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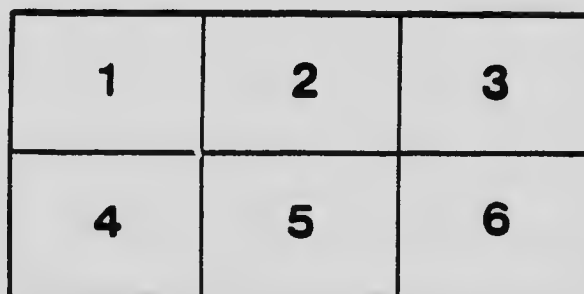
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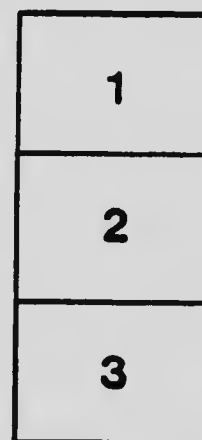
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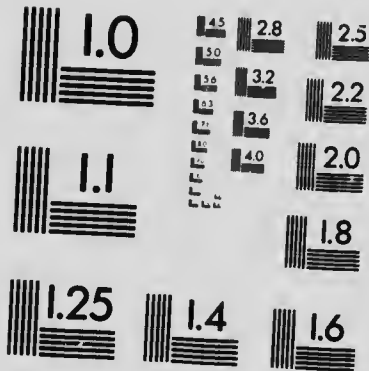
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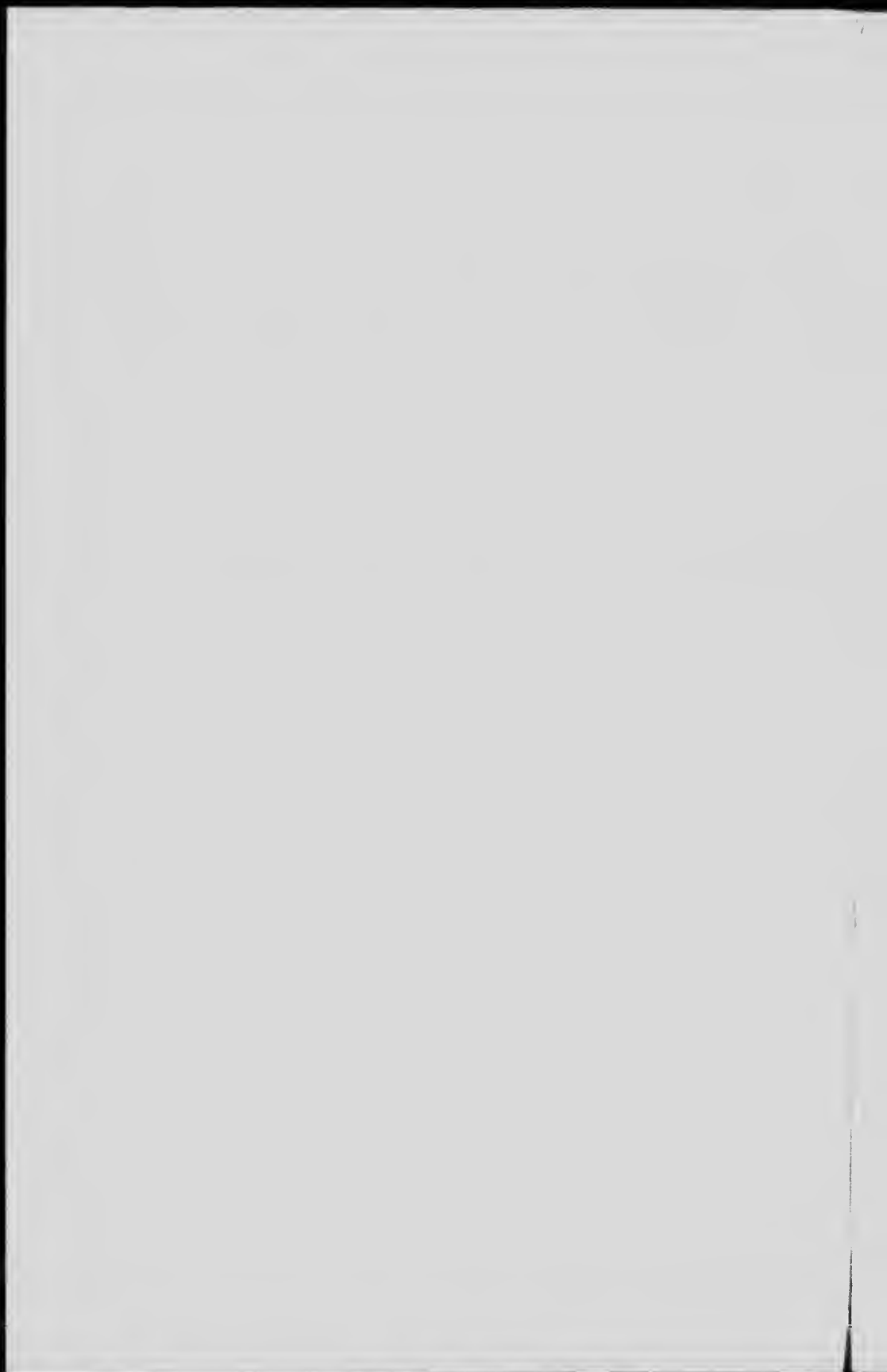


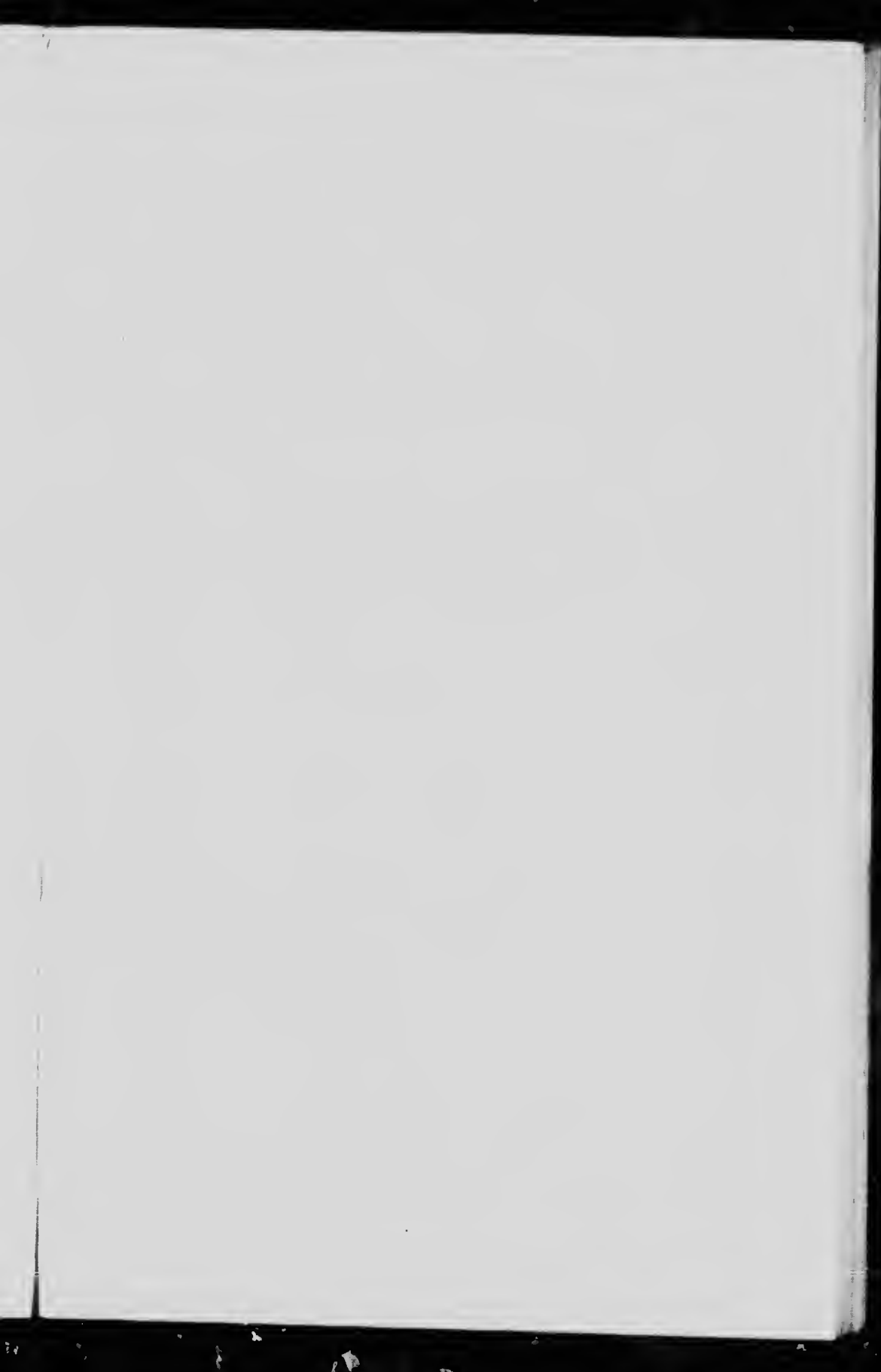
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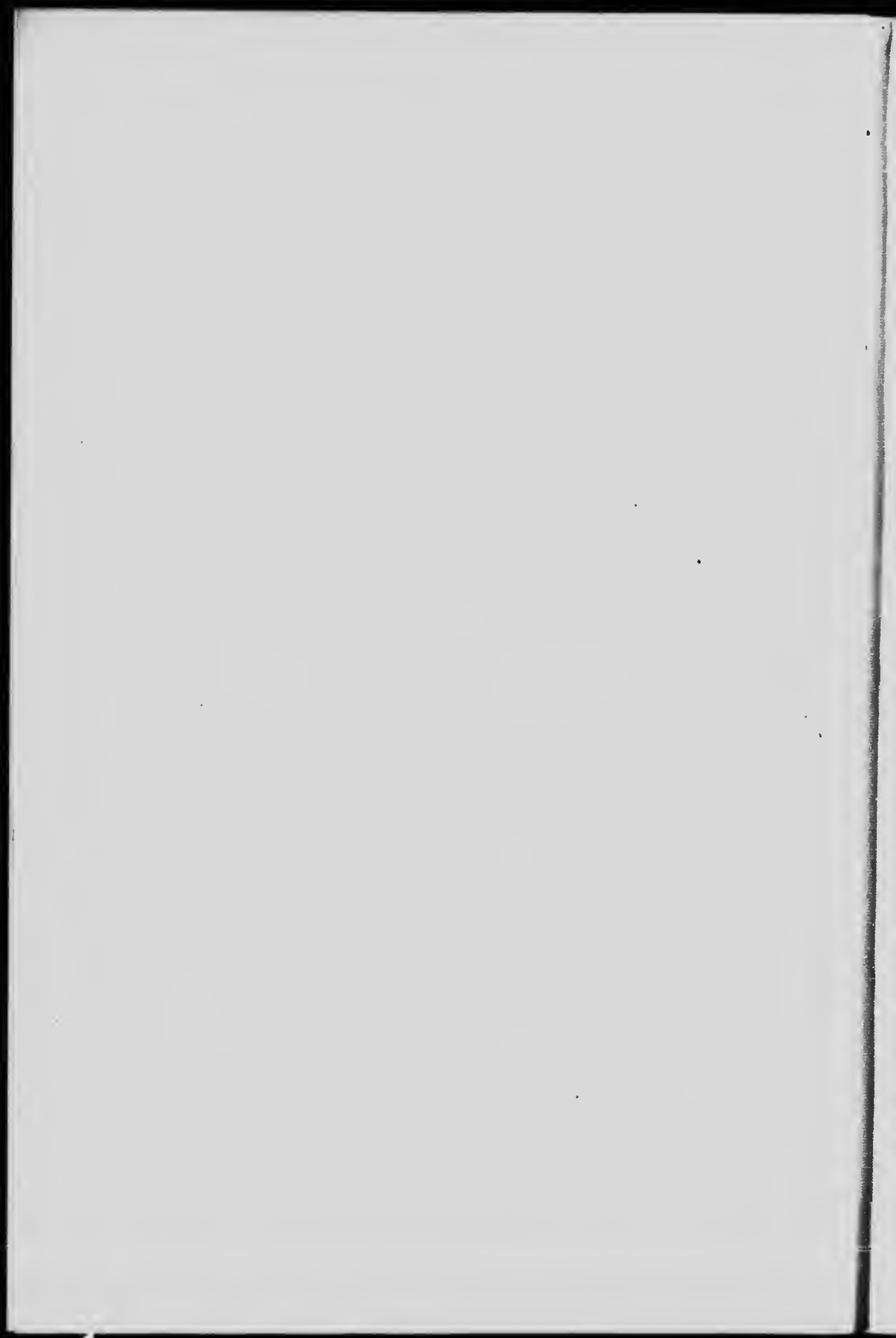
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THE
DOMINION WINDING-UP ACT

ANNOTATED BY
FORTUNAT LORD, L. L. L.
ADVOCATE OF THE THREE RIVERS BAR

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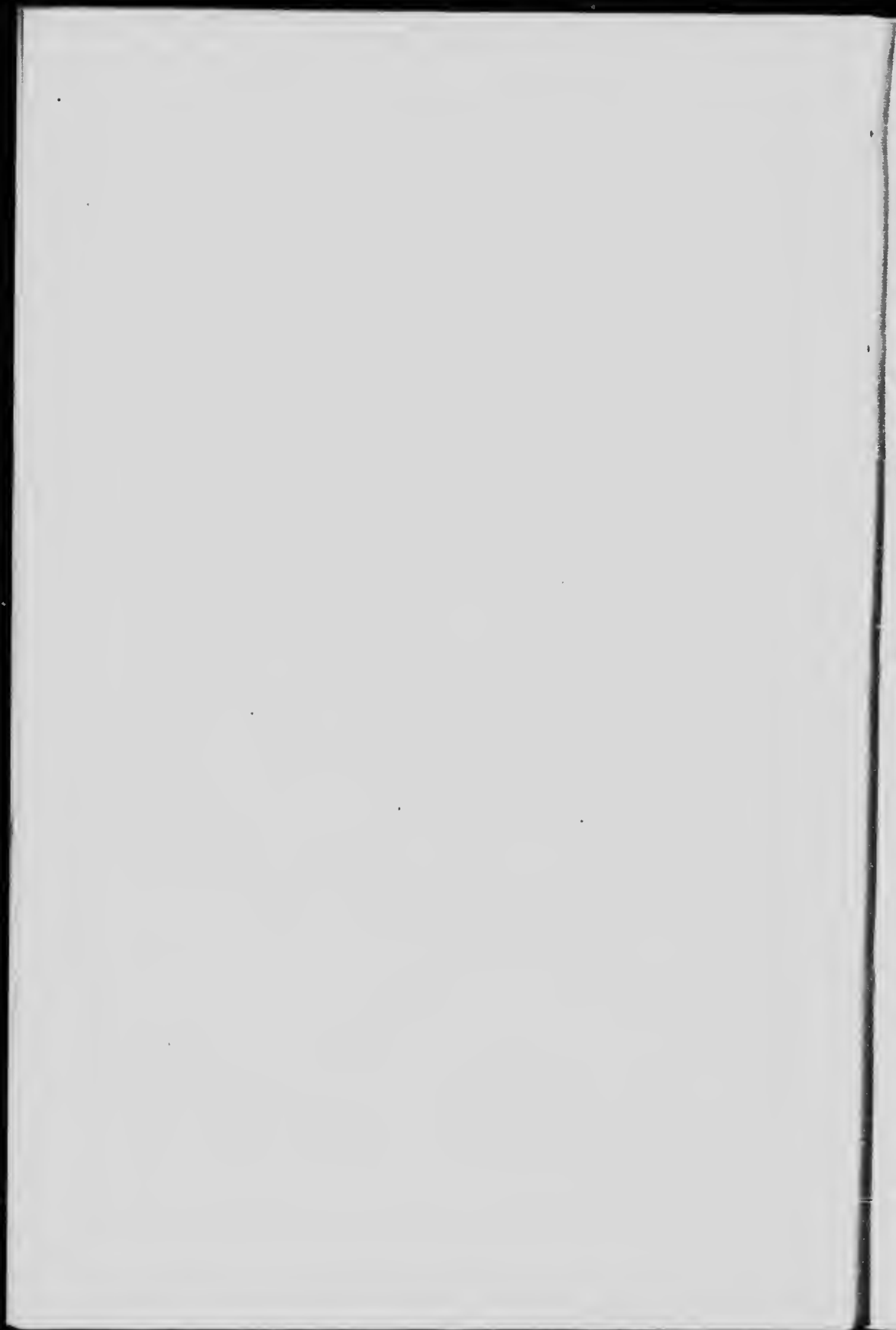
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PREFACE

THE works, recently published on the Dominion Winding-up Act, contain but a small number of Quebec decisions. I have written my book with a view to correct that omission. My professional brethren will find herein with the principal English judgments the whole jurisprudence of Canada.

Three Rivers, March 5th, 1913.

FORTUNAT LORD.



ABBREVIATIONS

USED IN THIS BOOK

Alb. R.....	Alberta Reports.
A. R.....	Ontario Appeals Cases
Beav.....	Beaven.
B. C. R.....	British Columbia Reports.
B. R.....	Rapports Officiels de la Cour du Ranc du Roi.
C.....	Chapter.
C. A.....	Court of Appeal.
Cam. Cas.....	Cameron's Cases.
Can. L. R.....	Canada Law Reports.
C. C.....	Code Civil
C. C.....	Cour de Circuit.
C. D.....	Chancery Division.
Ch.....	Chancery.
Ch. App.....	Chancery Appeals.
C. L. T.....	Canadian Law Times
Cout. Dig.....	Coutlée Digest.
C. P.....	Code de Procédure Civile.
C. S.....	Rapports Officiels de la Cour Supérieure.
C. S. C.....	Canadian Supreme Court Reports.
D. C.....	Divisional Court.
De G., J. & S.....	De Gex, Jones & Smith Reports
De G., M. & G.....	De Gex, McNaughton & Gordon Reports.
D. L. R....	Dominion Law Reports.
Eq.....	Equity.
H. C.....	High Court.
H. L. C.....	House of Lords Cases.
Jur.....	Jurist.
Jur. N. S.....	Jurist, new series.
Law Rep., Ch. App..	Law Reports, Chancery Appeals
Law Rep., Eq.....	Law Reports, Equity.
L. C. J.....	Lower Canada Jurist.
L. J. Ch.....	Law Journal Chancery.
L. N.....	Legal News.
L. R.....	Law Reports.
L. R. H. L.....	Law Reports, House of Lords

L. T.	Law Times.
L. T. N. S.	Law Times, new series.
Macq. Sc.	MacQueen's Scotch Appeals Cases.
Man. R.	Manitoba Reports.
M. L. R. B. R.	Montreal Law Reports, Cour du Banc de la Reine.
M. L. R. C. S.	Montreal Law Reports, Cour Su- périeure.
N. B. R.	New Brunswick Reports.
N. S.	New Series.
N. S. R.	Nova Scotia Reports.
O. A. R.	Ontario Appeal Reports.
O. L. R.	Ontario Law Reports.
O. P. R.	Ontario Practice Reports.
O. R.	Ontario Reports.
O. W. N.	Ontario Weekly News.
O. W. R.	Ontario Weekly Reporter.
P. C.	Privy Council.
Q. B.	Adolphus & Ellis Reports.
Q. B.	Queen's Bench.
Q. L. R.	Quebec Law Reports.
R. J.	Revue de Jurisprudence.
R. L.	Revue Légale.
R. L. n.s.	Revue Légale, nouvelle série.
R. S.	Revised Statutes.
R. P.	Rapports de Pratique.
Sask. R.	Saskatchewan Reports.
S. C.	Superior Court.
SS.	Sections.
T. R.	Terms Report.
Terr. L. R.	Territories Law Reports
W. N.	Weekly News.
W. R.	Weekly Reporter.
Yuk.	Yukon Territory.

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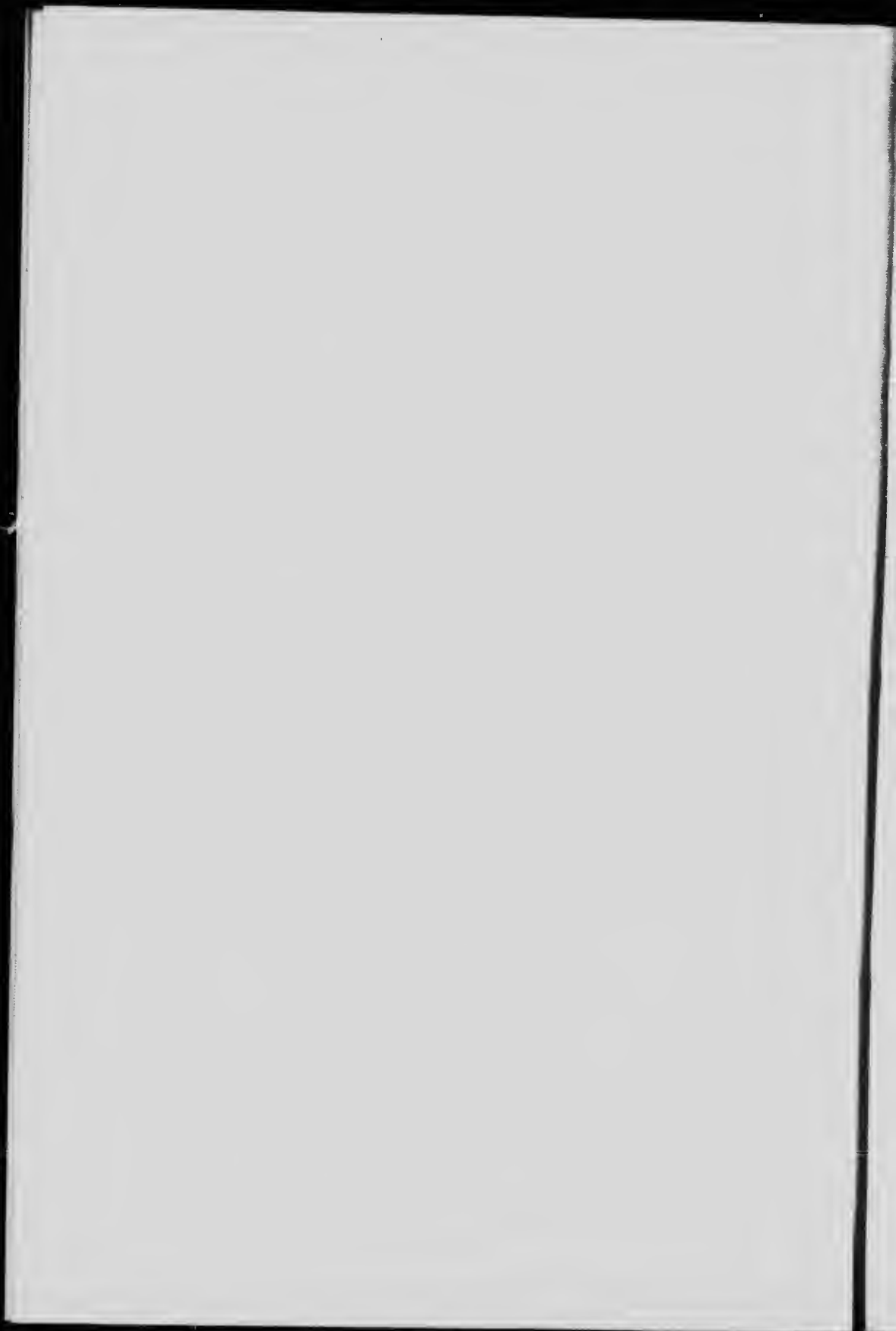


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DOMINION WINDING - UP

PRELIMINARY TITLE

1. This Act may be cited as the Winding-up Act.

THEORY.

a. In a winding-up by the Court, the liquidation is carried out under the control of the Court. The liquidator is an officer of the court, and if the company be insolvent, is a trustee only for the creditors.

b. In voluntary winding-up, the liquidation is carried out privately. The business is done by the liquidator, who is a trustee for the company, and winding-up does not necessarily imply insolvency.

c. In voluntary winding-up continued under supervision, the form of order now in use includes a direction that the liquidator shall once a quarter file with the Registrar a report in writing as to the position of and the progress made with the winding-up, and that no costs or remuneration of the liquidator or any solicitor employed by him or any other person be paid out of the assets of the company unless taxed or allowed by the Registrar. The effect of a supervision order being obtained is very slight.

