the members of such class (a). It is,

Advertisements, notices, and proxies.

of winding up a company under the Companies Acts (*Re English, Scottish and Australian Chartered Bank*, [1893] 3 Ch. 385, 393, 394, C. A.; *Re Alabama, New Orleans, Texas and Pacific Junction Rail. Co.*, [1891] 1 Ch. 213, 236, C. A.; *Re London Chartered Bank of Australia*, [1893] 3 Ch. 540, 546).

(p) *Companies (Consolidation) Act, 1908* (8 Edw. 7, c. 69), s. 120 (2).

(q) *Booth v. Walden Spinning and Manufacturing Co., Ltd.*, [1909] 2 K. B. 368; and see *Re Richards & Co.* (1879), 11 Ch. D. 676, where the company was in winding up.

(r) *Re Inter-Oceanic Railway of Mexico* (1896), 3 Mans. 162.

(s) *Re Central Bahia Rail. Co.* (1902), 18 T. L. R. 503.

(t) *Re English, Scottish and Australian Chartered Bank*, [1893] 3 Ch. 385, C. A. These proxies require a 10s. stamp, and where executed abroad can be stamped within thirty days after they arrive in England (*ibid.*); and see *Sadgrove v. Bryden*, [1907] 1 Ch. 318.

(a) *Re Tea Corporation, Ltd., Sorsbie v. Same Co.*, [1904] 1 Ch. 12, C. A. The dissent of a class which is not interested may be disregarded (*ibid.*).