(Emden. 2.)

JURISPRUDENCE.

1. It is desirable to follow the rules for guidance to be found in the English cases under the Winding-up Act.

(Alpha Oil Co., 12 O.P.R., 298.)

2. The provisions of this section, being in the nature of insolvent legislation, are *intra vires* of the Dominion Parliament.

(Shoolbred vs Clarke, 17 C.S.C., 265; Clarke and Union Fire Ins., Co., 14 O. R., 618; 16 O.R., 161; Eldorado Union Store Co., 18 N. S.R., 514; British Columbia Iron Works Co., 6 B.C.R., 536; Lake Winnipeg, etc., Trading Co., 7 Man. R., 255.)

3. La loi des liquidations, c. 144 S.R.C., s'applique à la liquidation volontaire aussi bien qu'à la liquidation forcée des Compagnies insolubles, puisqu'en vertu de l'art. 12 et du second alinéa de l'art. 13, l'ordre de mise en liquidation peut être demandé et requis par la Compagnie elle-même.

(C.S., Bruneau, J., Richelieu, 1912, La Cie Pontbriand, Ltée, et Cosky, 14 R.P., 20.)

2. In this Act, unless the context otherwise requires,—

(a) "Minister" means the Minister of Finance;

(b) "company" includes any corporation subject to the provisions of this Act;

(c) "insurance company" means a company carrying on either as a mutual or stock company, the business of insurance, whether life, fire, marine, ocean or inland marine, accident, guarantee or otherwise;

(d) "trading company" means any company, except a railway or telegraph company, carrying on business similar to that carried on by apothecaries, auctioneers, bankers, brokers, brickmakers, builders, carpenters, carriers, cattle or sheep salesmen, coach proprietors, dyers, fullers, keepers of inns, taverns, hotels, saloons or coffee houses, lime burners, livery stable keepers, market gardeners, millers, miners, packers, printers, sharebrokers, quarrymen, ship-owners, shipwrights, stockbrokers, stockjobbers, victuallers, warehousemen, wharfingers, persons using the trade of merchandise by way of bargaining, exchange, hartering, commission, consignment or otherwise, in gross or by retail, or by persons who, either for themselves, or as agents or

factors for others, seek their living by buying and selling or by buying and letting for hire goods or commodities, or by the manufacture, workmanship or the conversion of goods or commodities trees;

(c) "court" means,

(i) in the province of Ontario, the High Court of Justice,

(ii) in the Province of Quebec, the Superior Court,

(iii) in the province of Nova Scotia, the Supreme Court,

(iv) in the province of New Brunswick, the Supreme Court,

(v) in the province of Manitoba, the Court of King's Bench,

(vi) in the province of British Columbia, the Supreme Court,

(vii) in the province of Prince Edward Island, the Supreme Court,

(viii) in the province of Saskatchewan, the Supreme Court,

(ix) in the province of Alberta, the Supreme Court,

(x) in the Northwest Territories, such court or magistrate or other judicial authority as is designated, from time to time, by proclamation of the Governor in Council, published in the *Canada Gazette*, and

(xi) in the Yukon Territory, the Territorial Court;

(f) "official gazette" means the *Canada Gazette* and the gazette published under the authority of the government of the province where the proceedings for the winding-up of the business of the company are carried on, or used as the official means of communication between the lieutenant-governor and the people, and if no such gazette is published, then it means any newspaper published in the province, which is designated by the court for publishing the notices required by this Act;

(g) "contributory" means a person liable to contribute to the assets of a company under this Act; and, in all proceedings for determining the persons who are to be deemed contributories and in all proceedings prior to the final determination of such persons, it includes any person alleged to be a contributory;

(h) "winding-up order" means an order granted by the court under this Act to wind up the business of the

company, and includes any order granted by the court to bring within the provisions of this Act any company in liquidation or in process of being wound up;

(i) "capital stock" includes a capital stock *de jure* or *de facto*;

(j) "creditor" includes all persons having any claim against the company present or future, certain, ascertained, or contingent, for liquidated or unliquidated damages; and in all proceedings for determining the persons who are to be deemed creditors it shall include any person making any such claim.

Origins. — 9-10 Ed. VII. c. 62, s. 1; 62-63 Vict., c. 13, s. 5; R.S. (1886), 129 ss. 2, 33, 56 and 61.

Section 2 derives from 49 Vict., c. 25, s. 14; 45 Vict., c. 23, ss. 3, 4, 5, 6, 8 and 13.

Section 33 derives from 45 Vict., c. 23, s. 39. Section 56 from 49 Vict., c. 46, s. 1; 45 Vict., c. 23, s. 60 in part. Section 61 from 45 Vict., c. 23, s. 64.

Theory. — Ss. 14, 48, 69, 101, 149, 160.

JURISPRUDENCE.

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1. That the Dominion Winding-up Act (c. 144 R.S.C., 1906), applies only to Corporations incorporated under provincial legislation when it is shown that such Corporations are insolvent, in liquidation or in process of being wound up, and as it was not shown that the Corporation in question was in liquidation or being wound up and as there was no sufficient evidence to establish insolvency, the Dominion Act did not apply.

(Nelson Ford Lumber Co., 1 Sask. R. 503.)

2. The provisions of the Dominion Winding-up Act, R.S.C., ch. 129, do not apply to social clubs, incorporated under art. 5487 et seq., R.S.Q.,—the Winding-up Act applying to incorporated trading Companies and not to civil Corporations such as social clubs.

(Mathieu, J.C.S., Montreal, 1895, *The Montreal City Club* and *Stevenson et al.*, 8 C.S., 521.)

2a. Application by a creditor to wind up, which is opposed by the Company and some creditors, whilst the petitioner is supported by other creditors.

It is first objected that the Company is not a "TRADING COMPANY" within the meaning of the Act and therefore the Court has no jurisdiction.

2b. The Memorandum of Association empowers the Company to do a great many things such as acting as real estate and financial agents, manufacturing and dealing in brick, selling and supplying gravel, etc. . . . which admittedly would make it a trading Company since being licensed in British Columbia has, however, merely bought and sold land and in one instance erected an hotel which it afterwards sold. It is argued that I must have regard only to its operations and not to its powers.

HELD :

2c. I cannot agree. To do so would be to concede that a Company might be at one moment within the scope of the Act and at another without it according as it was exercising one or other set of powers conferred upon it by its memorandum of association. Further it has been held that if the Company for any purposes for which it exists comes within the term defined by the Act it is sufficient.

(Anchor Investment Co., Ltd., 7 D. L. R. 915).

3. Per Gwynne:

"The intention of Parliament in submitting all proceedings, instituted for the Winding-up of insolvent companies under these Acts, to the jurisdiction of the ordinary courts in the respective provinces of the Dominion, was to leave those proceedings or cases to be dealt with in those courts by the machinery and course of procedure ordinarily in use in those courts in *consimili casu*."

(Shoolbred vs Clarke, 17 C.S.C., 268.)

4. That the powers, assigned to provincial courts or judges by the Winding-up Act, are to be exercised by means of the ordinary procedure. It was, therefore, no ground of objection to the winding-up order in this case that it was referred to a master to settle the security to be given by the liquidator appointed therein.

(Shoolbred vs Clarke. 13 L.N., 218; 17 C.S.C., 265.)

5. In "Quebec", the Superior Court means the Superior Court for the district where the head office for the Company is situate.

(Dupont vs Cie de Moulin, 11 L.N., 225.)

6. The Winding-up Act has established a special tribunal of **exclusive jurisdiction** (to wit: The Superior Court) for disposal of claims against a Company in liquidation; an action taken in the Circuit Court will therefore be referred to the Superior Court.

(Purcell, J., Montreal, 1908, Baxter vs International Steel Co., 10 R.P., 27.)

7. La Cour de Circuit n'a pas juridiction pour entendre une cause dirigée contre le liquidateur d'une Compagnie, mise en liquidation en vertu de la loi des Liquidations fédérales.

(Andrews, J.C.S., Québec, 1901, Robillard vs Blanchet, 3 R. P. 352; 19 C. S. 383).

8. A local judge of the Supreme Court of British Columbia is not a "Court" as used herein .

(Kootenay Brewing Co., 7 B.C.R., 131.)

9. The Admiralty Court has no jurisdiction to entertain a suit in damages for a collision against a steamer owned by a navigation Company, which is in liquidation under the Winding-up Act; the lien of the plaintiff must be enforced before the Winding-up Court.

(Dunlop, J.C.S., Montreal, 1908, The Richelieu and Ontario Navigation Co. vs The Steamer Imperial and al., 10 R.P., 161.) (reversed by the Exchequer Court, 1909.)

10. Court of Chancery will not, in general, interfere to oust the jurisdiction of insolvent court by winding-up the affairs of an insolvent Company.

(McNeil vs Reliance Mutual Fire Ins. Co., 27 Gr. 567.)

11. Order by Judge in Bankruptcy in England, enjoining plaintiffs from proceeding in the High Court of Justice for Ontario.

See: (*Maritime Bank vs Stewart*, 13 O.P.R., 86.)

12. The order for the winding-up of a Company upon petition may be made by a Judge in Chambers.

(*Toronto Brass Co.*, 18 O.P.R., 248.)

13. Les pouvoirs, attribués à la Cour Supérieure par la loi des Liquidations, peuvent être exercés par le juge en chambre.

(*Cooke, J.C.S., Trois-Rivières, de Lorimier vs The Canadian Gas and Oil Co.*, 34 C.S., 381.)

14. A judge in Chambers has no jurisdiction to order a sheriff to give up to a liquidator, under the Winding-up Act, possession of goods and chattels seized, under execution prior to the making of the winding-up order.

(*Merchants Bank vs Roche Percee Coal Co.*, 3 Terr. L.R., 463.)

15. La fabrication et la vente du gaz d'éclairage est une opération de commerce au sens de la sect. 2, c. 144, S.R.C., et ce statut s'applique aux Compagnies formées pour cet objet.

(*Cooke, J.C.S., Trois-Rivières, de Lorimier vs The Canadian Gas and Oil Co.*, 34 C.S., 381.)

16. On the meaning of the term "Contributory", see the following Canadian cases:

(*Standard Fire Ins. Co.*, 12 C.S.C., 644; *Maritime Bank vs Troop*, 16 C.S.C., 456.)

(*Hess Mfg. Co. and Edgar vs Sloan*, 23 C.S.C., 644.)

(Common vs McArthur, 29 U.S.C., 239; Hood vs Eden, 36, U.S.C., 476.)

(Queen City Refining Co., 10 O.R., 264.)

See now the following english cases:

(Oakes vs Turquand, L.R., 2 H.L., 325; Anglesea Colliery Co., L.R., 1 Ch. 555.)

(Scottish Petroleum Co., L.R., 1 Ch., Div., 413.)

3. A company is deemed insolvent.—

(a) If it is unable to pay its debts as they become due;

(b) If it calls a meeting of its creditors for the purpose of compounding with them;

(c) If it exhibits a statement showing its inability to meet its liabilities;

(d) If it has otherwise acknowledged its insolvency;

(e) If it assigns, removes or disposes of, or attempts or is about to assign, remove or dispose of, any of its property, with intent to defraud, defeat or delay its creditors, or any of them;

(f) If, with such intent, it has procured its money, goods, chattels, land or property to be seized, levied on or taken, under or by any process of execution;

(g) If it has made any general conveyance or assignment of its property for the benefit of its creditors, or if, being unable to meet its liabilities in full, it makes any sale or conveyance of the whole or the main part of its stock in trade or assets, without the consent of its creditors, or without satisfying their claims; or,

(h) If it permits any execution issued against it, under which any of its goods, chattels, land or property are seized, levied upon or taken in execution, to remain unsatisfied till within four days of the time fixed by the sheriff or proper officer for the sale thereof, or for fifteen days after such seizure.

Origins. — R.S., (1886), c. 129, s. 5; 45 Vict., c. 23, s. 9.

Theory. — See s. 175.

1. It is manifest that there are two entirely different sets of circumstances under which it may be deemed necessary to wind-up a Company.

(a) When the objects of the Company are fulfilled or when from any other cause it is considered inexpedient to continue;

(b) When the Company is insolvent, and a winding-up in the interests of the creditors is unavoidable.

The first has been aptly termed a voluntary winding-up.

The second, an involuntary.

The first is decided upon at the instance of the Company itself; the second, as a rule, at the instance of its creditors.

(Stephens, On Corporations, 389-390.)

2. Le mot "insolvency" peut être entendu dans deux sens: le sens juridique et le sens ordinaire.

Dans le sens ordinaire, il signifie l'état d'une personne dont les dettes excèdent l'actif.

Dans le sens juridique, il signifie la cessation de paiements par un commerçant.

Le terme "insolvency" veut donc dire ici cessation de paiements.

(Demers, J.C.S., Saint-François, 1908, Mitchell vs The Moore Carpet Co., Ltd., 14 R. de J., 210-11 (affirmed in appeal).)

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1. L'abus des pouvoirs corporatifs par les administrateurs d'une compagnie à fonds social peut donner lieu au recours de l'art. 978 C.P., ce n'est pas une cause de mise en liquidation en vertu de la loi des Liquidations.

(B.R., Montréal, *La Société des Arts du Canada vs Prévost*, 20 B.R.. 228.)

2. Une Compagnie à fonds social, étant devenue insolvable, doit être mise en liquidation en vertu du c. 129 et amendements des S. R. du Canada, et ne peut être requise de faire cession en vertu du C.P.

(Ta-cherneau, J.C.S., Terrebonne, 1901, Nant La Cie d'Imprimerie du Nord, 7 R. de J., 205.)

3. Where a Company is able to meet its liabilities, it is not to be considered insolvent, although it has sustained, and is continuing to sustain heavy losses, and the court will not make an order to wind it up merely on this ground.

(Joint-Stock Coal Co.. Law Rep., 8 Eq. 146.)

3a. Insolvency is the condition in which the debtor is placed when he has not sufficient property subject to execution to pay all his debts if sold under legal process at a sale fairly and reasonably conducted.

(Anchor Investment Co., Ltd., 7 D. L. R. 915).

4. The court will not, under this clause, order a Company to be wound up by reason of liabilities not immediately payable, unless it is reasonably certain

that the existing and probable assets will be insufficient to meet the existing liabilities, and will not take into account the possible liabilities or profits which may accrue in respect of future business.

(European Life Ass. Society, Law Rep. 9 Eq. 122.)

5. A demand being made under s. 4, and the time for payment having elapsed without the demand having been complied with, and no reason given why payment is not made, under such circumstances Company must be deemed insolvent.

(Cushing Sulphite Fibre Co., 37 N.B.R., 251.)

6. By sect. 5 (C) of the Dominion Winding-up Act, a company is deemed insolvent, *if it exhibits, a statement showing its inability to meet its liabilities.*

Held:—That the inability to meet liabilities means liabilities to creditors as distinguished from liabilities to shareholders.

On the hearing of a petition based on such a statement, the statement must be accepted as correct.

(United Canneries, 9 B.C.R., 528, 2 Commercial L.R., 396; 9 R.L., n.s., 321.)

7. There is no wider meaning to be given to the words: *unable to pay his debts in full*, than to: *insolvent circumstances*, but both expressions refer to the same financial condition, that is, to a condition in which a debtor is placed when he has not sufficient property subject to execution to pay all his debts, if sold under legal process at a sale fairly and reasonably conducted.

(Dominion Bank vs Cowan, 14 O.R., 465.)

8. The fact that all the assets are either mortgaged, or under warehouse receipts, is not alone sufficient to render a debtor insolvent.

(Lake Winnipeg, etc., Trading Co., 7 Man. R. 255.)

9. Affidavit of president that Company is "unable to pay its debts in full" with no comparative statement of assets and liabilities.

Held:—Insufficient evidence of insolvency.

(Lake Winnipeg, etc., Trading Co., 7 Man. R., 255.)

10. If a petition is based on the insolvency of the Company, the petitioner must strictly prove the existence of one or more of the circumstances set out in section 3rd or his petition will be dismissed.

(Rapid City Farmer's Elevator Co., 9 Man. L.R., 574.)

10a. Petitioners for the winding-up of a Company under the Dominion Winding-up Act on the ground of its insolvency must not only allege, but strictly prove, the existence of one or more of the circumstances set out in sect. 3 of the Winding-up Act, R.S.C., 1906, ch. 144, which would justify an order for winding up.

10b. That a Company's president threw open the books of the company to an accountant, embodied the result of his examination thereof in a report to the creditors, showing that the Company was insolvent, does not bring the Company within subsection (c) of section 3 of the Winding-up Act, as exhibiting a statement showing its inability to meet its liabilities.

10c. Where an affidavit, offered in support of a petition for winding-up a Company, stated that the deponent, an auditor designated by certain creditors, had examined the Company's books and records and, in connection therewith, had obtained, from time to time, information as to the affairs of the Company from its president, and that though the deponent was

unable from the limited time at his disposal to make a complete audit or arrive at a balance, he made a sufficient examination and secured sufficient information from the president to arrive at the conclusion that the company was insolvent, such statement is but an expression of the auditor's professional opinion and is not an acknowledgment by the company of its insolvency within sub-section (d) of section 3 of the Winding-up Act.

10d. The acknowledgment of insolvency, required by sub-section (d) of section 3 of this Winding-up Act, must be some formal act of the directors or of the shareholders or of some officer, expressly or impliedly authorized to make such an acknowledgment on the Company's behalf. An officer to the Company's creditor by the president of a Company carrying on a grain commission business to pay a special sum in full of all liability upon condition that he be reinstated as a member of the grain exchange, cannot be construed as an acknowledgment of the Company's inability to pay its creditors in full.

10e. An officer of a Company, who is at the same time director, president and manager, cannot make the acknowledgment of insolvency, specified in sub-section (d) of section 3 of the Winding-up Act, in the absence of authority so to do.

10f. The directors of a company may, without the sanction of the shareholders, make an acknowledgment of the Company's insolvency for the purpose of winding-up, as required by sub-section (d) of section 3 of the Winding-up Act.

(K.B., Manitoba, 1912. Manitoba Commission Company, Ltd., 2 D.L.R., 1.)

10g. The application is based on the insolvency of the Company and if an order is to be made it must be because the material filed satisfied some one of the sub-sections of s. 3 of the Act.

It was argued that the petitioner holding an unsatisfied judgment was sufficient to invoke sub-section (a). But admittedly s. 4 has not been complied with and that being so said sub-section (a) cannot be made the foundation of an order.

Next it is sought to rely upon sub-section (d) i. e, that the Company has acknowledged its insolvency otherwise than in sub-sections (a), (b) and (d) This sub-section requires something actively to be done by the Company which constitutes such acknowledgement.

HELD :

10h. I think further that this sub-section was inserted to cover actions by the Company not intended to amount to such acknowledgement of insolvency. The two preceding sub-sections seem to cover all possible acts which a Company might commit with the intention of making such acknowledgment.

(Anchor Investment Co., Ltd., 7 D. L. R. 915).

11. Sub-section C was held *intra vires* of the Parliament of Canada.

(Lake Winnipeg, etc., Trading Co., 7 Man. R., 255.)

12. The acknowledgment of insolvency must be alleged in petition, if relied on.

(Briton Medical, etc., Assn. and General Life Ins., 11 O.R., 478.)

13. That insolvency can only be established in winding-up proceedings in the manner provided by the Act, and admissions of officers of the company of its insolvency are not sufficient to bring the case within the Act.

(Outlook Hotel Co., 2 Sask. R., 435.)

14. To enable a Company to be wound up, it is not sufficient for the Company to appear by counsel and admit insolvency, and consent to be wound up. The facts showing insolvency must be disclosed in the material on which the petition is based.

(Grundy Stove Co., 7 O.L.R., 252.)

15. The affidavit, supporting petition for winding-up order, must state the facts which constitute the fraud charged.

(Qu'Appelle Valley Co., 5 Man. R., 165.)

16. The Court has a discretion to refuse the order and allow the assignment proceedings to be continued, if the creditors or the majority of them so desire.

(Strathy Wire Fence Co., 8 O.L.R., 186.)

17. Conveyance by company of its assets to another Company, without consent of its creditors, and without satisfying their claim, is sufficient ground of winding-up order.

(Qu'Appelle Valley Co., 5 Man. R., 165.)

18. As to "adverse proceedings" affecting the estate.

(Clarke vs Union Fire Ins. Co., Caston's Case, 10 O.P.R., 339.)

19. That, in computing the time under this subsection (h), the day fixed for the sale is exclusive, and, therefore, where an unsatisfied writ was in the

sheriff's hands, on the 30th of December, and the sale was fixed for the 3rd January, it was a writ remaining "unsatisfied till within 4 days of the time "fixed for the sale", and that the Company was insolvent within the meaning of the Act.

(Lake Winnipeg, etc., Trading Co., 7 Man. R., 255.)

20. L'insolvabilité d'une Compagnie ne peut constituer un moyen de défense à une action en recouvrement d'une créance par cette Compagnie.

(Mathieu, J.C.S., Montréal, 1896, Taylor vs Beaudry, 1 R.P., 5.)

4. A company is deemed to be unable to pay its debts as they become due, whenever a creditor, to whom the company is indebted in a sum exceeding two hundred dollars then due, has served on the company, in the manner in which process may legally be served on it, in the place where service is made, a demand in writing, requiring the company to pay the sum so due, and the company has, for ninety days, in the case of a bank, and for sixty days in all other cases, next succeeding the service of the demand, neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor.

Origins. —R.S.. (1886), c. 129, s. 6; 45 Vict., c. 23, ss. 10 and 11.

THEORY.

1. The debt, on which the petition is founded, being *bona fide* disputed by the Company, the convenient and proper course is not to try the question of the debt on the petition, but to adjourn the hearing of the petition until the debt has been established at law.

If the debt was *bona fide* contested and there is no evidence, other than no compliance with the statutory notice to show that the Company is insolvent, and the Company denies its insolvency, the petition will be dismissed.

The Company must show reasonable grounds for disputing the debt.

When the debt is established, it appears that the Court has no discretion, if the application is within the Act.

(Stephens, On Corporations, 398.)

JURISPRUDENCE.

1. The demand in writing must be served on the Company in the manner in which process may legally be served on it. It is not sufficient that verbal demands have been made or demands by letter.

(Rapid City Farmers' Elevator Co., 9 Man. R., 574.)

2. Service of the specially indorsed writ of summons, in an action against the Company to recover the amount of a creditor's claim, is not a sufficient demand in writing, within the meaning of s. 6 of the Winding-up Act, R.S.C., 1886, c. 129, to serve as the foundation for a petition by the creditor for a winding-up order.

(Abbott, Mitchell Iron and Steel Co., 2 O.L.R., 143.)

3. Lorsqu'une Compagnie est insolvable et que l'insolvabilité est alléguée dans la requête, le créancier, qui demande l'ordre de mise en liquidation, n'est pas tenu d'alléguer et de prouver qu'il a fait à la Compagnie une demande de paiement, conformément à la sect. 10 du Statut 45 Victoria.

(Mathieu, J.C.S., Montréal, 1884, Mackay vs L'Association Coloniale de Construction et de Placements, 13 R.L., 383.)

4. A secured creditor can make the demand mentioned herein, without valuing his security (under s. 76) in such demand.

(Cushing Sulphite Fibre Co., 37 N.B.R., 254.)

5. It was held in *Gurofski vs Harris*, that a plaintiff suing for a tort is not a "Creditor" within the meaning of the Ontario Statute as to preferences. (27 O.R., 201.)

6. Le créancier hypothécaire, qui n'est pas créancier personnel d'une Compagnie et ne peut exercer contre elle que l'action hypothécaire à raison des immeubles qu'elle détient, n'a pas qualité pour demander sa mise en liquidation.

(Loranger, J.C.S., Montréal, 1899, *Leduc vs The Kensington Land Co.*, 16 C.S., 213; conf. par. B. R.)

7. It is a good demand, if the creditor demands payment of a sum greater than that actually due him, if the Company neglects to pay or offer the sum due.

(Cardiff Coal and Coke Co., vs Norton. 2 Ch., 405.)

8. Une Compagnie doit être considérée en état de faillite, aux termes des arts. 3 et 4 du ch. 144 des S.R. du C., lorsqu'elle est incapable de payer ses dettes à leurs échéances, et la loi présume une cessation de paiements, suivant l'art. 4 des mêmes statuts, lorsqu'une Compagnie néglige pendant 2 mois de payer une créance de \$2000.00.

(Demers, J.C.S., Montréal, 1908, *Mitchell vs The Moore Carpet Co.*, 14 R. de J., 208). (conf. en appel).

9. That a winding-up order may be obtained against an incorporated Company, when it is in fact insolvent, though 60 days have not elapsed since the service on such Company of a demand for payment of an overdue debt; but, when a petition for a wind-

ing-up order is presented before the expiration of such delay, the petitioner is required to prove the insolvency of the Company, unless it be acknowledged or unless one of the other cases in which a Company is deemed insolvent exists.

(Wurtele, J.C.S., Aylmer, 1890, Eddy Mfg. Co. vs Henderson Lumber Co., 6 M.L.R.S.C., 137.)

10. In a petition for the winding-up of the above Company, under the Dominion Winding-up Act, R. S. C., 1886, c. 129, the petition alleged that the Company was unable to pay its debts as they became due, within the meaning of sect. 5 of the above Act, but gave no evidence of the demand in writing, and neglect by the Company to pay within 60 days thereafter, as required by sect. 6.

The petition must be dismissed, unless amended and fresh evidence given, since sect. 6 specifies the only way of proving a case under clause of sect. 5.

(In Chambers, Ontario, 1904, Ewart Carriage Worns, 8 O.L.R., 527). (11 R.L., n.s., 238.)

11. The petition need not be presented immediately after the expiration of the 60 days or 90 days as the case may be. Delay in petitioning does not destroy the right.

(Imperial Hydropathic Hotel Co., 49 L.T., 147.)

5. The winding-up of the business of a company shall be deemed to commence at the time of the service of the notice of presentation of the petition for winding-up.

Origins. — R.S., (1886), c. 129, s. 7; 45 Vict., c. 23, s. 12.

Theory. — Ss. 48, 52, 56, 71, 94 et seq.

JURISPRUDENCE.

1. See: *Fuchs vs Hamilton Tribune*. 10 O.P.R., 409.

2. The winding-up of a Company, when ordered under the Winding-up Act, R.S.C., 1906, c. 144, takes effect retroactively as of the date of service of the notice of motion, so that the winding-up of the business of the Company is to be deemed to commence at that time.

(*Bank of Hamilton vs Kramer-Irvine Co.*, 1 D.L.R., 475.)

6. This Act applies to all corporations incorporated by or under the authority of an Act of the Parliament of Canada, or by or under the authority of any Act of the late province of Canada, or of the province of Nova Scotia, New Brunswick, British Columbia or Prince Edward Island, and whose incorporation and the affairs whereof are subject to the legislative authority of the Parliament of Canada; and also to incorporated banks, savings banks, incorporated insurance companies, loan companies having borrowing powers, building societies having a capital stock, and incorporated trading companies doing business in Canada wheresoever incorporated and,—

(a) which are insolvent; or,

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

Origins. — 52 Vict., c. 32, s. 3; R.S., (1886), c. 129, s. 3; 47 Vict., c. 39, s. 1.

JURISPRUDENCE.

1. The Winding-up Act, which provides that the Act applies to incorporated trading Companies doing business in Canada wheresoever incorporated, is *intra vires* of the Parliament of Canada.

(*Allen vs Henson*, 18 C.S.C., 667.)

2. Sections 2 and 3 of the Winding-up Act. (47 Vict., c. 39, ss. 2 and 3) do not apply to banks, but an insolvent bank, whether in process of liquidation or not, at the time it is sought to bring it, under the Winding-up Act, must be wound up with the preliminary proceedings provided for by 45 Vict., c. 23, ss. 99, 120, as amended by 47 Vict., c. 39, s. 2.

(*Mott vs Bank of Nova Scotia*, 14 C.S.C., 650.)

3. That a foreign Company, which has done business in this province, although several years have elapsed between the cessation of his business and the service of Winding-up petition, is subject to liquidation under Winding-up Act. if there be unsatisfied obligations.

(B.R., Montreal, 1908, *Scott vs The Great Northern Construction Co.*, 10 R.P., 164; 15 R.L. n.s., 307.) (18 B.R., 138.)

4. A Company, incorporated under an Act of the province of Ontario and carrying on business in Ontario, is "doing business in Canada" within the meaning of this section.

(*Ontario Forge and Bolt Co.*, 25 O.R., 407.)

5. The Steel Co. of Canada, incorporated in England under the Imperial Joint Stock Companies Acts, 1862-1867, carrying on business in Nova Scotia, and having its principal place of business at Londonderry, N.S., was, on the application of the respondents and by consent, ordered to be wound up under 45 Vict., c. 23, (D).

The appellants, creditors of the Company, objected to the Winding-up order, on the sole ground that the Act did not apply to foreign corporations.

Held:—That 45 Vict., c. 23, (D) should not be construed as intended to apply to foreign corporations doing business in Canada.

(C.S.C., *Merchants Bank of Halifax vs Gillespie*, 10 C.S.C. 312.)

6. A Company, incorporated under an Imperial Act, but doing business in Canada, can be wound up under the Canadian Winding-up Act as regards its assets in Canada, and the Statute 47 Vict., c. 39, (R.S.C., c. 129, s. 3), which provides that the Winding-up Act applies to incorporated trading Companies "doing business in Canada, wheresoever incorporated", is not *ultra vires* of the Dominion Parliament.

(B.R., *Montréal*, 1890, *Allen vs Hanson*, 16 Q.L.R., 79) (affirmed by 18 C.S.C., 667.)

7. The provisions of the Dominion Winding-up Act (R. S. S. 1906, c. 144), do not apply to a Company incorporated under the Ontario Companies Act, unless such Company is shown to be insolvent.

(*Cramp Steel Co., Ltd.*, 16 O.L.R., 230.)

8. An application was made under the Dominion Winding-up Act to wind up a Company incorporated under the provisions of the North-West Territories Companies Ordinance, c. 20 of 1901. Evidence was adduced for the purpose of showing that the Company was insolvent, but it was largely dependent upon hearsay:

Held:—That, notwithstanding the Company was incorporated by the provincial legislature, it could be put into compulsory liquidation and wound up under the Dominion Winding-up Act. R.S.C., c. 129.

(*Shoolbred vs Clark*, 13 L.N. 218; 17 C.S.C., 265.)

9. The bank appealed to the full Court in British Columbia from a winding-up order in respect of British Columbia Iron Works Co., on the ground

that the Dominion Winding-up Acts, under which the order had been made, did not apply to the Company, which was incorporated under the provincial Companies Act, 1890.

The judgment, appealed from, decided that the Dominion Acts applied and were authority for making the order.

The judgment was reversed by the Supreme Court of Canada, and the order set aside and petition dismissed with costs.

(Bank of British North America vs Warren, 12th November 1900).

10. The Winding-up Act, R.S.C., ch 144, applies to a foreign Company, which has done business in Canada, although the same has been discontinued for a period of five or six years, if there be unsatisfied obligations arising therefrom.

A foreign Company, doing business in Canada, is subject to the Winding-up Act, and the Superior Court has jurisdiction and power to make a winding-up order against it thereunder, although no liquidation proceedings are taken against it, at its domicile, and the correct view is that on its application, the act is to be construed, not strictly, but liberally.

(B.R., Montreal, 1908, Scott vs Hyde, 18 B.R., 138); affirming 24 C. S., 432).

11. A Winding-up order by a Canadian court in the matter of a Scottish Company, incorporated under the Imperial Winding-up Acts, doing business in Canada, and having assets and owing debts in Canada, which order was made upon the petition of a Canadian creditor, with the consent of the liquidator previously appointed by the Court in Scotland as an-

illary to the winding-up proceedings, there is a valid order under the Winding-up Act of the Dominion.

(Allen vs Hanson, In re Scottish Canadian Asbestos Co., 18 C.S.C., 667.)

12. An application for an order to proceed with the winding-up of a Company in the Yukon Territory is properly made pursuant to the rules of procedure made by the judges of the Supreme Court of the North-West Territories at a time antecedent to the separation of the Yukon Territory from the North-West Territories, since no rules have been made modifying or replacing these rules.

A foreign Corporation doing business in the Yukon Territory under a license of the Dominion Government, is subject to the provisions of the Dominion Winding-up Act, in so far as its assets situate within the Dominion of Canada are concerned.

(Territorial Court, Yukon 1912, The Stewart River Gold Dredging Co., Ltd., 7 D.L.R., 736.)

7. This Act does not apply to building societies which have not a capital stock or to railway or telegraph companies.

Origins. — R.S., (1886), c. 129, ss. 4, 97: 45 c. 129, s. 3; 47 Vict., c. 39, s. 1.

PART I.—GENERAL

LIMITATION OF PART.

8. In the case of a bank other than a savings bank the provisions of this Part are subject to the provisions of Part II. of this Act.

Origins. — R.S., (1886), c. 129, ss. 4, 97; 45 Vict. c. 3, s. 2 and subtitle.

Theory. — S. 149.

JURISPRUDENCE.

1. An insolvent bank, whether in process of liquidation or not, at the time it is sought to bring it under the Winding-up Act, must be wound-up with the preliminary proceedings specified in ss. 150-156 of part 11 *infra*.

(*Mott vs Bank of Nova Scotia, in re Bank of Liverpool*, 14 C.S.C., 650.)

9. In the case of life insurance companies, and of insurance companies doing life insurance and other insurance, in so far as relates to the life insurance business of such companies, the provisions of this Part are subject to the provisions of Part III. of this Act.

Origins. — R.S., (1886), c. 129, ss. 4 and 105; 45 Vict. c. 23, s. 2 and subtitle.

Theory. — S. 160.

JURISPRUDENCE.

1. Canadian policy-holders petitioning for distribution of deposit of foreign life insurance Company in hands of Minister of Finance.

Held:—That they were entitled to the relief asked, notwithstanding that proceedings to wind-up the Company were pending before the English Courts.

(Briton Medical, etc., Assn. and General Life Ass.,
1 P.O.R., 111.)

2. But see:—*Merchants Bank of Halifax vs Gillespie*, 40 C.S.C., 312;

Allen vs Hanson, *In re Scottish Canadian Asbestos Co.*, 18 C.S.C., 667.

10. In the case of insurance companies other than life insurance companies, and of insurance companies doing life insurance and other insurance, in so far as relates to such other insurance, the provisions of this Part are subject to the provisions of Part IV. of this Act.

Origins. — R.S., (1886), c. 129, ss. 4 and 115;
45 Vict., c. 23, s. 2 and subtitle.

Theory. — S. 174.

WINDING-UP ORDER.

11. The court may make a winding-up order.—

(a) where the period, if any, fixed for the duration of the company by the Act, charter or instrument of incorporation has expired; or where the event, if any, has occurred, upon the occurrence of which it is provided by the Act or charter or instrument of incorporation that the company is to be dissolved;

(b) where the company, at a special meeting of shareholders called for the purpose, has passed a resolution requiring the company to be wound up;

(c) when the company is insolvent;

(d) when the capital stock of the company is impaired to the extent of twenty-five per centum thereof, and when it is shown to the satisfaction of the court that the lost capital will not likely be restored within one year: or,

(e) when the court is of opinion that for any other reason, it is just and equitable that the company should be wound up.

Origins. — 52 Vict., c. 32, s. 4.

JURISPRUDENCE.

1. A winding-up order will not be granted where there are no assets, and the petitioning creditor would, therefore, get nothing by the order.

(Georgian Bay, etc., Aqueduct Co., 29 O.R., 358.)

2. An order directing the winding-up of a company instead of the business of the company is good.

(Cushing Sulphite Fibre Co., 37 N.B.R., 254.)

3. Where the insolvency of a Company is admitted, the court has no discretion to refuse or to grant winding-up, on the petition of a creditor, who has a substantial interest in the estate, although the Company has made a voluntary assignment for the benefit of its creditors, and most of them are willing that the winding-up should be under such assignment.

(William Lamb Mfg. Co., of Ottawa. 32 O.R., 243; Union Bank of Canada. 15 O.R., 307.)

4. The Court will not, in the absence of fraud, make an order under the clause for a compulsory winding-up, on the petition of shareholders, against the wish of a large majority of the creditors and contributories, but will leave the Company to exercise their judgment in determining on a voluntary winding-up.

(London Flour Co., W. N. 1868, p. 84; 16 W.R., 552.)

4a. Mismanagement or misconduct of directors is not a sufficient ground for winding-up, unless insolvency is thereby caused.

(Anglo-Greek Steamship Co., 2 Eq., 12.)

5. To enable a Company to be wound up under the Winding-up Act, R.S.C., 1886, c. 129, it is not sufficient for the Company to appear by counsel and

admit insolvency and consent to be wound up, but the facts as required by the Act, showing insolvency must be disclosed in the material on which the petition is based.

Having regard to these considerations, it appears to me that the order ought not to be made in this case, and that the petition should be dismissed.

(Meredith, J., Ontario, 1904, Grundy Stove Co., 7 O.L.R., 253); (10 R.L., n. s., 358.)

6. If the Company borrows money by an *ultra vires* act, the creditor cannot petition.

(National Permanent, 5 Ch., 309.)

7. Where an assignment for the benefit of its creditors had been made by a Company, and its assets had been sold with the approval of the great majority of its creditors and shareholders, an application to wind-up the Company, made by a creditor and shareholder, who had taken part in all the proceedings, and had himself tried to purchase the assets, was refused.

(Strathy Wire Fence Co., 8 O.L.R., 186.)

8. Semble: That the mere fact that a Company has large liabilities, and has decided that, in view of them, it is unable to carry on its business, is not proof of "insolvency."

9. Where no regular meeting of directors was held to proceed to convene an extraordinary meeting of the Company to consider a resolution for winding-up, but it was shown that the requisite number of shareholders had joined in the requisition pursuant to s. 118 of the Companies Ordinance, among them being all the directors, all of whom subsequently signed an endorsement directing the secretary—himself a director—to call the meeting.

10. That the want of a regular meeting of the directors, was a mere irregularity, and did not invalidate the meeting of shareholders, subsequently held in pursuance of notice by the secretary, at which the winding-up resolution was passed.

(Red Deer Mill and Elevator Company vs Hall, 1 Alta. R., 530.)

11 On the meaning of the terms of: *Just and equitable*, see: Florida Mining Co., 9 B.C.R., 108.

12. Where it appears just and equitable, the court, under this section, has power to order a Company to be wound-up, notwithstanding such winding-up is contrary to wishes of a majority of the shareholders.

(British Oil and Cannel Co., 15 L.T.N.S., 601, Ch.)

13. The words "just and equitable that the Company should be wound up," used here, are to be considered as referring to matters *ejusdem generis* with the subject matters stated in the prior rules.

(Suburban Hotel Co., 2 Ch., 737.)

14. The petition must set out every circumstance, which is material to authorize the Court to make the order. The common form allegation that it is just and equitable that the company should be wound up, is not sufficient, unless the facts are stated which render it just and equitable.

(Wear Engine Works Co., 10 Ch., 188.)

15. If it be established that a Company never had any proper foundation, and that it was a mere fraud or "bubble Company", the Court will order it to be wound up. But, the misconduct of the directors and manager of a Company, though it may be such as to render them liable, if a suit were instituted against them by the shareholders, is not a ground on which

the court will consider it "just and equitable" to wind-up the Company under this section, where there is no evidence that their mismanagement has produced insolvency, or that the Company is a mere "bubble Company", and where there is a reasonable prospect that, under proper management, it may be successfully carried on.

(Anglo-Greek Steam Navigation and Trading Co., 35 Beav., 399.)

16. A petition by 3 shareholders to wind-up the Company under the Ontario Companies Act, 7 Edw. VII, c. 34, s. 199, sub-s. 3, upon the ground that it was *just and equitable* that the Corporation should be wound-up, was dismissed, no case for a winding-up order being disclosed. Any suspicion that the Company is being mismanaged is insufficient. The whole substance of the Company could not be said to be gone, the property acquired under the charter existing and there being a means of working it. A winding-up petition cannot be resorted to merely because there is dissension within the Company.

(Harris Maxwell Larder Lake Gold Mining Co., Limited, 1 O.W.N., 984.)

APPLICATION FOR ORDER.

12. The application for such winding-up order may, in the cases mentioned in paragraphs (a) and (b) of the last preceding section be made by the company or by a shareholder; and in the case mentioned in paragraph (c) of the last preceding section by the company or by a creditor for the sum of at least two hundred dollars, or, except in the case of banks and insurance corporations, by a shareholder holding shares in the capital stock of the company to the amount of at least five hundred dollars, and, in the other cases mentioned in the said section, by a shareholder holding shares in the capital stock of the company to the amount of at least five hundred dollars.

Origins. — 62-63 Vict., c. 43, s. 4; 32 Vict., c. 32, s. 5; S.R., (1886), c. 129, s. 8; 45 Vict., c. 23, s. 13, in part.

Theory. — Ss. 2, 150.

2. To entitle a person to petition as a creditor, there must be a debt either legal or equitable, which can be enforced by him against the Company; thus, a garnishee of a debt due from the Company cannot petition, he must first obtain judgment against the Company and petition, on his judgment debt.

(Emden, 34.)

JURISPRUDENCE.

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1. The Act, like the Insolvent Act of 1875, which provided for the winding-up of incorporated Companies, is intended to be put into operation, at the instance of creditors only.

(Union Ranch Co., of Canada, Ltd., 15 O.L.R., 307.)

2. Les seuls créanciers, qui peuvent provoquer la mise en liquidation d'une Compagnie à fonds social, sous la loi fédérale des Liquidations, étant ceux qui *"ont une réclamation actuelle, future, certaine,"* un créancier d'une dette litigieuse n'a pas qualité pour le faire.

(B.R., Montréal, La Société des Arts du Canada vs Prévost, 20 B.R., 227.)

3. Le créancier hypothécaire, qui n'est pas créancier personnel d'une Compagnie, et ne peut exercer contre elle que l'action hypothécaire à raison des immeubles qu'elle détient, n'a pas qualité pour demander sa mise en liquidation.

(Loranger, J.C.S., Montréal, 1899, Leduc et al., vs The Kensington Land Co., 16 C.S., 213). (Affirmed in appeal)

4. A Company will not be compulsorily wound up at the instance of insecured creditors, where it is shewn that nothing can be gained by winding-up, as for example, where there would not be any assets to pay liquidation expenses.

(Okell vs Morris and Co., 9 B.C.R., 153.)

5. That the petitioner's claim, being amply secured, he had no right to petition and force the Company into liquidation.

(Cushing Sulphite Fibre Co., 37 N.B.R., 254.)

6. A subsequent execution creditor may file a petition for a winding-up order.

(Lake Winnipeg, etc., Trading Co., 7 Man. R., 255.)

7. The assigning of claims for the purpose of bringing a petition is not to be encouraged. It is not permissible for various creditors of a Company to assign to any creditor or any other person their claims against the Company, in order that the petitioner may have a claim against the Company of enabling him to petition to wind-up the Company.

(People's Loan and Deposit Co., 7 O.W.R., 253.)

8. A petition for winding-up, presented by persons, who had merely acquired an interest in the Company for the purpose of presenting it, was not held to be irregular.

(Cheshire Patent Salt Co., 9 Jur. N.S., 1098.)

9. A shareholder cannot petition, on the ground that he was induced to take shares by misrepresentation. He should bring an action.

(Union Hill Silver Co., 22 L.T., 400.)

10. A Company issued bonds payable to bearer, the payment of which was secured by a trust mortgage, by which the Company purported to assign certain of its property to trustees, in trust, for the benefit of the bondholders, and covenanted with the trustees for the payment of the principal and interest of the bonds to the bondholders:

Held:—That the holder of some of the bonds, the interest on which was overdue, was entitled to petition for the winding-up of the Company.

11. That the bonds and trust mortgage must be read together, and that, under the terms of the trust mortgage, a bondholder was not a creditor within the meaning of the Act, and was not entitled to petition for a winding-up order.

12. That a secured creditor can make a demand under s. 6, and petition for the winding-up of the Company, and is not bound to value, in his petition, his security under s. 62; that where a demand is made under s. 6, and the time for payment has elapsed, and the demand has not complied with, and no reason is given why payment is not made, the Company must be deemed insolvent within the meaning of the Act.

(Cushing Sulphite Fibre Co., 37 N.B.R., 254.)

13. A person, who has a claim against the Company for unliquidated damages, is not a creditor within the meaning of the Dominion Winding-up, and cannot petition.

(Pen-y-van Colliery Co., 6 Ch., D., 477.)

14. A Company, incorporated under the Nova Scotia Companies Act, R.S., (1900), c. 128, for the purpose of carrying on mining operations, after operating its property for a time at a loss, disposed of it to another Company, the consideration for the transfer being shares in the latter Company.

Application was made by one of the shareholders for a winding-up order, under the provisions of the Companies Winding-up, the grounds being:

(a) That the substratum of the Company had gone;

(b) That it was not possible for the Company to carry on the business for which it was created;

(c) That the sale of its property for shares in another Company was illegal and unauthorized.

The application was opposed by the Company, and it did not appear that either the creditors or the shareholders generally desired a winding-up.

Held:—That the judge, to whom the application was made, was right, under these circumstances, in refusing an order.

That, before giving effect to the application and taking the matter out of the hands of the directors and of the Company, the learned judge was right, in requiring the shareholder to bring himself within the principle of the cases by showing, *inter alia*, that the Company was in such a state of solvency that there was a reasonable probability of sufficient assets being left for the shareholders to give him a tangible interest in having the Company wound-up.

(Tangier Amalgamated Mining Co., 39 N.S.R., 373.)

15. It is the general right of a creditor to have a Company wound up by the Court although other creditors to a much larger amount desire a voluntary winding-up, and a meeting of the shareholders has been called to pass a resolution in favour of a voluntary winding-up.

(General Rolling Stock Co., 11 Jur. N. S., 231, Ch.; 12 L. T.N.S., 9.)

16. *Held*:—That a creditor of a Company, who cannot be paid without winding-up proceedings, is entitled *ex-debito justitiae* to a winding-up order.

(Western Canada Oil, etc., Co., L.R., 17 Eq., 1.)

17. There is no objection to a Company presenting a petition to wind-up another Company.

(Mexican Co., 34 Sol. Jr., 269.)

18. Where two petitions to wind-up were presented, one by a paid-up shareholder, who had only paid the deposit on application, it not appearing that the Company was insolvent, an order was made upon both petitions; but it was held that the paid-up shareholder was entitled to the conduct of the winding-up.

(Constantinople and Alexandria Hotels Co., 12 W. R., 851.)

19. Two petitions were presented to wind-up a Company, the first by a creditor, the second and subsequent one by shareholder. The second contested the debt upon which the first was founded, and alleged circumstances to show that the relations between the creditor (a banking Company) and the Company required investigation.

The Master of the Rolls made an order on both petitions, on the ground that he could not dismiss the first, without determining that the debt was bad, nor the second, without coming to the conclusion that the charges, made by it, were frivolous and unsubstantial; and he could not arrive at either conclusion upon the evidence. The carriage of the proceedings was given to the shareholders, who presented the second petition.

(Lundy Granite Company, W.N., 1868, p. 260.)

20. Where there were two petitioners for a winding-up order against the one Company, although orders were made under both petitions, the conduct of the proceedings was given to the later petitioner, a creditor for money paid, in preference to the earlier one, who was shewn to be an employee of and in close touch with the Company.

(In Chambers, Ontario, 1904, *Estates Limited and the Winding-up Act*, 8 O.L.R., 564); (11 R.L., n.s., 238); (*Wakefield Rattam Co., vs Hamilton Whip Co.*, 24 O.L.R., 107.)

21. A winding-up order, having been obtained by a creditor from the Master in Chambers under 45 Vict. c. 23. s. 98 (D), on material, which was not regular, and the solicitor, who presented the petition, being the solicitor for the Company, it was ordered by the Court that the carriage of the proceedings should be given to creditors, who presented a petition on the following day. It is preferable to have the winding-up conducted by solicitors, who are disconnected with the company.

(*Joseph Hall Mfg. Co.*, 10 O.P.R., 485.)

22. A petition for winding-up, which is brought for the purpose of enforcing payment of a debt, which the Company *bona fide* disputes, is an abuse of the

process of the Court, and should and generally will be dismissed with costs. The Court will, however, take pains to see that the dispute is a *bona fide* one.

(A. Coy, (1894), 2 Ch., 349.)

23. A Company duly passed a resolution, at a general meeting for a voluntary winding-up under supervision, and a petition was presented accordingly. The liabilities of the concern were enormous; and another petition, being presented, before the hearing of the former one, by a creditor for upwards of 300,000l., praying an order to wind-up the Company compulsory, it was held that the Company must be wound-up compulsory.

(Barned's Banking Company, 14 L.T.N.S., 451 Ch.)

24. A secured creditor is not obliged to value his security on making a demand.

(Cushing Sulphite Fibre Co., 37 N.B.R., 254.)

25. A winding-up petition is not a proper mode of enforcing a disputed debt.

(Goldhill Mines, 23 Ch. D., 201.)

26. Where a creditor, having presented a petition, was paid part of his debt, but did not receive the balance, on the day fixed, and proceeded with his petition, and a winding-up order was made upon that and another petition, the creditor was compelled to repay the money so received by him.

(Greenwood, 9 Ch., 511.)

27. If the general body of the creditors desire a compulsory winding-up, a voluntary liquidation is not a bar, although no creditor prove he is prejudiced.

(Bishop and Sons, (1900). 2 Ch., 254.)

13. Such application may be made by petition to the court in the province where the head office of the company is situated or, if there is no head office in Canada, then in the province where its chief place, or one of its chief places of business is situated.

2. Except in cases where such application is made by the company, four day's notice of the application shall be given to the company before the making of the same.

Origins. — 52 Vict., c. 32, s. 6; R.S., (1886), c. 129, s. 8; 45 Vict., c. 23, s. 13 in part.

Theory. — See s. 2.

1. Where the petitioner dies before the hearing of the petition, it is submitted that an order to continue proceedings can be obtained.

(Parker and Clarke, 365.)

2. Persons served with the petition, the Company, and any creditors or contributories are entitled to be heard, provided the latter give notice of their intention to appear.

(Emden, 61.)

FORM OF PETITION.

UNDER THE WINDING-UP ACT.

Province of Quebec, }
District of Montreal, } SUPERIOR COURT.
No. }

and

Petitioner

Respondent

To the Honourable the Superior Court, sitting in and for the district of Montreal, or to any one of the Honourable Judges thereof.

The Petition of your Petitioner Respectfully Sheweth:

1. That the Respondent is a commercial Corporation, incorporated by Letters Patent under the great seal of the Dominion of Canada;

2. That your petitioner is a non-secured creditor of the said Company in a sum exceeding two-hundred dollars, namely: in the sum of \$, for goods sold and delivered by your Petitioner to the said Respondent, at the times and places and for the various amounts mentioned in the statement of account herewith filed to form part thereof, the said account being long past due;
3. That the Respondent is insolvent and unable to pay its debts as they become due;

Wherefore your Petitioner prays that this Court, or Your Lordship, be pleased to order the winding-up of the said Company and the appointment of a provisional liquidator thereof; that one or more liquidators be appointed to the property of the said Company, after such notice to the creditors, contributories, shareholders and members thereof, as the Honourable Court, or Your Lordship, may see fit to prescribe: the whole with costs.

Montreal, , 191 .

AFFIDAVIT.

I, , of the city and district of Montreal, being duly sworn, do depose and say:

1. I am the Petitioner herein;
2. All the facts mentioned in the foregoing petition are true;

And I have signed.

Sworn to before me, at Montreal,
this day, of , 191 .

C.S.C.

NOTICE.

To the

Gentlemen,

Take notice of the foregoing petition and of the affidavit in support thereof, and that the said petition will be presented to the Superior Court, or to any one of the Honourable Judges thereof, in and for the district of Montreal, sitting in the Practice Division, in Room 31, in the Court House, at Montreal, on the _____ day of _____, 191____, at ten o'clock in the forenoon, or as soon thereafter counsel can be heard.

Montreal, _____ day of _____, 191____

Attorney for Petitioner.

JURISPRUDENCE.

1. Service of a petition for a winding-up order on an assignee for creditors of a Company is not service upon the Company, as required by s. 8 of the Winding-up Act, R.S.C. c. 129, such assignee not being an agent of the Company for the purposes of such service, within Con. Rule 159, at any rate, when the president and directors are readily accessible and have given no express authority to the assignee to accept such service.

(Rodney Casket Company, 12 O.L.R., 409.)

2. La signification d'une requête pour mise en liquidation est valablement faite au bureau de la Compagnie par la délivrance d'une copie à un employé, qui en a la garde.

(Cooke, J.C.S., Trois-Rivières, de Lorimier vs The Canadian Gas and Oil Co., 34 C.S., 381.)

3. It is not necessary to serve the affidavits with the petition, but they may be left to be demanded by the Company in according with usual practice.

(Qu'Appelle Valley, Man. R., 160.)

3a. Il n'est pas nécessaire de donner à une Compagnie un avis de 4 jours avant la présentation de la requête demandant sa mise en liquidation, lorsque la Compagnie est elle-même partie à la demande.

(C.S., Bruneau, J., Richelieu, 1912, La Cie Pontbriand, Ltée, and Cosky, 14 R.P., 20.)

4. Under s. 8 of the Winding-up Act, R.S.C., c. 129, which directs that a creditor may, after 4 days' notice of the application to the Company, apply petition for a winding-up order, a notice given on the first of the month for a hearing on the fifth is sufficient.

(Maritime Wrapper Co., 35 N.B.R., 682.)

5. Under s. 8 of the Winding-up Act, R.S.C., 1886, c. 129, a petition may be presented *after four days' notice* of the application, and where notice of its presentation was given on the 4th for the 8th November, it was held sufficient.

(Arnold Chemical Co., 2 O.L.R., 671.)

6. *Semble*:—That, as s. 8 of the Act requires the petitioner to give four days' notice of his application, effect could not be given to a ground of which the Company had not that notice.

(Abbott-Mitchell Iron and Steel Co., Ltd., 2 O.L.R., 143.)

7. The provisions of the Winding-up Act, R.S.C., 1906, c. 144, s. 13 (2), that "4 days' notice shall be *given to the Company before the making of*" an application for the Company; and where the full 4 days' notice has not been given, a judge has no power to make order.

The Consolidated Rules of Practice are not by any of the provisions of the Winding-up Act made applicable so as to authorize the Court to shorten the time.

(Farmers' Bank of Canada, 22 O.L.R., 556.)

8. Une requête pour un ordre de mise en liquidation d'une Compagnie, incorporée par lettres patentes du parlement fédéral, doit être présentée à l'endroit où la Compagnie a son siège social.

(Davidson, J., Montréal, 1908, Wetsel Co., vs Oriental Silk Co., 9 R.P., 289.)

9. An application was made to wind-up a Company on the grounds of insolvency, under the provisions of the Companies Winding-up Act. The petition set out that the petitioner was a creditor, and that the Company was indebted to other persons in large amounts; that the Company was unable to pay these debts, and that certain persons in charge of the company's business had admitted its insolvency. This petition was verified by affidavit which stated: "That such of the statements in the petition as relate to my own acts and deeds of others I believe to be true." No other evidence was filed with the petition, nor was notice of any other affidavit served until 2 days before the application was to be heard, when 3 further affidavits were served and leave was asked to read them:

Held:—That the affidavit did not verify the petition as required by the rules, and was not sufficient to support it.

That the original affidavit filed being totally insufficient, there was no evidence on file when the petition was presented to support it, and leave should not be given to file further affidavits in an endeavour to make out a case after the return of the motion.

(Outlook Hotel Co., 2 Sask. R., 435.)

9a. A petition for a winding-up order cannot be supported by statements verified by an affidavit on information and belief only.

(K.B., Manitoba, 1912, Manitoba Commission Co., Ltd., 2 D.L.R., 1.)

10. A petition for winding-up a Company should not also pray for the appointment of a particular person as official liquidator. The court has power to appoint one, at the hearing of the petition, if the parties consent; otherwise the matter must be settled in chambers.

(The Commercial Discount Co., 7 L.T.N., 816, Ch.)

11. *Semble*:—The Court may allow the facts alleged in the petition to be proved on the hearing, although the petition was not verified by affidavit.

(Maritime Wrapper Company, Limited, 35 N.B. R., 682.)

12. On the hearing of a winding-up petition, which was dismissed, the petitioner did not avail himself of an opportunity to examine the officers of the Company. It was too late then to grant an inquiry.

(Sup. Court, B.C., 1902, Okell vs Morris and Co. 9 B.C.R., 153); (8 R.L., n.s., 443.)

12a. In Ontario, a petition may be presented to a judge in chambers.

(Toronto Brass Co., 18 O.P.R., 248.)

13. On an application by a creditor, the onus lies on him to show that his rights are prejudiced.

(New York Exchange, Ltd., 39 Ch. D., 415.)

14. If a friendly petition is presented by a creditor, the petitioner's solicitor should not act for the company, otherwise the carriage of the order may be given to another creditor, and the petitioner's costs disallowed.

(Lennox Publishing Co., 61 L.T., 787.)

15. Where, upon the hearing of a petition presented by a judgment creditor, evidence is before the Court upon which the issue whether the judgment was or was not obtained by collusion, can be decided,

the petition will be forthwith disposed of, notwithstanding that the judgment has not been impeached in an action at law.

(United Stock Exchange Co., 51 L.T., 687.)

16. A judgment creditor, presenting a petition, will not be compelled to refute by other evidence, an allegation that the judgment was obtained by fraud, but the Court will direct the winding-up order to be good, unless the Company within a certain time commence an action and impeach the debt.

(Bowes vs Hope Insurance Soc., 11 H.L.C., 389.)

17. Adjournments at the request of the petitioner, opposed by the Company, are not allowed as a matter of course, for the winding-up order relates back to the presentation of the petition, and the pendency of the petition may be prejudicial to the company.

(Metropolitan Railw. Warehousing Co., 17 L.T., 108.)

14. The court may, on application for a winding-up order, make the order applied for, dismiss the petition with or without costs, adjourn the hearing conditionally or unconditionally, or make any interim or other order that it deems just.

Origins. — R.S., (1886), c. 129, s. 9; 45 Vict., c. 23, s. 14.

Theory. — Ss. 2, 29, 101 and 151.

2. In the event of an appeal from a winding-up order, it is advisable to apply at once for an order restraining the advertisement of the winding-up order pending the appeal.

(Emden, 66.)

JURISPRUDENCE.

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1. Les pouvoirs, attribués à la Cour Supérieure par la loi des Liquidations, peuvent être exercés par le juge en chambre.

(Cooke, J.C.S., *Trois-Rivières, de Lorimier vs The Canadian Gas and Oil Co.*, 34 C.S., 381.)

2. The Court has a discretion to grant or withhold a winding-up order under s. 9 of R.S. Canada, 1886, c. 129, (*Maple Leaf Dairy Co.* (1901), 2 O.L.R. 590. followed.)

On the hearing of a winding-up petition, which was dismissed, the petitioner did not avail himself of an opportunity to examine the officers of the Company:

Held, on appeal: — That it was too late then to grant an inquiry.

(Okell and Morris Co., Limited, 9 B.C.R., 153; 8 R.L., n.s., 443.)

3. The Court has a discretion to grant or withhold a winding-up order under s. 9 of R.S.C., 1886, c. 129.

(Maple Leaf Dairy Co., 2 O.L.R., 590.)

4. A discretion to grant or refuse the order exists, notwithstanding the making of the assignment (Wakefield Rattan Co. v. Hamilton Whip Co., (1893), 24 O.R., 107; Maple Leaf Dairy Co. (1901), 2 O. L. R., 590, approved; William Lamb Manufacturing Co. (1900), 32 O.R., 243, considered).

(Strathy Wire Fence Co., 8 O.L.R., 186.)

5. Where a shareholder petitioned for a winding-up order, and asked the court to direct a meeting of the shareholders to be held, the court, having dismissed the petition for want of sufficient grounds, held that it could not direct a meeting to be held, except with the sanction of the shareholders, a majority of whom, it appeared, were opposed to such a course being adopted.

(Joint Stock Coal Co., W.N., 1869, p. 82.)

6. To obtain a winding-up order, the holder of a paid-up share must satisfy the court, that the Company has ceased to carry on its business, and that the assets of the Company are sufficient, after payment of the debts of the Company, to produce a surplus for division among the shareholders.

(The Lancashire Brick and Tile Co., 34 L.J., Ch., 331; 11 Jur. N.S., 405.)

7. Where the assets of the Company were small, and the creditors had almost unanimously entered upon a voluntary liquidation under the Ontario assignments act, a petition for a compulsory winding-up order was refused.

(Maple Leaf Dairy Co., 2 O.L.R., 590.)

8. On a petition for winding-up on the ground that the business of a Company was carried on at a loss, and that a change had been introduced in the system of working it, a meeting of shareholders, held by the direction of the Court had decided that it was expedient that the Company should be carried on. The Court being satisfied that the Company was solvent, and that the new system of which the shareholders approved was not inconsistent with the scheme of the Company, declined to make an order for winding-up.

(Factage Parisian Co., 13 W.R., 330; 34 I.C., Ch., 140.)

9. A creditor's petition will be ordered to stand over, at the instance of the shareholders, if there is reason to believe that the Company will discharge their liabilities.

(Brighton Hotel Co., Law Rep., 6 Eq., 339.)

10. Where a creditor petitions for a compulsory winding-up, although the Court may allow the petition to stand over, if the Company undertake to pay the debt, the Court will not do so simply to enable the Company to wind-up voluntarily, even though a voluntary winding-up is wished for by a considerable body of other creditors.

(General Rolling Stock Co., 34 Beav., 314.)

11. Where the majority of the creditors are opposed to winding-up order made, the order will be

made in cases, where it appears that the minority creditors may be prejudiced unless the winding-up order is made.

(Charles H. Davies Co., Ltd., 90 W.R., 992.)

12. That, if a majority of creditors are of a different opinion to the petitioning creditor, the Court is bound to have regard to their wishes, and may accordingly make a supervision order instead of a compulsory order, or if the Company be already in voluntary liquidation, may refuse to make any order if a majority of creditors so desire.

(The Langley Mill Co., L.R., 12 Eq. 26.)

13. It was held that the provisions of the act as to the winding-up orders are not intended to apply to cases, where there is a very small body of shareholders and no difficulties exist in the way of voluntary winding-up.

(Natal, etc., 1 H.S.M., 639.)

14. The Court has in all cases a wide discretion as to the course it will take, on hearing a petition to wind-up a Company, and by ss. 91 and 149 (our sect. 61) is empowered to take steps to ascertain the wishes of creditors or contributories, and to have regard to those wishes. The circumstances, under which the Court shall have power to order a winding-up, are set forth in ss. 79 and 80 (our ss. 11 and 3); but it rests with the Court to exercise that discretion or not.

(Metropolitan Saloon Omnibus Co., ex-parte Hawkins, 5 Jur. (N.S.), 922.)

15. The Court will not interfere with a voluntary winding-up of a Company by its shareholders and order a compulsory liquidation, unless it is shown that the rights of the petitioner will be prejudiced by the voluntary winding-up. Service on the liquid-

ator of a notice of appeal, on behalf of the Company from a compulsory winding-up order, is not necessary.

(The Oro Fino Mines, Limited, 7 B.C.R., 388.)

16. A winding-up order will not be granted where there are no assets, and the petitioning creditor would, therefore, get nothing by the order.

(Georgeian Bay, etc., Aqueduct Co., 29 O.R., 358; Okell and Morris Fruit Preserving Co., 9 B.C.R., 153.)

17. Where several petitions are presented for winding-up the same Company, and an order has been made upon one of them, each of the subsequent petitions will be treated individually as if it were the only one presented, and, to entitle the petitioner to costs, must disclose such facts as would induce the court to make a winding-up order, if no other petition had been presented.

(European Bank, Ex parte Baylis, Law Rep., 2 Eq., 521; 35 L.J., Ch., 690; 12 N.S., 615.)

18. If a second petition is presented, the second petitioner must allege and prove an objection to the prior petition, v.g.: collusion.

(Standard Portland Cement Co., (1890). W.N., 91).

19. When an assignment for the benefit of its creditors has been made by a joint stock Company, a creditor of the Company is not entitled as of course to a winding-up order.

(Strathy Wire Fence Co. 8 O.L.R., 186.)

20. Where a petition is filed for the winding-up of a Company and a second petition is subsequently filed and brought on for hearing before the first petition, the Court should be informed of the prior pro-

ceedings. An attempt, made to forestall a *bona fide* application by a friendly one, is not a practice that should be encouraged.

(Enterprise Hosiery Co., 4 O.W.R., 56.)

21. The petition cannot be amended, on the hearing, so as to include a ground, which the order can be made which was not set out in the petition. The Act requires 4 days' notice of the application to be given to the Company and effect cannot be given to a ground of which the Company had not that notice.

(Abbott-Mitchell Iron and Steel Co., 2 O.L.R., 243.)

22. An application for an order for the winding-up of a bank was refused, the curator objecting to the notice.

The judge might have adjourned the hearing under s. 14 of the Winding-up Act; but as there were other applications pending, he considered that the first applicant, who has wholly regular, should not be deprived of any advantage to which his adherence to the rules, statutes and practice, entitled him.

The applicant was ordered to pay costs to the curator, who opposed the application, but not to creditors and others, who appeared upon the hearing.

(Farmers' Bank of Canada, 22 O.L.R., 556.)

23. Where a creditor appeared on the hearing of a shareholder's petition, the Court refused to make an order on his application, although there was evidence that the company was insolvent, but left him to present a petition of his own, if he chose.

(Spence's Patent, etc., Co., Law Rep., 9 Eq., 9.)

24. An order, made under the Winding-up Act, 2 Rev. Stat. of Can. c. 129, directing the winding-up of a Company instead of the business of a Company, is good.

(Cushing Sulphite Fibre Co., 37 N.B.R., 254.)

24a. Where the petitioner had agreed to refer all matters in difference to arbitration and the arbitrator had made his award, but it had not been taken up, it was held that the petitioner was not barred from obtaining a winding-up order.

(Lancaster and Newcastle-upon-Tyne Railw. Co., 5 Railw. and Can. Cases, 632.)

25. An order made in Chambers cannot be varied or set aside by another Judge than the one granting the order, and by him only in Court, and consent of the Judge, whose order is to be varied or set aside, will not confer jurisdiction.

(D. Wade Co., 2 Alta. R., 117.)

26. A winding-up order made against a company, after appearance and contestation by it of the petition, is *res judicata* and conclusive against the shareholders.

(The Great Northern Construction Co., and Hyde, 34 C.S., 432); (affirmed by 18 B.R., 138.)

27. The general rule that a winding-up order, made against a company, after appearance and contestation by it, is conclusive against the shareholders, does not apply where the ground taken is that the company was not subject to the Winding-up Act, or that the petition for the order had not been served upon it and was a fraudulent abuse of the process of the Court.

(B.R., Montreal, 1908, Scott vs Hyde, 18 B.R., 138; 10 R.P., 164); (15 R.L., n.s., 307.)

28. One creditor obtained a winding-up order. Other creditors applied to have the order set aside on the grounds of fraud and prejudice.

Held:—That the order was in effect a judgment of the Court, directing the Company's assets to be realized and applied *pro rata* in discharge of its

obligations and no other creditor could have any greater or higher right; that the order could not defraud any creditor nor in any way prejudice him; that the application was without precedent and unwarranted by the practice; that the Court had no power on this application to appoint a receiver; that application for leave to intervene should be made to the referee.

(Standard Cobalt Co., 16 O.W.R., 501; 1 O.W.N. 875.)

29. Where a winding-up is a proceeding in a foreign Court and special relief is sued for in a province, where certain of the assets are situate, it is not proper for a local court to interfere in respect to property controlled by the foreign Court in the winding-up. If the suit or proceeding is in aid of the foreign proceedings, the shape, in which the assistance should be given in the local Court, would depend on what has been done in the foreign court.

There must be no conflict between the two Courts and, in order to prevent this the local Court should have evidence to show the position of matters in the foreign Court and the steps about to be taken there so as to furnish proper relief to the plaintiff and, at the same time, not to interfere with steps being taken in the foreign Court with the same object.

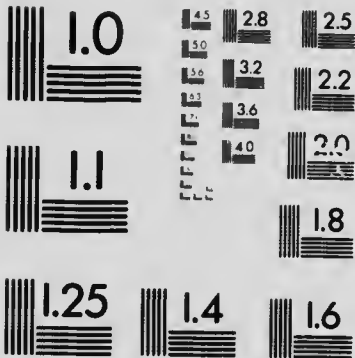
(Louth vs Western of Canada Oil Co., 22 Gr. 557.)

30. The Master of the Rolls held, that where a petition to wind-up a Company is dismissed, the petitioner will, as a general rule, be ordered to pay the costs of the Company opposing the petition, and of every person against whom a personal charge is made by the petition, and who appears and disproves



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such charge, and is otherwise free from blame; but no other person appearing, either to support or oppose the petition, will be allowed any costs. But where the winding-up order is made, the petitioner and the Company will have their costs out of the estate, and shareholders and creditors, who appear to support the petition, will have out of the estate one set of costs between them.

(Humber Ironworks and Shipbuilding Company, 35 Beav., 346.)

31. The petitioner's costs are the first charge upon the company's property in a winding-up, and must be paid in full, in priority to the costs of the official liquidator.

(Audley Hall Spinning Co., Law Rep., 6 Eq., 245.)

32. Under the English Act, it has been held that a winding-up order is not equivalent to an adjudication in bankruptcy.

(Agra and Masterman's Bank, Anderson's case, L. R., 3 Eq., 337.)

33. When a Company has been wound-up and dissolved, a new winding-up cannot be made unless the first winding-up can be impeached for fraud.

(Coxon vs Gorst, 2 Ch., 73.)

34. A person, who appears to support a petition that is dismissed, or to oppose one that succeeds, will not be entitled to costs.

(London and Mediterranean Bank, W.N., 1866, p. 207.)

35. A creditor, presenting a winding-up petition, having notice that another creditor has already presented a petition with the same object, does so at his own risk as to costs and must prove not merely that

he had reason to suspect that the first was not *bona fide*, but that *mala fides* or collusion actually existed.
(Building Society Trusts, L.R., 11 Ch. D., 140.)

36. The company is entitled to its costs of appearing on the petition even although it does not oppose the application, but in fact facilitates it: its costs may be paid out of the estate.

(Warton Beet Sugar Co., 3 O.W.R., 393.)

37. Where a petition was directed to stand over to establish a debt, and the debt was established and order made, it was held that the petitioner was entitled to costs of establishing debt as well as those of petition.

(Railway Finance, 14 W.R., 754.)

38. Where a petition was served and filed without notice, when a previous petition was pending, and the second petition made out a good case for a winding-up order, the petitioners were allowed their costs, although a winding-up order was made on the first petition.

(Algoma Commercial Co., 3 O.W.R., 140.)

39. The company has a right of action against a person, who maliciously presents a petition for its winding-up, if the petition is dismissed.

(Quartz vs Eyre, 11 Q.B.D., 674.)

40. Where a petition for winding-up a Company, containing charges of fraud against the directors, was published at full in a newspaper, before the hearing, it was held that the publishers had committed a contempt of court, and they were ordered to pay the costs of a motion to commit.

(Cheltenham and Swansea Railw. Carriage and Waggon Co., Law Rep. 8 Eq., 580.)

41. On March 24th, 1902, a County Court Judge made an order, upon an affidavit of a liquidator, declaring the above association dissolved. On June

21st, 1902, on the application of a dissatisfied shareholder, he made an order revoking his former order, and also one which he had made on April 7th, 1902, staying proceedings in actions against the association.

Held:—That the order of June 21st, was an appealable order. for even if the appeal to the Court of Appeal, under s. 27 of the Ontario Winding-up Act, was to be restricted to appeals from final orders, yet this was a final order since it put an end to the order of dissolution.

42. That the County Court Judge had no authority to make the order of June 21st, as he had no further material before him than he had had when making that of March 24th, and there was no reason for saying that he had been misled in making the former order, and the proper way to have attacked the latter order was by appeal.

(The Equitable Savings Loan and Building Association, 6 O.L.R., 26.; 2 Commercial L.R., 446.)

43. Where a petition is opposed on grounds with respect to which an inquiry is directed, if the result shows that the petitioner's contention was correct, the costs of the inquiry must be borne by the persons, whose opposition was the cause of the inquiries being directed.

(Bosworthon Mining Co., 26 L.J., Ch., 612.)

44. A winding-up order, made by a Court having jurisdiction, even if made improperly, must be treated as valid until reversed on appeal.

(Arthur Average Ass. 3 C.D., 522.)

44a.—Une ordonnance de mise en liquidation d'une compagnie étant susceptible d'appel ou d'opposition ne peut être rétractée pour irrégularités par la voie de la requête civile.

41b. Dans une demande pour faire mettre de côté une mise en liquidation, le requérant ne peut, par tierce opposition, attaquer la légalité des procédures antérieures à l'ordonnance.

44c. L'ordonnance, accordant la mise en liquidation d'une compagnie, peut être rendue pendant les vacances.

(C.S., Bruneau, J., Richelieu, 1912, La Cie Pontbriand, Ltée, and Cosky, 15 R.P., 20.)

45. As to costs of petitioning, see:

Albion Ironworks Co., 24 C.L.T., 300;

Estates Ltd., 8 O.L.R., 564;

Manitoba Milling Co., 8 Man. R. 426;

Commercial Bank of Manitoba, 13 C.L.T., (Occ. N.) 381.

15. If the company opposes the application on the ground that it has not become insolvent, or that its suspension or default was only temporary, and was not not caused by any deficiency in its assets, or that the capital stock is not impaired to the extent aforesaid, or that such impairment does not endanger the capacity of the company to pay its debts in full, or that there is a probability that the lost capital will be restored within a year or within a reasonable time thereafter, and shows reasonable cause for believing that such opposition is well founded, the court, in its discretion, may, from time to time, adjourn proceedings upon such application, for a time not exceeding six months from the date of the application, and may order an accountant or other person to inquire into the affairs of the company, and to report thereon within a period not exceeding thirty days from the date of such order.

Origins. — 52 Vict., c. 32, s. 8; R.S., (1886), c. 129, s. 10; 45 Vict., c. 23, s. 15.

JURISPRUDENCE.

1. Celui qui demande la nullité de la mise en liquidation d'une compagnie doit procéder par une requête à cet effet.

2. La requête en contestation d'une demande de mise en liquidation n'a pas besoin d'être autorisée par la Cour.

(C.S., Montreal, 1911, *The Siche Light Co. vs Fortin*, 13 R.P., 235.)

3. Under section 15 of the Winding-up Act, providing that if a Company opposes the application for a winding-up order, on the ground that it is not insolvent, the Court may make an order for an accountant to inquire into the affairs of the Company. The power so conferred can be exercised only where the petitioners have made such a *prima facie* case of insolvency against the Company as would justify a winding-up order, and upon their failure so to do, no order for an audit by an accountant will be made.

(K.B., Manitoba, 1912, *Manitoba Commission Co., Ltd.*, 2 D.L.R., 2.)

16. Upon the service on the company of an order made under the last preceding section, for an inquiry into the affairs of the company, the president, directors, officers and employees of the company and every other person, shall respectively exhibit to the accountant or other person named for the purpose of making such inquiry, the books of account of the company, and all inventories, papers and vouchers referring to the business of the company or of any person therewith, which are in his or their possession, custody or control, respectively; and they shall also respectively give all such information as is required by such accountant or other person as aforesaid, in order to form a just estimate of the affairs of the company.

Origins. — R.S., (1886), c. 129, s. 11: 45 Vict., c. 23, s. 16.

Theory. — s. 140.

17. Upon receiving the report of the accountant or person ordered to inquire into the affairs of the company and after hearing such shareholders or creditors of the company as desire to be heard thereon, the court may either refuse the application or make the winding-up order.

Origins. — R.S., (1886), c. 129, s. 12; 15 Viet., c. 23, s. 17.

STAYING PROCEEDINGS

18. The court may, upon the application of the company or of any creditor or contributory, at any time after the presentation of a petition for winding-up order and before making the order, restrain further proceedings in any action, suit or proceeding against the company, upon such terms as the court thinks fit.

Origins. — R.S., (1886), c. 129, s. 13; 45 Viet., c. 23, s. 18.

THEORY.

1. Ss. 22, 23.

2. In exercising the jurisdiction to stay proceedings, the Court has regard to the following facts:

a. Whether the directors have complied with their statutory duties in regard to the winding-up and any matters connected with the promotion, formation, or failure of the Company, which appear to the Court to require investigation;

b. Whether the Company be a public one or a private one.

(Emden, 69.)

3. Quasi-criminal proceedings before a magistrate to recover penalties under the Companies Acts, or by an overseer of the poor for the poor rates can be restrained.

(Emden, 124.)

JURISPRUDENCE.

1. The Court will not allow its administration of the assets to be interfered with by other proceeding affecting the estate.

(Clarke vs Union Fire Ins. Co., Gaston's Case, 10 O.P.R., 339.)

2. In a suit against a Company to restrain trespass, liberty was given under this section, to the plaintiffs, after a winding-up order, to proceed with the suit.

(Wyley vs The Exhalt Coal Mining Co., 33 Beav., 538.)

3. There is jurisdiction under s. 13 of the Dominion Winding-up Act, R.S.C., 1886, c. 129, to restrain proceedings against the Company, even in actions outside the ordinary territorial jurisdiction of the Court, and the enforcing of an execution is a proceeding within this section.

Held:—Therefore, that there was jurisdiction in the High Court, in this Province, to make an order staying proceedings under an execution in the hands of the sheriff of a county, in the province of New Brunswick, as had been done in this case. But the sheriff having, notwithstanding, proceeded with the sale under the execution against the lands of the Company, and executed a deed of the same to the purchaser.

4. That there was no jurisdiction in the Court under the Winding-up Act to make an order summarily declaring the sale void.

(C.A., Tobique Gypsum Co., Costigan vs Longley, 6 O.L.R., 515.)

5. A private individual, who is defendant in the same suit with a joint-stock Company against which a winding-up order has been made, is not entitled to

have further proceedings stayed, on the ground that no application has been made under this section for leave to proceed with the suit.

(Wells vs Estates Investment Co., 15 W.R., 762.)

6. After the making of the winding-up order, the landlord will be restrained from making any distress in respect of rent accrued before the commencement of the winding-up.

(Oak Pitts Colliery Co., 21 C.D., 322.)

7. A distress for rent is not avoided by proceedings taken under the Winding-up Act, 2 R.S.C., c. 129, to put a company in liquidation, if the distress is made before the making of the winding-up order.

(Colwell Candy Co., 35 N.B.R., 613.)

8. A creditor of a Company, on the day of which a winding-up order was made, obtained a judgment against the Company, and issued a *fi. fa.*, which he subsequently delivered to the sheriff for execution. The Court, on the application of the official liquidator, restrained further proceedings.

(Waterloo Life, etc., Insurance Co., 31 Beaven 589; 9 Jur. N.S., 192, Ch.; 7 L.T.N.S., 459.)

9. An order was made, under the provisions of the Companies Winding-up Ordinances (c. 13 of 1903), to wind-up a Company, and a liquidator was appointed.

Before the appointment of the liquidator, the sheriff seized the goods of the Company under a writ of execution.

On an application for an order directing the sheriff to hand over the goods so seized to the liquidator.

Held:—That the Court had, under the Companies Winding-up Ordinances, 1903, no jurisdiction to require the sheriff to hand over the goods seized by him under execution.

(Regina Windmill and Pump Co., 2 Sask. R., 32.)

10. The Court refused to stay proceedings in a winding-up pending an appeal from the winding-up order about to be presented to the House of Lords.

(*London and Manchester Railway Co., Ex parte Barber*, 1 Mac. and G., 183.)

11. Where the winding-up petition was presented after the writ in an action against the Company had been served, but before judgment had been signed, and the creditor having no notice of the petition had obtained judgment, and a writ of execution had been issued and possession taken by the sheriff before the winding-up order was obtained, the Court, in the exercise of its discretion, under sect. 18, refused a motion for injunction to restrain execution. But the creditor was put upon terms in regard to the description of property to be taken.

(*Bastow and Co., Law Rep.*, 4 Eq., 681; 16 L.T. N.S., Ch. 788.)

12. A liquidator of a Company in winding-up proceedings must obtain leave from the Court or referee exercising the powers of the Court, under the Winding-up Act, R.S.C., 1906, c. 141, before instituting proceedings to set aside a consent judgment obtained against the Company between the service of notice of motion for winding-up and the pronouncement of the order, on the ground that the winding-up order took effect as from the date of service of the notice and that the solicitors, who had given the consent had, therefore, no authority to bind the Company.

(*H.C., Bank of Hamilton v. Kramer-Irwin Co.*, 1 D.L.R., 475.)

19. The court may, upon the application of any creditor or contributory, at any time after the winding-up order is made, and upon proof, to the satisfaction of the court, that all proceedings in relation to the winding-up

ought to be stayed, make an order staying the same, either altogether or for a limited time, on such terms and subject to such conditions as the court thinks fit.

Origins. — R.S., (1886), c. 129, s. 18; 45 Vict., c. 23, s. 22.

THEORY.

1. It is common practice before the Master in Ordinary to have the proceedings stayed pending a settlement of all creditors' claims and the Company is encouraged in any *bona fide* efforts so to do.

(Parker and Clarke, 385.)

JURISPRUDENCE.

1. A contributory, petitioning to set aside a winding-up order, was required to give security for the costs of the Company and the creditor, who opposed the petition where it appeared that the creditor was merely acting in the interests of other persons, who lived out of the jurisdiction and who had indemnified him as to costs.

(Rainy Lake Lumber Co., 11 O.P.R., 311.)

EFFECT OF WINDING-UP ORDER.

20. The company, from the time of the making of the winding-up order, shall cease to carry on its business, except in so far as is, in the opinion of the liquidator, required for the beneficial winding-up thereof; but the corporate state and all the corporate powers of the company, notwithstanding it is otherwise provided by the Act, charter or instrument of incorporation, shall continue until the affairs of the company are wound up.

Origins. — R.S., (1886), c. 129, s. 19; 45 Vict., c. 23, s. 19.

THEORY.

1. The infirmity of the charter, or even an assignment in insolvency does not effect a complete dissolution of a corporation so as to terminate its existence.

(Stephens, *On Corporations*, 393.)

2. See ss. 2, 31.

JURISPRUDENCE.

1. Que l'état de corporation d'une Compagnie continue nonobstant sa liquidation.

(Lavergne, J.C.S., Montréal, 1902, *Soney vs La Cie d'Imprimerie Industrielle*, 6 R.P., 195.)

2. Le fait qu'une Compagnie a été mise en liquidation, ne donne pas lieu à une reprise d'instance par le liquidateur dans les actions pendantes au nom de la Compagnie, cette dernière conservant son état de corporation et pouvant ester en justice sous son nom corporatif.

(Taschereau, J.C.S., Montréal, 1884, *Ross vs Per-ras*, 5 C.S., 420.)

3. Plaintiff was engaged as accountant of defendant Company in April, 1904. In the following August, the debenture holders seized the property and put in charge a receiver and manager, to whom plaintiff delivered the books of account, plaintiff himself having actually made the seizure. He, afterwards, continued in the same position as before the seizure, but was paid by the receiver.

Held:—(following *Reid vs Explosives Co.*, 19 Q. B.D., 264.) That there had been an actual seizure known to the plaintiff and that the appointment of

a receiver and manager operated as a discharge of the servants of the Company, and the plaintiff could not recover.

(*Relf v. Canadian Timber and Saw Mills*, 12 B.C.R., 363.)

21. All transfers of shares, except transfers made to or with the sanction of the liquidator, under the authority of the court, and every alteration in the status of the members of the company, after the commencement of such winding-up, shall be void.

Origins. R.S., (1886), c. 129, s. 15; 15 Vict., c. 23 s. 19.

THEORY.

1. The use of the words "after the commencement of such winding-up" seems unfortunate, as it is almost evident that the provisions of section 5 have been overlooked, by which section the winding-up is deemed to commence at the time of the service of the notice of presentation of the petition. The present section is taken from section 131 of the English Act of 1862 and the wording of this part is not changed (Parker and Clarke, 387.)

2. See: ss. 48, 53.

3. At the time of the institution of proceedings in liquidation, a number of contracts for the sale and purchase of shares may be pending, the transfer of which has not been completed, and the purchaser's name substituted for the vendor's, from one of these reasons:

- 1.—Because the time has not yet arrived for the completion of the contract;
 - 2.—Because the vendor is in default;
 - 3.—Because the purchaser is in default;
 - 4.—Because the Company has neglected or has refused to sanction the transfer.
- (Stephens, On Corporations, 407).

JURISPRUDENCE.

1. Where a Company's articles required that transfers of shares should be executed by the transferor and the transferee, and that the transferee should be approved of by the directors before the registration of the transfer, the Court refused to exercise its discretion under this section, where these conditions had not been complied with.

(Overen, Gurney and Co., Walker's case, Law Rep., 2 Eq., 554; 35 L.J., Ch. 826.)

2. The Court does not encourage dealing in shares after a winding-up order has been made.

(Cordova Co., 2 Ch., 580.)

3. Where a Company executed a deed of transfer as a transferor of shares, and the winding-up of the Company commenced after the deed of transfer had been sent in for registration, but before it had been registered, it was held that the validity of the registration of the Company as shareholders was not effected by this section.

(Barned's Banking Co., Ex parte the Contract Corporation, Law Rep., 3 Ch. App. 105.)

4. Under s. 21 of the Winding-up Act providing that all transfers after the commencement of winding-up proceedings, except transfers made to or with the sanction of the liquidator under the authority of the Court, shall be void, the mere entry in the transfer of the Company of a transfer of stock, after the commencement of the winding-up proceedings, will not shift the responsibility as contributories under s. 130 of the Bank Act from the transferors to the transferees.

(C. A., Ontario, 1912, Ontario Bank, 8 D. L. R. 244).

22. After the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company, except with the leave of the court and subject to such terms as the court imposes.

Origins. — R.S., (1886), c. 29, s. 16; 45 Vict., c. 23, s. 20.

Theory. — s. 18.

FORM.

Motion Asking Leave to Proceed.

UNDER THE WINDING-UP ACT.

Province of Quebec,	}	SUPERIOR COURT
District of Montreal,		
No.		

In re

In Liquidation.

and

Liquidator.

To the Honourable the Superior Court sitting in and for the district of Montreal, or to any one of the Honourable Judges thereof,

The Petition of your Petitioner Respectfully Sheweth:

1. That under the number _____ of the records of the Superior Court for the district of Montreal, a case is pending in which the above named Company is plaintiff and one _____ is defendant, and that it is to the interests of the creditors and shareholders of the said Company that the said case should be proceeded with and prosecuted to final judgment, and that your petitioner be authorized, in his quality of liquidator of the said Company plaintiff, for such purposes.

Wherefore, your Petitioner prays that this Court, or your Lordship, be pleased to authorize him, in his said quality, to proceed with and prosecute the said case to final judgment; the whole with costs.

Montreal. day of , 191 .

Attorney for Petitioner.

JURISPRUDENCE.

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1. Leave to sign final judgment against a foreign Company in process of liquidation abroad, but doing business and having assets in Ontario, was granted under rule 80 Ont. J. A.

(Plummer vs Lake Superior Co., 10 O.P.R., 527.)

2. The fact that, prior to a winding-up order, judgment against the Company being wound up was registered, will not disentitle a mortgage or a debenture holder of his right to obtain leave to proceed with an action to enforce his security.

(Giant Mining Co., 10 B.C.R., 327.)

3. Where a creditor in an action against a Company had, before a petition for winding up the Company was presented, recovered judgment and sued out a writ of execution, which was in the sheriff's

hands, and would have been executed but for resistance made to the sheriff's officer, the Court, after making the winding-up order, in the exercise of its discretion, dissolved an injunction, restraining the execution, which had been obtained on motion *ex parte* by the petitioning creditor immediately after the presentation of the petition, and gave leave to put in force the execution.

(London Cotton Co., Law Rep., 2 Eq., 53.)

3a. S. 22 of the Winding-up Act, providing that "after the winding-up order is made, no suit, action, or other proceeding shall be proceeded with or commenced against the Company", does not prevent a sheriff from making a return of *nulla bona* to a writ of execution issued prior to the winding-up order.

(D.C., Ontario, 1912, Pukulski vs Jardine, 5 D. L.R., 243.)

4. Notwithstanding s. 23, *infra*, the Court has power, under this section, where a winding-up order has been made, to give leave to a creditor to proceed with an execution; and it was thrown out by Wood, V. C., that the 23rd section has reference to cases of fraudulent preference.

(London Cotton Co., Law Rep., 2 Eq., 53.)

5. The liquidator of an extra-provincial Company, which is being wound up in another province, can by petition ask that the seizure of the goods of the Company in Quebec be quashed, as made without leave of the Courts of that province.

(Davidson, J., Montreal, 1905, Phillips vs Canada Cork Co., 7 R.P., 223.)

6. Leave to appeal from the order of a Judge in Court affirming the dismissal by the referee of the application for leave to proceed was refused.

(Britton, J., Pakenham Pork Packing Co., 40 C. L.J., 35.)

7. By s. 16 of the Winding-up Act (Rev. Stat. Can. c. 129), proceedings by a mortgagee under a decree of foreclosure of the Company's premises is stayed, but the mortgagee has the absolute right to have leave to proceed unless special circumstances make it inequitable for him to do so.

The exercise of discretion in granting or refusing leave by the Judge having charge of the winding-up proceedings may be reviewed on appeal.

The liquidators have no equity to have the conduct of the sale under foreclosure proceedings, and an order, made at their instance by the judge directing the winding-up proceedings, postponing the sale and directing the referee as to the advertising and fixing a subsequent date for the sale, is bad.

(Cushing Sulphite Fibre Co., 38 N.B.R., 581.)

8. The general rule is, that leave to continue or commence an action will only be given where some question arises, which cannot be satisfactorily determined in the winding-up, and which renders an action necessary.

(Keynsham Co., Beav., 123.)

9. Where a shareholder has, before the commencement of the winding-up, brought an action for rescission of contract on the ground of misrepresentation, leave to proceed is generally given.

(Hall vs Old Talargoch, 6 O.L.R., 582.)

10. Previous to an order for the winding-up of the Company under the Dominion Winding-up Act, an action had been brought by the Company against a shareholder for unpaid calls, and the shareholder had delivered a defence and counterclaim praying that his application for shares should be cancelled on the ground of misrepresentation and of false and fraudulent statements in the prospectus.

Held:—That the shareholder could have in the winding-up proceedings all the relief that he claimed by his defence and counterclaim; and his application for leave to proceed in the action, notwithstanding the winding-up order, was refused, but leave to apply again was reserved.

(Pakenham Pork Packing Co., 40 C.L.J., 35; 10 R.L., n. s., 65.)

11. A claimant against a Company, in course of liquidation, brought an action by leave of the Court against the Company, in respect of his claim, which was defended on behalf of the Company by the official liquidator, also by leave of the Court. The claimant, having obtained a judgment, which carried costs, the court held that the claimant was entitled to have his costs of the action, and also his costs of the application for leave to bring the action, paid in full out of the assets of the Company, as well as his costs of the application to the Court for an order establishing his right to such payment; and his other costs to be added to his debt.

(Trent and Humber Shipbuilding Co., Bailey and Leetahm's case, Law Rep., 8 Eq., 94.)

12. A secured creditor has a right to apply for and obtain leave to bring an action to enforce his security. It is not optional for a secured creditor to either prove his claim in a winding-up or else proceed with an action to enforce it, and if he does commence an action it is still compulsory on him to proceed before the liquidator under s 63 et seq. of the Winding-up Act.

(Lenora Mount Sicker Copper Mining Co., 9 : R., 471; 2 Commercial L.R., 423.)

13. Where a Company is being wound up pursuant to the Dominion Winding-up Act, in the Supreme Court proceedings in the Admiralty Court on a claim

for seamen's wages, taken without leave of the Court having charge of the winding-up, are not void, but only irregular.

Held:—That, in the circumstances here, the leave should be granted without the imposition of terms. (B.C., Tie and Timber Co., 14 B.C.R., 204.)

14. If, before a Winding-up order, under R.S., ch. 129, is made, a suit is brought against a Company by a shareholder to have his subscription set aside for fraud, he will be authorized on motion to continue his proceedings, after the order has been obtained.

(Archibald, J.C.S., Montréal, 1907, Johnson vs The Ewart Co., Ltd., 31 C.S., 336.)

15. Après qu'une Compagnie a été mise en liquidation, tout recours à exercer contre elle doit, en règle générale, être exercé par requête sommaire et non par action.

Lorsqu'une action peut être intentée ou continuée contre elle, ce ne peut être qu'avec la permission de la Cour et aux conditions que la cour impose.

Cette action doit être portée contre la Compagnie en son nom corporatif, et non contre le liquidateur, *ès-qualités*, ce dernier n'étant qu'un mandataire à pouvoirs limités.

(Gagné, J.C.S., Québec, 1902, Ambrostor vs Holgate, *ès-qualités*, 8 R. de J., 324.)

16. An action against a company in course of Winding-up, without the permission of a Judge, will be dismissed upon exception to the form.

(Soucy vs Electric Printing Co., 5 R.P., 105.)

17. Il faut obtenir l'autorisation de la Cour avant de poursuivre une Compagnie qui est en liquidation.

(Fortin, J.C.S., Montréal, 1908. Baxter vs The International Steel Co. of Canada et al., 9 R.P., 295.)

18. Il faut obtenir l'autorisation de la Cour avant de poursuivre une compagnie qui est en liquidation. Dans le cas contraire, une exception à la forme sera maintenue.

(B.R., Montréal, 1907, *Stevenson vs McPhail*, 9 R.P., 201.)

19. A creditor, who proceeds without leave, will be ordered to pay the costs even if, on application to stay the proceedings, the Court gives leave to proceed.

(*Wanzer Ltd.*, 1 Ch., 305.)

20. Where it is desired to commence or continue proceedings against other parties to which the Company is a necessary party, leave will be given.

(*Rio Grande Co.*, 5 C.D., 282.)

21. Where a plaintiff obtains leave to proceed and afterwards discontinues the action, he is not debarred from claiming in winding up.

(*The Ardandhu Co.*, 12 A.C., 256.)

22. Qu'aux termes de la loi relative à la liquidation des Compagnies insolvables, aucune procédure ne peut être commencée ou continuée sans permission spéciale; et qu'une cause prise en délibéré, sous de telles circonstances, sans que l'ordre préalable apparaisse au dossier, pourra être déchargée du délibéré, à la demande d'une des parties.

(*Jetté*, J.C.S., Montréal, 1887, *Molleur vs Cie Pulpe St-Laurent*, 3 M.L.R.S.C., 273.)

23. Lorsqu'une Compagnie en liquidation a transigé avec la majeure partie de ses créanciers (dans l'espèce, plus des 4/5) et que cette transaction a été déclarée valide et exécutoire par un jugement de la Cour Supérieure, la Compagnie a alors repris la direction de ses affaires et les pouvoirs du liquida-

teur ont cessé. Si elle est poursuivie, elle ne peut, par exception à la forme, alléguer que la poursuite n'a pas été autorisée par la Cour et que le liquidateur n'a pas été mis en cause.

(Bruneau, J.C.S., Sorel, 1908, *Beauchemin vs La Cie de Navigation Canadienne du St-Laurent*, 10 R. P., 41.)

21. The application should be made to the Court that made the winding-up order, and the Court should be satisfied that it is not for the interest of the Company or of those interested in the winding-up that the proceedings should go on.

(*Worcester, Tenbury, and Ludlow Railw., Co.*, 3 De G. and S., 189.)

25. Where claimant did not seek to enforce any rights against the Company by a suit rather to ascertain his rights, leave was granted.

(*Lake Winnipeg, etc., Trading Co.*, 7 Man. R., 602.)

23. Every attachment, sequestration, distress or execution put in force against the estate or effects of the company after the making of the winding-up order shall be void.

Origins. — R.S., (1886), c. 129, s. 17; 45 Vict., c. 23, s. 21.

THEORY.

1. See: ss. 18, 21.

2. A winding-up commences when the petition is presented.

(Cox, 253.)

JURISPRUDENCE.

1. The Court has power under the 22nd section of this act, where a winding-up order has been made, to give leave to a creditor to proceed with an execution; and it seems this section is chiefly directed against cases of fraudulent preference.

(London Cotton Co., Law Rep., 2 Eq., 53; 35 L.J., Ch., 425; 12 Jur. N.S., 313.)

2. An execution is "put in force" when the sheriff seizes; an attachment, *e. g.*, of a debt by a garnishee order, is "put in force" when the order *nisi* is served.

(Standhope's case, 11 C.D., 161.)

3. An undertaking by a provisional liquidator to pay such a claim is by sections 22 and 23 void, unless the permission of the Court is first obtained.

(Fuches vs Hamilton Tribune, 10 O.P.R., 497.)

4. Celui qui veut exécuter un jugement contre les biens d'une Compagnie en liquidation, sera condamné aux dépens encourus sur l'opposition faite contre cette exécution par le liquidateur.

(Langolier, J.C.S., Montréal, 1899, The Great North Western Telegraph Co., of Canada vs La Cie du Journal "Le Monde", 5 R.P., 379); (9 R.L., n.s., 379.)

5. Lorsqu'une saisie-exécution a été pratiquée, avant la mise en liquidation d'une Compagnie, la vente des effets saisis, après le décret ordonnant la liquidation, sera valide, si aucune opposition n'a été faite et aucun avis de la mise en liquidation donné au créancier saisissant.

(Fortin, J.C.S., Montréal, 1909, The Canada News Syndicate Co., and Hyde and Meunier. 10 R.P., 407.)

6. Un immeuble appartenant à une Compagnie mise en liquidation ne peut être vendu par les autorités municipales, pour le recouvrement des taxes scolaires.

(B.R., Montréal, 1887, La Corporation des Commissaires d'Ecoles d'Hochelaga vs La Cie des Abattoirs de Montréal, 3 M.L.R., B.R., 116.)

7. The right to prove a claim for taxes against a Company in liquidation depends upon the right to maintain an action therefor which right only exists when the taxes cannot be recovered in any special manner provided by the Assessment Act, as *e. g.*, a distress or sale of land. Where, therefore, a claim was made for arrears of taxes against a Company in liquidation and it was shewn that, before the date of the winding-up order, the taxes might have been, but were not, recovered by distress, the claim was disallowed.

(Ottawa Porcelain and Carbon Co., 51 O.R., 679.)

8. After the winding-up order is made, the Court will not allow its administration of the assets to be embarrassed by other proceedings affecting the estate administered, and when a creditor is restrained from enforcing his rights at law it is upon the principle of allowing him to bring his legal rights with him into the Master's office, which the Court substitutes for proceedings at law.

(Clarke vs Union Fire Ins. Co., Caston's Case, 10 O.P.R., 339.)

9. A Judge in Chambers has no jurisdiction to order a sheriff to give up to a liquidator under the Winding-up Act possession of goods and chattels seized under execution prior to the making of the winding-up order.

(Merchants Bank vs Roche Perceé Coal Co., 3 Terr. L.R., 463.)

10. A receiver, appointed by an order of the High Court of justice, in England, to an insolvent Company incorporated in that country, but owning real estate in this province, has no status or quality in which he can make an opposition to a seizure of such real estate, in execution of a judgment rendered against the Company.

(*Champagne, J.C.S., Bryson, 1906, Beauvais vs The British and Canadian Land Co., and Robertson, 31 C.S., 289.*)

11. Where Canadian creditors of a joint stock Company, incorporated under the (Imperial) Companies' Acts, 1862-83, are proceeding to execute a judgment obtained in the Courts of this province upon assets of the Company situate within the province, a liquidator named in Great Britain to the voluntary winding-up of such Company cannot intervene and demand that the Company's assets be removed to Great Britain, to be there by him distributed in accordance with the provisions of the said Companies' Act.

(*Quebec Bank vs Bryant, 3 C.S., 122.*)

APPOINTMENT OF LIQUIDATORS.

24. The court in making the winding-up order, may appoint a liquidator or more than one liquidator of the estate and effects of the company.

Origins. — R.S., (1886), c. 129, s. 20; 47 Vict., c. 39 s. 4; 45 Vict., c. 23, s. 24.

Theory. — See: ss. 26, 28, 30, 33, 34, 40, 107, 132, 156.

1. Upon a contest for the appointment of a liquidator in a winding-up proceeding, it is desirable to follow the rules for guidance to be found in the England cases.

(*Alpha Oil Co., 12 O.L.R., 298.*)

2. The liquidator in a compulsory winding-up is the person appointed for the purpose of conducting the proceedings in winding-up a company and performing such duties in reference thereto as the Court may impose.

4. Generally speaking, the liquidator is said to represent the Company, the creditors, and the general body of contributories. But he only represents the creditors because he represents the Company and through the Company the rights of the creditors are to be enforced.

FORM.

Under the Winding-up Act and Amendments.

The day of one thousand nine hundred Present:

In Re

and

having heard the said

upon petition

praying for a winding up

order for the liquidation of the affairs of said Respondent and for the appointment of a liquidator in this matter.

Do grant said petition and do order that the affairs of said Company Respondent be wound up, do name and appoint

provisional liquidator and do further order that a meeting of all the creditors, shareholders and contributories of said Respondent be held in the Court Room for Insolvency matters, at the Court House, in the City of Montreal, on the at of the clock in the forenoon, to appoint a final liquidator to the said Company Respondent and for said meeting the following notices shall be given at least five days before the date thereof, to wit: two advertisements in one, French and English newspaper, published daily in the said City of Montreal and in addition, notice to each of the creditors, shareholders and contributories of said Company Respondent by registered letters addressed to them severally.

JURISPRUDENCE.

1. Power of appointment of liquidator cannot be delegated.

(Shoolbred vs Union Fire Ins. Co., 13 O.A.R., 268; 14 C.S.C., 624.)

2. Il est préférable de ne nommer qu'une personne à la charge de liquidateur, le liquidateur conjoint étant souvent une cause de difficultés, et de frais pour la liquidation.

Il est aussi préférable que le directeur d'une banque, qui est créancière de la faillite pour un fort montant, ne soit pas nommé liquidateur de cette faillite. Lorsque deux personnes sont proposées conjointement

comme liquidateurs d'une faillite, si l'une d'elles se trouve déqualifiée pour agir, les votes donnés en faveur de l'autre sont par le fait même annulés.

(Lafontaine, J.C.S., Montréal, 1910, Dignard vs Angers, 11 R.P., 389).

3. La nomination d'un liquidateur, en vertu de l'acte des liquidations, peut être faite quand même la liste des contribuables n'aurait pas encore été préparée, cette liste ne doit pas nécessairement être faite par le liquidateur provisoire.

(Lemieux, J.C.S., Québec, 1909, La Cie Villeneuve and Price and Brothers, 10 R.P., 307.)

4. A valid winding-up order must contain the appointment of a liquidator.

(Shoolbred vs Union Fire Ins. Co., 13 O.A.R., 268; 14 C.S.C., 624.)

5. The Court will not, upon the hearing of a petition to wind-up a Company, enter into a contest as to the person to be appointed official liquidator, and it will not appoint one, on that occasion, unless with the concurrence of all parties.

(The Commercial Discount Co., 32 Beav., 198.)

6. The Court abstains from laying down any such rule as that the nominee of the petitioning creditor should have a preference.

The Court will consider the condition of affairs to ascertain what parties are most interested in the due administration of the estate in liquidation, and other things being equal, will act upon their recommendation.

(Alpha Oil Co., 12 O.L.R., 298.)

7. Where a liquidator to an insolvent company was appointed in Scotland, and subsequently another liquidator was appointed in Canada under the Winding-up Act, objection to the Canadian appointment

could not in any case be properly made by a shareholder, but by the Scotch liquidator only.

(B.R., Montreal, 1890, *Allen vs Hansen*, 16 Q.L.R., 79.) (affirmed by 18 C.S.C., 667.)

8. *Held*:—(affirming 22 N.S.R., 97):

That there is nothing in the Act requiring both creditors and shareholders to be represented on the board of the liquidators; that a bank may be appointed liquidator; and that if any appeal lies from the decision of the judge, in exercising his judgment as to the appointment, such discretion was wisely exercised in this case.

(*Forsythe vs Bank of Nova Scotia, In re Bank of Liverpool*; 18 C.S.C., 707.)

9. Where a judge in the exercise of his discretion has appointed an official liquidator, the Court of Appeal will not disturb the appointment.

(*International Contract Co.*, Law Rep. 1 Ch. App. 523; 12 Jur. N.S., 591. Ch.; 14 L.T.N.S., 843.)

25. If more than one liquidator is appointed, the court may declare whether any act to be done by a liquidator is to be done by all or any one or more of the liquidators.

Origins. — R.S., (1886), c. 129, s. 23; 45 Vict., c. 23, s. 27.

Theory. — Ss. 33 and following.

JURISPRUDENCE.

1. If more than one liquidator is appointed and no order made under this section, it is not proper for one of them to delegate duties or powers to another. They should act in conjunction and give the estate the benefit of their joint judgment and discretion in all matters pertaining to their office. If

any exigency arises, or it is found impossible to act in conjunction, the Court may exercise its jurisdiction under this section, upon an application for that purpose.

Where several liquidators are to be appointed and there is a difference of opinion as to who should be appointed, the test laid down by the English judges is sound in principle and should be followed, *i. e.*, the choice should be given to the nominees of those, who will have the benefit and immediate concern in realizing the assets.

(Central Bank of Canada, 15 O.R., 309.)

26. The Court may, if it thinks fit, after the appointment of one or more liquidators, appoint an additional liquidator or liquidators.

Origins. — R.S., (1886), c. 129, s. 22; 45 Vict., c. 23, s. 26.

27. No liquidator aforesaid shall be appointed unless a previous notice is given to the creditors, contributories and shareholders or members; and the court shall by order direct the manner and form in which such notice shall be given and the length of such notice.

Origins. — R.S., (1886), c. 129, s. 20; Vict., c. 23, s. 24 in part.

Theory. — s. 124.

FORM.

Notice to Creditors, Etc.

UNDER THE WINDING-UP ACT.

Province of Quebec.	} SUPERIOR COURT
District of Montreal.	
No.	

In Liquidation

A winding-up order has been granted in this matter and a meeting of the creditors, shareholders and contributories of the said Company is hereby called for the
day of

at ten of the clock in the forenoon, in the Court Room No. 31, in the Court House, at the said City of Montreal, to appoint a final liquidator to the said Company.

Montreal, day of . 191

Deputy Prothonota

JURISPRUDENCE.

1. The Court has a discretion in the appointment and is not bound to accept the nominee of the creditors and contributories.

(Northern Assam., 5 Ch., 644.)

2. *Held*:—That there is nothing in the Act requiring creditors and shareholders to be represented on the board of liquidators.

(Forsythe vs Bank of Nova Scotia, 18 C.S.C., 707; Cam. Cas. 209.)

3. It is a substantial objection to a winding-up order, appointing a liquidator to the estate of an insolvent Company under 45 Vict., c. 23, that such order has been made without notice to the creditors, contributories, shareholders or members of the Company, as required by sect. 24 of said Act, and an order so made was set aside, and the petition therefor referred back to the judge to be dealt with anew.

(C.S.C., Shoolbred vs Union Fire Ins. Co., 14 C.S.C., 624.)

4. The appointment of a liquidator under the Winding-up Act, R.S.Q., ch. 129, without a previous notice to the creditors, contributories, shareholders or members of the Company, in the manner and form prescribed by the Court, is null and void. The power given to the Court by sect. 11 of 52 Vict., ch. 32, to dispense with notices, etc., does not extend to that required for the appointment of a liquidator under sect. 20 of the former Act.

(B.R., Montreal, 1902, *Stimson vs The North West Cattle Co.*, 14 B.R., 279; 9 R.L., n.s., 141; 5 R.P., 181.)

4a. It cannot be inferred from a letter, sent by a Company to a creditor, which merely stated "have representative meet the creditors", at a specified time and place, that it was meeting of the Company's creditors called for the purpose of compounding with them, where the proceedings at the meeting are not disclosed, by means of which a special application or significance of the words of the letter might appear.

(K.B., Manitoba, 1912, *Manitoba Commission Co., Ltd.*, 2 D.L.R., 1.)

5. Where all the shares of a Company have been fully paid-up and the assets of the Company are insufficient to discharge its debts, the Court will pay regard to the wishes of creditors in preference to those of shareholders.

(*Lonsdale Vale Ironstone Co.*, 16 W.R., Ch. 601.)

6. It is desirable that the liquidator should be a disinterested person and for this reason neither creditors nor shareholders should be appointed.

(*Northumberland*, 2 De G. and J., 357.)

7. The choice of the creditors, they having the chief and immediate concern in realizing the assets, should be adopted.

Preference, however, should be given to one who is neither a creditor nor a shareholder, the general rule being that it is desirable that liquidators should be disinterested persons.

(*Central Bank of Canada*, 15 O. R., 309.)

8. The Court will consider the condition of affairs to ascertain what parties are most interested

in the due administration of the estate in liquidation and, other things being equal, will act upon their recommendation.

(Alpha Oil Co., 12 O.P.R., 298.)

28. The court shall also determine what security shall be given by a liquidator on his appointment.

Origins. — R.S., (1886), c. 129; s. 24; 45 Vict., c. 23, s. 28.

Theory. — s. 124.

JURISPRUDENCE.

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

(Shoolbred vs Clarke, In re Union Fire Ins. Co., 17 C.S.C., 265.)

2. After the assignee for the benefit of creditors of an incorporated Company had sold part of the assets and received the proceeds, he was appointed liquidator under the Winding-up Act, and gave security by a bond, which recited all the proceedings and orders and was conditioned to be void, if the liquidator should duly account for what he should receive or become liable to pay as liquidator.

Held:—That the funds and property in the hands of the assignee became vested in him as liquidator upon his appointment as such and that the sureties were responsible for his subsequent misappropriation

thereof. The bond provided that the certificate of the Master in Ordinary of the amount for which the liquidator was liable should be sufficient evidence of liability as against the sureties and should form a valid and binding charge against them.

3. That the sureties had the right to appeal from the certificates in accordance with the usual practice of the Court. Judgment of a Divisional Court affirmed.

(Army and Navy Clothing Co., of Toronto. Limited, 3 O.L.R., 37.)

29. The court may on the presentation of the petition for a winding-up order or at any time thereafter and before the first appointment of a liquidator appoint provisionally a liquidator of the estate and effects of the company and may limit and restrict his powers by the order appointing him.

Origins. — 52 Vict., c. 32, s. 12; R.S., (1886), c. 129, s. 26; 45 Vict., c. 23 s. 30.

THEORY.

1. See: s. 14.

2. If the provisional liquidator desires to carry on the business of the Company, he must obtain an order from the Court allowing him to do so and the Court may give him leave to borrow money for that purpose.

The provisional liquidator is also required to file and give security for the due performance of his duties. The amount of the bond being fixed through the statement of the assets of the Company, which the liquidator submits under oath to be Master for this purpose.

(Parker and Clarke, 407.)

JURISPRUDENCE.

1. The Master of the Rolls thus stated his practice with reference to the appointment of provisional liquidators: "Where there is no opposition to the winding-up, I appoint a provisional liquidator as a matter of course, on the presentation of the petition; but there is an opposition to it, I never do, because I might paralyse all the affairs of the Company, and afterwards refuse to make the winding-up order at all. But where the directors themselves apply, or do not oppose the winding-up, then I appoint the provisional liquidator."

(London, Hamburg, and Continental Exchange Bank, *Emmerson's case*, Law Rep. 2 Eq., 236.)

2. Il n'est pas nécessaire de nommer un liquidateur provisoire, mais la Cour, si les créanciers sont présents ou dûment appelés, peut nommer tout de suite un liquidateur définitif.

(*Taschereau*, J.C.S., *Terrebonne*. 1901, *Nantel vs La Cie d'Imprimerie du Nord*, 7 R. de J., 205.)

3. In the absence of special reasons to the contrary, a person, who has entered upon his duties as voluntary liquidator, should be appointed provisional liquidator under a petition for the winding up of a Company.

(*Price vs Villeneuve Co.*, 10 R.P., 338.)

30. An incorporated company may be appointed liquidator to the goods and effects of a company under this Act; and if an incorporated company is so appointed, it may act through one or more of its principal officers designated by the court.

2. Where under the laws of any province a trust company is accepted by the courts of such province, and is permitted to act, as administrator, assignee or cura-

tor without giving security, such trust company may be appointed liquidator of a company under this Act, without giving security.

Origins. — 6-7 Ed. VII, c. 51, s. 2; R.S., (1886), c. 129, s. 21; 45 Vict., c. 23, s. 25.

JURISPRUDENCE.

1. That a bank may be appointed liquidator.

(*Forsythe vs Bank of Nova Scotia, In re Bank of Liverpool*, 16 C.S.C., 707.)

31. Upon the appointment of the liquidator all the powers of the directors shall cease, except in so far as the court or the liquidator sanctions the continuance of such powers.

Origins. — R.S., (1886), c. 129, s. 34; 45 Vict., c. 23, s. 38.

Theory. — S. 20.

JURISPRUDENCE.

1. Upon the appointment of a liquidator for a Company being wound-up under R.S.C. c. 129, if the powers of the directors are not continued as provided by s. 34 of the Act, their fiduciary relations to the Company or its shareholders are at an end and a sale to them by the liquidator of a Company is valid.

(*Chatam National Bank vs McKeen*, 24 C.S.C., 348.)

2. Although the directors of a Company have no control over its affairs after the winding-up is commenced, yet it has been held that they do not then cease to be officers of the Company, and are therefore bound to answer interrogatories.

(*The Madrid Bank, Limited, vs Bayley*, Law Rep. 2 Q.B., 37.)

3. Where a curator has been appointed for a bank under the Bank Act, R.S.C., 1906, c. 29, he is by ss. 119 and 121, vested with all the powers, which directors and solicitor had before his appointment; and after the appointment of a curator, the board of directors have no power to give a solicitor authority to consent to a winding-up order or to anything which may have any effect upon the rights and interests of creditors; and a solicitor has no such authority derivable from his former retainer by the bank; and in this case, the consent, admission and waiver of a solicitor, purporting to act on behalf of the bank, though made in good faith, after the appointment of the curator, had no validity.

(Farmers' Bank of Canada, 22 O.L.R., 556.)

32. A liquidator may resign or may be removed by the court on due cause shown, and every vacancy in the office of liquidator shall be filled by the court.

Origins. — R.S., (1886), c. 129, s. 27; 45 Vict., c. 23, s. 31.

Theory. — Sa. 140, 157.

2. Liquidators have been removed where the Company is insolvent, and all the creditors desire the removal of a liquidator appointed by the shareholders; where the liquidator refused to take action against the directors; where the liquidator persists in continuing an action contrary to the wish of the majority of creditors and the assets are deficient; where liquidator had taken shares in a new Company to which they had sold the Company's property; where the liquidator went abroad giving a power of attorney to others to act for him; and where a liquidator became insane.

(Emden, 94.)

JURISPRUDENCE.

1. Un liquidateur, qui est sur le point de laisser le pays, peut se démettre de ses fonctions comme tel.

Si un liquidateur conjoint abandonne sa charge, l'autre liquidateur ne peut obtenir l'autorisation de continuer à agir seul comme tel, à moins qu'avis préalable de cette requête n'ait été donné aux créanciers, contribuables, actionnaires et membres de la Compagnie.

(Woodburn Sons vs Duggan, 11 R.P., 393.)

2. Lorsqu'il n'y a pas une harmonie parfaite entre les liquidateurs d'une banque en faillite, et que les créanciers actionnaires demandent la révocation de l'un des liquidateurs, cette demande sera accordée et la révocation sera prononcée.

(Mathieu, J.C.S., Montréal, 1885, La Banque d'Epargne du Canada vs Campbell, 15 R.L., 373.)

3. A liquidator cannot be removed unless he has had notice of the application.

(Oxford Building, etc., Co., 49 L.T., 495.)

4. An experienced liquidator will not be removed merely because a creditor is willing to act *gratis*.

(Civil Service, W.N., 158.)

5. It is not necessary to prove fraud to have the liquidator removed.

(Newitt, 14 Q.B.D., 177.)

6. An application to remove a liquidator was granted upon the grounds:

(a) That the proposed liquidators would act without remuneration;

(b) That the business connection of one of the proposed liquidators would be beneficial to the Company.

(Assiniboine Valley Stock Co., 6 Man. R., 105.)

7. The jurisdiction of the Court to remove a liquidator may be exercised whenever the Court is satisfied that it is desirable in the interests of all those interested in the assets, that a particular person should not manage the liquidation without there being shown any personal misconduct or unfitness.

(Charlesworth, 36 C.D., 299.)

8. La Cour peut révoquer les liquidateurs d'une banque en liquidation et les remplacer, de l'avis des parties intéressées, et, avant d'accorder les conclusions d'une demande en révocation d'un liquidateur, elle devra convoquer une assemblée des actionnaires et des créanciers de la banque pour prendre leur avis sur le contenu de la requête.

La Cour pourra destituer un liquidateur, sur l'avis des créanciers, s'il lui est démontré que les liquidateurs ne s'accordent pas et qu'il n'y a pas d'harmonie entre eux dans la liquidation des affaires de la Banque.

Dans une assemblée de créanciers, ceux qui ne sont pas présents, sont censés s'en rapporter à la décision de ceux qui assistent à l'assemblée, et l'avis des créanciers présents doit être considéré comme l'avis de tous les créanciers.

(Mathieu, J.C.S., Montréal, 1884. La Banque d'Echange du Canada vs Darling, 16 R.L., 649.)

9. The words *on due cause shewn* as a general rule point to some unfitness of the person—it may be from personal character or from his connection with other parties or from circumstances in which he is mixed up,—some unfitness in the wide sense of the term.

(Sir John Moore Gold Co., 12 C.D., 325.)

POWERS AND DUTIES OF LIQUIDATORS.

33. The liquidator, upon his appointment, shall take into his custody or under his control, all the property, effects and choses in action to which the company is or appears to be entitled, and he shall perform such duties in reference to winding-up the business of the company as are imposed by the court or by this Act.

Origins. — R.S., (1886), c. 129, s. 36; 45 Viet., c. 23, s. 40.

Theory. — *Id.* 47, 55, 76, 119, 122, 139.

JURISPRUDENCE.

1. Qu'un créancier d'une Compagnie en liquidation, qui lui a vendu à crédit, plusieurs mois avant sa mise en liquidation, des marchandises qui ont été expédiées aux frais de la Compagnie, et sont subseqüemment demeurées en douane jusqu'à ce que le liquidateur en prit possession, ce peut revendre ces marchandises à l'encontre du liquidateur dans les 30 jours, qui suivent cette prise de possession.

(Taschereau, J.C.S., Montréal, 1900. *The William Drysdale Co. and Murphy et al.*, 3 R.P., 353.)

2. Where a creditor has a personal lien on goods of the Company, if the goods are in the possession of the creditor at the commencement of the winding-up, the winding-up does not terminate the lien.

(*Northfield Iron Co.*, 14 L.T., 695.)

3. The liquidator, appointed in the course of the voluntary winding-up of the Company formed in England under the Joint Stock Companies' Acts, 1862-83, has no right to the possession of monies of the Company in this province, previously attached

by process under a judgment rendered against it, and an intervention by him to quash the attachment and obtain such possession is properly dismissed on demurrer.

(B.R., Quebec, 1893, *Powis and Quebec Bank*, 2 B.R., 566.)

4. Creditors may have a claim in damages against the liquidator personally for breach of his statutory duties, if he has not used proper diligence to protect their claims before the Company has been dissolved and they thus lost their remedy against it.

(*Pulsford vs Devinish*, 2 Ch. 625.)

5. The E. Company became the holders of 525 shares in the capital stock of a coal Company and of 50 shares in a steel Company, depositing the certificates thereof, which were put in the name of the defendants, a trust Company, with them for safe keeping, receiving from the trust Company a document under seal whereby they acknowledged the receipt of the certificates, and agreed to hold same in their safe deposit vaults to the order of the loan Company, with any dividends received in respect thereof, guaranteeing they would be kept safely therein, and delivered up on demand to the E. Company, the remuneration of the trust Company also being provided for.—375 of the shares had been acquired by the E. Company, under an agreement with another company, the A. Loan Company, which had an interest in the prospective profits to be derived from the sale of the shares. While the certificates were in the defendant's possession, both loan Companies were ordered to be wound up under the Dominion Act, the defendants being appointed liquidators of the A. Company, and the L. and W. Trust Company liquidators of the E. Company. After the commencement of the liquidation proceedings, the L. and W.

Company, as such liquidators, demanded the certificates from the defendants, and, on the latter refusing to deliver them up, this action was brought for damages for the detention.

Held:—That the defendants were merely bailees, and not trustees, but, even if regarded as trustees, the failure to hand over the certificates was not a breach of trust, for which they were fairly excusable under 62 Vict., c. 15, s. 1; for, owing to their dual character of trustees of the E. Company, they did not act with singleness of purpose; and that a direction made by the Master in Ordinary, to whom was referred the winding-up of the A. Loan Company, that the whole 525 shares should be retained by the defendants as such liquidators, was made without jurisdiction and so afforded no protection, and that damages for the detention (delivery having been made pending the action) should be based on an estimate of what had been lost by the detention, the measure thereof being the highest price, which could have been procured for the shares between the demand and the delivery.

(The Elgin Loan and Savings Co., et al., vs The National Trust Co., Ltd. 10 O.L.R., 41.)

34. The liquidator may, with the approval of the court, and upon such previous notice to the creditors, contributories, shareholders or members as the court orders,—

(a) bring or defend any action, suit or prosecution or other legal proceeding, civil or criminal, in his own name as liquidator or in the name or on behalf of the company, as the case may be;

(b) carry on the business of the company so far as is necessary to the beneficial winding-up of the same;

(c) sell the real and personal and heritable and movable property, effects and choses in action of the company.

by public auction or private contract, and transfer the whole thereof to any person or company, or sell the same in parcels;

(d) do all acts, and execute, in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose use, when necessary, the seal of the company;

(e) prove, rank, claim and draw dividends in the matter of the bankruptcy, insolvency or sequestration of any contributory, for any sum due the company from such contributory, and take and receive dividends in respect of such sum in the matter of the bankruptcy, insolvency or sequestration, as a separate debt due from such contributory and ratably with the other separate creditors;

(f) draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company;

(g) raise upon the security of the assets of the company, from time to time any requisite sum or sums of money; and,

(h) do and execute all such other things as are necessary for winding-up the affairs of the company and distributing its assets.

2. The drawing, accepting, making or endorsing of every such bill of exchange or promissory note, as aforesaid, on behalf of the company, shall have the same effect, with respect to the liability of such company, as if such bill or note had been drawn, accepted, made or endorsed by or on behalf of such company in the course of the carrying on of its business.

3. No delivery of the whole or of any part of the assets of the company shall be necessary to give a lien to any person taking security as aforesaid upon the assets of the company.

Origins. — 62-63 Vict., c. 42, s. 3; R.S., (1886), c. 129, s. 31; 45 Vict., c. 23, s. 35.

Theory. — ss. 38, 42, 44, 73, 77, 85, 109, 164, 168, 169, 180, 183, 185.

POWERS AND DUTIES OF LIQUIDATORS (34) 97

6. That for that purpose your petitioner requires the leave of this Honourable Court, or your Lordship.

Wherefore, your Petitioner prays this Court, or your Lordship, that he be permitted to commence an action against the Company in liquidation for the purposes above mentioned; the v with costs.

Montreal, day of , 191 .

Attorney for Petitioner.

To

Gentlemen,

Take notice of the foregoing petition and that the said petition will be presented to the Superior Court, or to any one of the Honourable Judges thereof, in and for the district of Montreal, sitting in the Practice Division, in Room 31, in the Court House at Montreal, on the day of , 191 , at ten o'clock in the forenoon, or so soon thereafter counsel can be heard.

Montreal, day of , 191 .

Attorney for Petitioner.

JURISPRUDENCE.

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1. The official liquidator is not authorized to do these things without the sanction of the Court.

(Commercial Bank Corporation of India and the East, Smith Fleming and Company's case; Gladstones and Company's case, Law Rep. 1 Ch. App., 538.)

2. A petition whereby the liquidator of a Company asks to be allowed to sue one of the debtors

thereof need not be served upon the said debtor, before its presentation to the Court or judge.

(Curran J.C.S., Montréal, 1901, *La Cie d'Opéra Comique de Montréal vs Desaulniers*, 7 R.P., 83.)
(11 R.L., n.s., 508.)

3. A right of action can be exercised with leave of a judge by the liquidator (appointed in Canada) of a foreign Company against which a winding-up order has been made in Canada, in his quality of liquidator.

(B.R., Montreal, 1910, *Hyde vs Thibaudeau*, 11 R.P., 419.)

4. La disposition de la loi des liquidations, qui défend de commencer ou de poursuivre une action, sans la permission du tribunal, contre une Compagnie en liquidation, est impérative et sa violation entraîne nullité absolue.

Il ne peut être remédié au défaut de la permission du tribunal, au moyen d'une demande, qui en est faite après l'institution de l'action. Pour le même motif, une défense, produite par le liquidateur sans cette permission, doit être rejetée avec dépens contre le liquidateur personnellement.

(Lemieux, J.C.S., Québec, 1911, *Ruffer vs Rattray*, 39 C.S., 246.)

5. After a winding-up order has been made, the Company (*semble the Liquidator*) has power to sue under the statute and, if it chooses to run the risks of costs, it would seem it may do so without the sanction of the Court. If an action is brought without the sanction of the Court, the proper course is to take the objection that there is no authority to sue on a motion in Chambers to dismiss on that ground. It is too late to take such an objection at the trial.

(Sarna Agricultural Implement Mfg. Co., vs Hutchinson, 17 O.R., 676.)

6. Where an action is brought by the liquidator of a Company in liquidation in his own name, he is personally liable for costs; the fact that he obtained leave from the Court to sue will not relieve him of his liability in this respect.

(Jackson vs Cannon, 10 B.C.R., 73.)

7. Where an action is brought by the liquidator of a Company in liquidation in his own name, he is Company, and he is not otherwise a party to it, he cannot be ordered personally to pay the costs of it.

(Ontario Forge and Bolt Co. vs Comet Cycle Co., 17 O.P.R., 156.)

8. The liquidator may appeal from an order refusing his costs out of the estate.

(Raynes Park, 1 Q.B., 961.)

9. Est irrégulière et illégale, l'assignation donnée à des liquidateurs conjoints en parlant à l'un d'eux seulement à leur place d'affaires.

Une société de liquidateurs est un être moral distinct de ses membres, lesquels sont liquidateurs conjoints comme individus et non comme associés, et partant, cette société ne peut être assignée à répondre sur faits et articles, au nom d'une société dont ils ont été les liquidateurs.

Une assignation sur faits et articles, faite aux liquidateurs conjoints d'une société en liquidation, ne peut affecter les droits des membres de cette société, et les interrogatoires ne peuvent être tenus pour avérés par défaut, attendu que l'aveu, qui résulte du défaut d'y répondre, ne peut être fait par des liquidateurs et excède leurs pouvoirs.

(C.R., Montréal, 1904, La cité de Montréal vs Gagnon, 25 C.S., 178; 6 R.P., 197.)

POWERS AND DUTIES OF LIQUIDATORS (34) 191

10. Under the Winding up Act, s. 15 and 31, a Company in liquidation retains its corporate powers, including the power to sue, although such powers must be exercised through the liquidator under the authority of the Court.

10a. The liquidator must sue in his own name or in that of the Company, according to the nature of the action; in his own name, where he acts as representative of creditors and contributories; in that of the Company to recover either its debts or its property.

11. Where liquidators sued in their own name to recover a debt due to the Company, the error was one of form, which the Court had power to give leave under sect. 516 and 521 Code of Civil Procedure. The defendant having admitted the debt and pleaded set-off, and not having excepted to the form of the action, leave to amend should have been given in the sound exercise of judicial discretion.

(P.C., 1902, *Kent et al., liquidators of La Banque Ville-Marie vs La Communauté des Sœurs de Charité de la Providence*, 2 C.L.R., 379); (9 R.L., n.s., 550).

12. Ce n'est pas par motion, mais par un bref d'assignation ordinaire que le liquidateur d'une Compagnie insolvable peut être mis en cause.

(C.R., Montréal, 1910, *The Standard Mutual Fire Ins. Co., vs The Dominion Mutual Fire Ins. Co.*, 11 R.P., 392.)

13. If since the institution of the action, an insurance Company, defendant, has been put into liquidation, a motion by plaintiff to make the liquidator a party to the suit will be granted, but the liquidator must be summoned in the ordinary way.

(Fortin, J.C.S., 1910, *The Comet Motor Car Co. vs The Dominion Mutual Fire Ins. Co.*, 11 R.P., 311.)

14. Le liquidateur d'une Compagnie insolvable représente les créanciers de cette Compagnie pour les actions, qui appartiennent aux créanciers eux-mêmes.

Parlant, l'action qui demande la nullité du paiement fait par la Compagnie à un créancier, qui connaissait l'état d'insolvabilité de cette Compagnie étant de la nature d'une action paulienne, peut être intentée par le liquidateur.

(B.R., Montréal, 1896, *Blandy vs Kent*, 6 B.R., 196); (Conf. 10 C.S., 255.)

15. Le liquidateur à une Compagnie insolvable n'est pas tenu et ne peut être condamné à reprendre une instance en son nom personnel.

(Laurendeau, J.C.S., Montréal, 1911, *Fecteau vs Ideal Confectionery Co.*, 12 R.P., 360.)

16. The liquidator to the winding-up of a Company must take up the instance in all cases pending against the Company.

(Mathien, J., Montreal, 1881, *Hochelaga Bank vs Lewis*, 12 R.L., 639.)

17. Un actionnaire, poursuivi sur des appels de versements par une Compagnie mise en liquidation subséquemment à l'action, ne peut s'opposer à la requête du liquidateur pour permission de reprendre l'instance au nom de la Compagnie, en alléguant que l'obligation du défendeur de contribuer à l'actif de la Compagnie ne peut être exécutée qu'en vertu d'un nouvel appel de versements fait par le liquidateur, lequel doit être basé sur le montant nécessaire pour acquitter les dettes de la Compagnie et les frais de liquidation, ce qui rendrait sans effet les appels antérieurs, mais il sera permis à l'actionnaire de plaider ces moyens à l'action continuée par le liquidateur.

(Pagnuolo, J.C.S., Montréal, 1902, *Victoria Montre Fire Ins. Co. vs Derome*, 21 C.S., 319; 8 R.L., n.s., 481.)

18. Le liquidateur d'une Compagnie insolvable ne peut être condamné à reprendre l'instance aux lieu et place de cette dernière, vu qu'elle existe encore, ni avec elle parce qu'il n'est pas obligé de continuer la cause prise contre la Compagnie.

(Footen vs Ideal Confectionery Co., 12 R.P., 360.)

19. Although all the property of a Company being wound-up, is thus vested in the official liquidator, its position as to suits and actions is kept unaltered, and it may be dealt with just as if no stoppage had occurred, and no liquidation were in progress save so far as this act excepts.

(Agra and Masterman's Bank, *Anderson's case*, Law Rep., 3 Eq., 337.)

20. Le liquidateur d'une Compagnie incorporée ne peut intervenir dans une cause en son nom personnel, mais les procédures doivent être faites au nom de la Compagnie en liquidation.

(Taschereau, J.C.S., 1890, *La Banque d'Hoche-laga vs La Banque des Cantons de l'Est*, 20 R.L., 99.)

21. Que les poursuites pour versements peuvent être faites au nom du liquidateur.

(B.R., Montréal, 1910, *Lapierre vs Banque St-Jean*, 17 R.L., n.s., 428.)

22. Qu'un liquidateur de banque ne peut intenter aucune poursuite judiciaire sans l'autorisation d'un juge, mais il n'est pas nécessaire qu'il soit autorisé pour chaque poursuite séparément, une autorisation générale est suffisante. (Ibid.)

22a. By s. 14 of c. 32, of the Winding-up Act, (2 Vict., (C)), the Court may dispense with notice to creditors, contributors, shareholders or members of the Company, as required by s. 31, c. 129, S.R.C., before authorizing the liquidator to sue on behalf of the Company.

22b. That it is not necessary that there should be a special order dispensing with the notice to the creditors, it is sufficient that the notice be implicitly dispensed with by the order of authorization issuing without it.

23. That where the resolution of the advisory committee, presented to the judge to obtain authorization for the liquidator to sue, was made to appear as if it were the unanimous resolution of the committee, which consisted of five members, all of whom had been notified, whereas only three attended the meeting, and one of these voted against the resolution; this is not a ground for revoking the order of authorization.

(Mathieu, J.C.S., Montréal, 1896, *Common vs McCaskill*, 1 R.P., 199.)

23. Une Compagnie en liquidation continue d'avoir son existence légale, et pour exercer elle des droits antérieurs à la liquidation, l'action doit être prise contre la Compagnie elle-même et non contre ses liquidateurs. En vertu de l'acte des Liquidations, nulle action ne peut être intentée contre une Compagnie en liquidation sans avoir été autorisée judiciairement au préalable; et à défaut de telle autorisation, elle sera renvoyée.

(Taschereau, J.C.S., Terrebonne, 1906, *Léonard vs Owens et al.*, 8 R.P., 42.)

24. L'autorisation du juge doit être donnée à un liquidateur, avant que celui-ci n'ait commencé à poursuivre.

L'autorisation judiciaire, donnée à un liquidateur après l'institution de l'action, n'empêchera pas que l'action ne soit renvoyée sur exception à la forme.

(Matheson, J.C.S., Montréal, 1891, *Common vs McNeill*, 1 R.P., 55; C.C.C.S., 282.)

25. Le liquidateur d'une Compagnie doit être spécialement autorisé à poursuivre une réclamation de cette Compagnie, et une autorisation générale de poursuivre le recouvrement de tout l'actif de la Compagnie ne suffit pas.

(Matheson, J.C.S., Montréal, 1892, *Freygang vs Davigny*, 2 C.S., 505.)

26. The fact that the liquidator of a Company has not been regularly authorized to institute an action must be pleaded by an exception to the form, and not by a plea to the merits.

(Davidson, J.C.S., Montréal, 1907, *The Engineering Contract Co. vs The Midland Railw. Co.*, 8 R.P., 293.)

27. A suit cannot be entered against liquidators of an estate without leave of the Court.

(Andrews, J.C.S., Québec, 1901, *Robillard vs Blanchet*, 19 C.S., 383.)

28. The judge may allow the liquidator to an insolvent Company to exercise his powers under the Winding-up Act without further authorization, in all cases where the amount involved is under \$100,00.

(Langelier, J.C.S., Montréal, 1902, *Victoria Montreal Fire Ins. Co. vs Hyde & Co.*, 1 R.P., 315; (8 R.L., n.s., 157).)

29. If a liquidator acts without the sanction of the Court where the act requires such sanction, he exposes himself to serious consequences.

(The Grand Trunk Railway Co., vs Brodie, 3 De G. Mac. and G., 116.)

30. Une action prise contre une Compagnie en liquidation, sans la permission d'un juge, sera renvoyée sur exception à la forme.

(Mothien, J.C.S., Montréal, 1902, Soucy vs La Cie d'Imprimerie Electrique et al., 5 R.P., 105); (9 R.L., n.s., 24.)

31. Le liquidateur d'une Compagnie en liquidation ne peut intenter des procédures contre les débiteurs de cette Compagnie qu'avec l'autorisation préalable de la Cour sur tel avis aux créanciers, contributeurs, actionnaires ou membres, que la Cour prescrit, et il ne lui suffit pas de demander cette autorisation dans la procédure même adoptée par lui contre des débiteurs de la Compagnie.

32. Le fait qu'une Compagnie a été mise en liquidation ne donne pas lieu à une reprise d'instance par le liquidateur, dans les actions pendantes au nom de la Compagnie, cette dernière conservant son état de corporation et pouvant ester en justice sous son nom corporatif.

(Taschereau, J.C.S., Montréal, 1894, Ross vs Perros, 5 C.S., 470.)

33. The liquidator is liable for costs of continuing proceedings, which were commenced by the Company before the winding-up order.

(London Drapery Stores, 2 Ch., 685.)

34. Where Canadian creditors of a joint stock Company, incorporated under the (Imperial) Companies' Act, 1862-83, are proceeding to execute a judgment obtained in the Courts of this province upon assets of the Company situated within the province, a liquidator named in Great Britain to the voluntary winding-up of such Company cannot inter-

vene and demand that the Company's assets be removed to Great Britain, to be there by him distributed in accordance with the provisions of the said Companies' Act.

Quære: Has such liquidator any standing before the Courts of this province?

(Andrews, J., Quebec, 1843, *Quebec Bank vs Bryant et al.*, 16 L.N., 206); (3 C.S., 122.)

35. In a proceeding against a Company in a winding-up, the official liquidator is bound to answer questions and produce documents, as if he had been made a defendant in a suit for the purpose of discovery.

(Barnes's Banking Co., *Ex-parte Contract Corporation*, Law Rep., 2 Ch., App., 350.)

36. Le droit au procès par jury est d'une nature exceptionnelle et n'existe que dans les cas spécialement prévus par la loi. Lorsqu'une contestation est régie par la loi des liquidations, elle n'est pas susceptible d'un procès par jury.

(Fortin, J.C.S., Montréal, 1909, *The Tétrault Shoe Co., and Kent et al.*, 10 R.P., 244.)

37. A shareholder is deemed to have been represented by the Company in the proceedings, which have led to the granting of a Winding-up order of said Company, when the Company appeared and contested the petition for said order.

The shareholder is without right to attack by an opposition the judgment granting the same, said judgment being *chose jugée* against him.

(*Scott vs Hyde*, 10 R.P., 164; 15 R.L., n.s., 307.)

38. In speaking of this clause, the Master of the Rolls said: "The first clause is for getting in property belonging to the Company itself, before the winding-up order is made. In all such cases, he must sue in the name of the Company: but where in the

course of winding-up, he endeavours to get from a contributory the amount of his contribution, in those cases, the official liquidator may sue also with the sanction of the Court, I have always given to the official liquidator for that purpose."

(Turquand vs Kirby, Law Rep., 4 Eq., 128.)

39. A receiver, appointed by an order of the High Court of Justice in England to an insolvent Company incorporated in that country, but owning real estate in this Province, has no status or quality in which he can make an opposition by a seizure of such real estate, in execution of a judgment rendered against the Company.

(Beauvais vs British and Canadian Lead Co., 31 C.S., 289.)

40. Le pouvoir de la Cour Supérieure d'autoriser le liquidateur d'une Compagnie en liquidation de transiger au nom de la Compagnie et de régler des procès pendants, est un pouvoir discrétionnaire, et la Cour d'Appel ne doit intervenir dans l'exercice de cette discrétion que si le juge l'a exercée d'une manière déraisonnable.

Le liquidateur n'est pas obligé de consulter les créanciers de la Compagnie, avant de demander à la Cour, l'autorisation de consentir une transaction.

(B.R., Montreal, 1898, Morin vs Bilodeau. 8 B.R., 330.)

41. Where a Company is in course of winding-up, an action brought in its name cannot be compromised without the sanction of the Court.

(Joint-Stock Discount Co., W. N. 1868. p. 240.)

42. An action, founded on a lease executed by a Company before it was put in liquidation and delivered afterwards, without authority, by the liquidator, should be brought against the Company itself

and not against the liquidator. In such case the liquidator cannot, in his own name, maintain an action *en garantie* against a third party whom he claims to be liable.

(B.R., Montreal, 1907. *Stevenson vs McPhail*. 9 R.P., 199); (11 B.R., 119.)

43. When a Company is being wound up, the proper mode of recovering its assets is by proceeding under the Winding-up Act, and not by an action.

(*Cardiff Coal and Coke Co. vs Norton*, L.R., 2, Ch., 405.)

44. The defendants leased a house to the plaintiff, the lease containing a clause: "Provided that if the lessors obtain during the said term an offer to purchase the said premises, before accepting the same, the lessee shall be given the option of purchasing on same terms as in said offer." Subsequently an order for the winding-up of the Company was made, and the liquidator sold the premises without giving the plaintiff an opportunity to exercise his option.

Held:—That the winding-up order did not in any way cut down the rights of the plaintiff or change his position: that the liquidator was authorized to sell the premises, but only subject to the terms and conditions of the lease; and that he was bound to submit to the plaintiff, who had not waived his rights, the offer received, and, not having done so, the Company was liable in damages, notwithstanding that the plaintiff was aware that the liquidator was making efforts to sell the premises.

(*McCarter vs York County Loan Co.*, 14 O.L.R., 420.)

45. An inspector, appointed in a liquidation under the Winding-up Act, R.S.O., 1866, c. 129, cannot be allowed to purchase property of the insolvent. It

rests with the liquidator in such a winding-up to dispose of the estate with the sanction of the Court; but the Court cannot dispose of the estate without the sanction of the liquidator.

(Canada Woollen Mills Company, 8 O.L.R., 581);
(aff. by 9 O.L.R., 367; see par. 47.)

46. Under s. 34 (c), (d), of the Act, the liquidator may, with the approval of the Court, proceed to sell the real estate, etc. When the liquidator makes a sale approved by the referee, there is no need for an application to the Court to confirm the sale.

(McCann Knox Milling Co., 1 O.W.N., 579.)

47. An inspector, appointed in liquidation proceedings under the Dominion Winding-up Act, R. S.C., 1886, c. 129, is in a fiduciary position as regards the disposal of the assets and cannot, without the consent of all persons interested, become the purchaser thereof. In such liquidation proceedings, the power to sell the assets is by the Act vested in the liquidator, not in the Court, though the liquidator must obtain the approval of the Court as a condition of exercising the power of sale.

(C.A., Canada Woollen Mills Co. Long's Appeal, 9 O.L.R., 367.)

48. The sale by the liquidator of the good will and assets of a Company incorporated under letters-patent from the Crown, does not transfer to the purchaser the right to use the name of the Company after its dissolution—this being a right, which can only be granted by the Crown, and he is not entitled to an injunction to restrain a person who, since the dissolution, has registered a new firm under a similar name, from doing business under such name, there being no evidence that its members or the person sought to be restrained agreed or undertook not to do it.

(B.R., Montreal, 1897. Sabiston and Montreal Lithographing Co., 6 B.R., 510); (conf. by the Privy Council).

48a. The defendant, Langley, is liquidator of the Dominion Linen Mills, Ltd., which by an order of the High Court of Justice in January, 1906, was declared to be insolvent and liable to be wound up. Some time before the making of this order, the Company had hypothecated its principal assets, including its stock of manufactured linens, to the Crown Bank of Canada to secure advance and the bank had taken possession.

48b. By order of Court the business was allowed to be carried as a going concern by the liquidator and advances to be procured from the bank for wages, etc., to be repaid out of the first moneys coming into his hands. While so carrying it on, he advertised for tenders for purchase of the assets, and, in April, 1906, an agreement was entered into between the defendant and one Todd by which the latter became purchaser of the property of the Company "free from incumbrances" and transferred the same shortly after to the plaintiffs, a new Company formed to take over the business. The defendant received \$5,800.00 on account of the purchase money and, by direction of the plaintiffs, and on their undertaking to hold him harmless, paid it over to the Crown Bank.

48c. It appeared that the insolvent Company used to send their goods to Scotland to be bleached, and a quantity was there, when the winding-up order was made. The bleaching firm wrote to the defendant, stating the amount of their account in respect to their goods and asking for instructions. After some further correspondence, the liquidator wrote them full information as to what had been done, and stated

that the proceeds of sale of the assets would hardly pay the bank's claim. He ended his letter by saying: "I, as liquidator, have no objection to your disposing of the goods on the highest market, applying the proceeds of such sale on your claim and advising me accordingly." Under the law of Scotland the bleachers had no right to sell the goods to satisfy their lien without complying with certain formalities, which they did not do.

18d. The plaintiffs brought action against the liquidator claiming damages for conversion of the goods so sold and, at trial, were allowed to amend by adding a claim for breach of the contract to sell the assets of the insolvent Company "free from incumbrances."

18e. At the trial, they recovered judgment on the latter ground, which the Court of Appeal reversed, holding that there was no conversion, as the defendant's letter quoted above did not amount to instructions to sell, and that there was no breach of contract, as the term "free from incumbrances" as used in the contract with Todd, was not intended to apply to the charges for bleaching, but to the mortgage on the buildings and liens on the stock.

The plaintiffs appealed to the Supreme Court of Canada, which, after hearing counsel for the respective parties, reserved judgment, and on subsequent day dismissed the appeal.

(C.S.C., Ottawa, 1912. Dominion Linen Mfg. Co., Ltd., vs Langley. 46 C.S.C., 633.)

49. That the court had power under this section to transfer the assets of a Company under liquidation to a new Company for deferred payments secured by the promissory notes of the new Company.

(Agra and Masterman's Bank, W.N. 1866. p. 400.)

50. Qu'un jugement autorisant le liquidateur d'une Compagnie en liquidation, sous les dispositions du Winding-up Act, à vendre les biens de cette Compagnie, sous certaines conditions, n'est pas un ordre sujet à appel aux termes du statut.

(Mathieu, J.C.S., Montréal, 1900. *The Montreal Cold Storage and Freezing Co.*, Stevenson et al., 3 R.P., 371.)

51. Upon appointment of liquidator, if the powers of the directors are not continued as provided by section 31 of the Act, their fiduciary relations to the Company or its shareholders are at an end, and a sale to them by the liquidator is valid.

(*Chatham National Bank vs McKeen*, 24 C.S.C., 348.)

52. Le liquidateur d'une banque en liquidation n'a pas qualité pour poursuivre l'un des débiteurs de cette banque sur un billet devenu dû, avant la mise en liquidation, mais l'action doit être portée au nom de la banque.

Bien qu'un créancier d'une banque en liquidation puisse intervenir dans une action intentée par les liquidateurs contre un débiteur de la banque, pour surveiller la procédure et la continuer au cas où les demandeurs négligeraient de procéder avec diligence et d'invoquer des moyens favorables aux créanciers, il n'a pas le droit, alors que les demandeurs ont répondu au plaidoyer de ce débiteur et en ont demandé le renvoi pour des raisons spéciales, d'engager une contestation avec le défendeur pour faire renvoyer ce plaidoyer pour des moyens déjà invoqués par le demandeur et partant il doit être condamné aux dépens de sa contestation.

(Pagnuelo, J.C.S., Montréal, 1901. *Kent et al., és-qualités, vs La Communauté des Soeurs de la Providence*, 19 C.S., 556); (conf. par la Cour d'Appel).

(Modifié par le Conseil Privé: Voir le par. 11 de cette section.)

53. Le créancier d'une banque en liquidation peut intervenir dans une action intentée par le liquidateur contre un des débiteurs de cette banque, alors même qu'il ne ferait que soutenir, pour les mêmes raisons, les conclusions prises par ce liquidateur et n'allèguerait aucun fait nouveau, sauf au tribunal, au mérite, à condamner l'intervenant aux dépens, si son intervention avait été inopportunément produite.

(B.R., Montréal, 1900, *Communauté des Soeurs de la Providence vs Bastien*, 11 B.R., 64.)

54. Une Compagnie à fonds social, constituée par une charte du gouvernement fédéral, continue d'exister après sa mise en liquidation et la nomination d'un liquidateur, jusqu'au règlement final (Winding-up) de ses affaires. Ses recours légaux, actions et défenses doivent, dans cet intervalle, être exercés en son nom. Mais quand il s'agit d'attaquer ou de défendre ses actes, dans l'intérêt des créanciers, c'est au nom du liquidateur représentant ces derniers, que la procédure doit être instituée.

(B.R., Montréal, *Stevenson vs Macphail*, 17 B.R., 119; 9 R.P., 119). (See to s. 34, par. 42.).

55. If a Company in course of liquidation be ordered to pay costs, such costs are payable in full out of the assets of the Company, and are not to be proved as a debt in the winding-up.

(*Madrid Bank vs Bayley*, Law Rep., 7 Eq., 442.)

56. The liquidator of a Company in liquidation, whose action has been dismissed, may with the leave of a judge, appeal from that judgment to the Court of Review.

(C.R., Montréal, 1903, *The Montreal Coal and Towing Co., vs The Standard Life Ass. Co.*, 6 R.P., 243); (10 R.L., n.s., 441.)

57. La requête en contestation d'une demande de mise en liquidation n'a pas besoin d'être préalablement autorisée par la Cour.

(C.S., *The Siche Light Co. vs Fortin*, 13 R.P., 235.)

58. If several liquidators have been appointed, all should concur in drawing, accepting, etc., a bill. It is doubtful if they can authorize one of themselves to do so.

(*Birmingham Banking Co.*, 3 Ch., 651.)

59. The Court, under the old practice, in sanctioning or refusing leave to deal with bills, considered whether the proposed dealing would prejudice to estate, and whether it would tend to facilitate the collection and distribution of the assets for the benefit of the *general body* of creditors.

(*Smith, Fleming and Co.'s Case*, 1 Ch., 539.)

35. The liquidator may, with the approval of the court, appoint a solicitor or law agent to assist him in the performance of his duties.

Origins. — R.S., (1886), c. 129, s. 32; 45 Vict., c. 23, s. 36.

Try. — 1. Ss. 107, 111, 129.

2. The liquidator is not personally liable to his solicitor for the costs of the winding-up, either in a compulsory or in a voluntary liquidation. Of course, this rule in no way interferes with cases where the liquidator is ordered personally to pay costs to an adverse litigant. It is the duty of a liquidator to obtain the decision of the Judge where the solicitor requires payment for conveyancing work by item instead of by scale.

(*Emden*, 279.)

FORM.**Petition for Appointment of Solicitor.****UNDER WINDING-UP ACT.**

Province of Quebec, }
 District of Montreal. } SUPERIOR COURT.
 No.

In re

In Liquidation,

and

Liquidator.

To the Honourable the Superior Court sitting in and
 for the district of Montreal, or to any one of the
 Honourable Judges thereof,

The Petition of your Petitioner Respectfully sheweth:

1. That by judgment of this Court, rendered on the
 day of , 191 , he was duly
 appointed liquidator to said Company in liquida-
 tion;
2. That it is in the interests of the winding-up of the
 said Company that solicitors be appointed to advise
 and assist the liquidator in so winding-up the affairs
 of the Company;

Wherefore, your petitioner prays that this Court, or
 your lordship, may be pleased to appoint the undersigned
 attorney, Mr. , as soli-
 citor to assist and advise the liquidator in the winding-
 up of the affairs of the Company; the whole with costs.

Montreal, day of , 191 .

Attorney for Petitioner.

JURISPRUDENCE.

1. The liquidator's partner cannot act.

(Universal, etc., Co., 23 L.T., 629.)

2. It is preferable to have the proceedings under a winding-up order conducted by solicitors, who are totally unconnected with the Company to be wound up.

(Joseph Hall Mfg. Co., 10 O.P.R., 485.)

3. La rémunération et les frais du liquidateur et de ses avocats, agissant en vertu du présent acte, seront taxés contradictoirement avec les parties intéressées ou leurs procureurs, si des créanciers s'objectent à la feuille de dividende telle que préparée.

(Tellier, J.C.S., Montréal, 1906, The Laurie Engine Co. vs McKie, 8 R.P., 59.)

4. A solicitor may be employed to do administrative as well as legal, work, but will not be allowed to charge solicitor's charges for such work, but only such a sum as is fair and reasonable.

(Pryor's case, 59 L.T., 256.)

5. If a solicitor, employed by an official liquidator in a winding-up, is discharged, he has no lien for his costs on the file of proceedings in the winding-up and must deliver up all such documents to the official liquidator.

(Union Cement and Brick Co., Ex parte, Pulbrook, Law Rep., 4 Ch. App., 627).

6. The liquidator is not entitled to any remuneration, if the assets of the Company are insufficient for payment, of the costs payable in priority, including the costs of his own solicitor.

(Dronfield Coal Co., 23 Ch., D., 511.)

7. If there are two liquidators, they must agree upon one solicitor.

(London and Manchester Railway Co., 1 De G., and Sm., 722.)

36. The liquidator may, with the approval of the court, compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, demands and matters in dispute in any way relating to or affecting the assets of the Company or the winding-up of the Company, upon the receipt of such sums, payable at such times, and generally upon such terms, as are agreed upon.

2. The liquidator may take any security for the discharge of such calls, debts, liabilities, claims, demands, or disputed matters, and give a complete discharge in respect of all or any such calls, debts, liabilities, claims, demands, or matters.

Origins. — R.S., (1886), c. 129, s. 33; 45 Vict., c. 23, s. 37.

Theory. — *Ss.* 63, 64.

JURISPRUDENCE.

1. Le liquidateur n'est pas obligé de consulter les créanciers de la Compagnie avant de demander à la cour l'autorisation de consentir une transaction.

(B.R., Montréal. 1898, *Morin vs Bilodeau*, 8 B., R., 330.)

2. The Court has no power under this section to compromise *per se*. The only power is in the liquidator with the approval of the Court. The scheme of compromise must be initiated or recommended by the liquidator.

(*Sun Lithographing Co.*, 24 O.R., 200.)

3. The Court may rescind a compromise made with its sanction, if obtained by misrepresentation.

(Clarke's, case 14 W.R., 856.)

4. In sanctioning a compromise, the Court is exercising a judicial discretion, and therefore evidence of propriety of the compromise must be produced.

(Totty's Case, Dr. and Sm., 273.)

5. Since a liquidator in proceedings for the compulsory winding-up of a bank has no right under s. 36 of the Winding-up Act, to accept less than full payment from stockholders under s. 130 of the Bank Act, on a deficiency in the assets and property of the bank, an estoppel by reason of his laches cannot be asserted against him where he places upon the list of contributories the transferees of the stock instead of the holders on the day the proceedings were commenced since the liquidator cannot accomplish by mere laches that which he could not do with deliberation and intention.

(C. A., Ontario, 1912, Ontario Bank, 8 D. L. R. 244).

37. The liquidator may, with the approval of the court, make such compromise or other arrangement with creditors or persons claiming to be creditors of the company as he shall deem expedient.

Origins. — R.S., (1886), c. 129, s. 61; 45 Vict. c. 23, s. 64.

JURISPRUDENCE.

1. La transaction entre le liquidateur autorisé par le juge et un réclamant sous la sect. 61 du chap. 129, S.R.C., lie des créanciers de la Compagnie en liquidation et les autres intéressés; elle ne peut être attaquée que pour cause de nullité. La loi 62-63 Vict., ch. 43, qui permet la convocation et la consultation des créanciers en certains cas, n'a ni abrogé, ni modifié la sect. 61 précitée, quoiqu'elle y ait fait allusion.

(B.R., Montréal, 1904, Ward vs Mullin, 14 B.R., 19.)

38. The court may provide, by any order subsequent to the winding-up order, that the liquidator may exercise any of the powers conferred upon him by this Act, without the sanction or intervention of the court.

Origins. — 52 Vict., c. 32, s. 12.

Theory. — Ss. 109, 110.

JURISPRUDENCE.

1. The Judge may allow the liquidator of insolvent Company to exercise his powers, under the Winding-up Act, without further authorization, in all cases where the amount is under \$100.

(Victoria Montreal Fire Ins. Co., and Hyde, 4 R.P., 315).

1a. See to section 34, par. 25.

2. In an order for the winding-up of a Company, it was provided that the liquidators, with the consent and approval of the inspectors appointed to advise in the winding-up, might exercise any of the

powers, conferred upon them by the Winding-up Act. (Cm.), without any special sanction or intervention of the Court. Instituting or defending an action constituted one of the powers.

2a. S. 38 of the Act enables the Court to provide by any order subsequent to the winding-up order, that the liquidator may exercise any of the powers conferred upon him by the Act without the sanction or intervention of the Court.

Held:—That it is necessary to obtain an order, subsequent to the winding-up order, so as to get the benefit of s. 38.

(Kendall vs Webster, 11 B.C.R., 390.) (rev. by 15 B.C.R., 238.)

3. In an order for the winding-up of a Company, it was provided that the liquidators with the consent and approval of the inspectors appointed to advise in the winding-up, might exercise any of the powers conferred upon them by the Winding-up Act, without any special sanction or intervention of the Court. Instituting or defending an action constituted one of the powers.

3a. Section 38 enables the Court to provide by any order subsequent to the winding-up order, that the liquidator may exercise any of the powers conferred upon him by the Act without the sanction or intervention of the Court.

3b. The liquidators having brought an action, proceeding under the above order, Morrison, J., at the trial, held that it was necessary to obtain an order subsequent to the winding-up order before s. 38 enured.

3c. *Held* (on appeal): That the action having the consent and approval of the inspectors, was properly brought.

(Kendall vs Webster, 15 B.C.R., 268.) (reversing 14 B.C.R., 390.)

4. Where an order is made for the winding-up of a Company, under the Dominion Winding-up Act, R.S.C., 1906, c. 144, the order, in the usual form, directs a master or a referee to take all necessary proceedings for the winding-up of the Company, and delegates to him all such powers conferred upon the Court by the Act as may be necessary for the winding-up; and under this order everything may be carried out by the referee, without referring to the Court except by way of appeal.

(Boyd, J., McCann Knox Milling Co., 1 O.W.N., 579.)

5. By sect. 11 of chap. 32 of the Winding-up Amendment Act, 52 Vict., (C), the Court may dispense with notice to creditors, contributories, shareholders or members of the Company as required by sec. 31, ch. 129, R.S.C., before authorizing the liquidator to sue on behalf of the Company.

Held:—That it is not necessary that there should be a special order dispensing with the notice to the creditors; it is sufficient that the notice be implicitly dispensed with by the order of authorization issuing without it.

(Mathieu, J.C.S., Montreal, 1898, Common vs McCaskill, 1 R.P., 199.)

APPOINTMENT OF INSPECTORS.

39. The court may appoint, at any time when found advisable, one or more inspectors, whose duty it shall be to assist and advise the liquidator in the liquidation of the company.

Origins. — 62-63 Vict., c. 42, s. 1.

JURISPRUDENCE.

1. An inspector appointed in a liquidation under the Winding-up Act, R.S.O., 1866, c. 129, cannot be allowed to purchase property of the insolvent.

It rests with the liquidator in such a winding-up to dispose of the estate with the sanction of the Court; but the Court cannot dispose of the estate without the sanction of the liquidator.

(MacMahon, J., Ontario, 1904, Canada Woollen Mills Co., 8 O.L.R., 581); (11 R.L., n.s., 239.)

2. An inspector appointed in liquidation proceedings under the Winding-up Act, R.S.C., 1886, c. 129, is in fiduciary position as regards the disposal of the assets and cannot, without the consent of all persons interested, become the purchaser thereof.

(Ibid., on appeal, 9 O.L.R., 377.)

3. An inspector cannot become the purchaser of the Company's assets either directly or indirectly or derive any profit out of the winding up or receive any remuneration, without the sanction of the Court, obtained before the business is commenced from which the profit is derived. This consent cannot be given otherwise.

(Gallard's case, 1 Q.B., 68.)

REMUNERATION OF LIQUIDATORS AND INSPECTORS.

40. The liquidator shall be paid such salary or remuneration, by way of percentage or otherwise, as the court directs, upon such notice to the creditors, contributories, shareholders or members, as the court orders.

2. If there is more than one liquidator the remuneration shall be distributed amongst them in such proportions as the court directs.

Origins. — R.S., (1886), c. 129, s. 28; 45 Vict., c. 23, s. 32.

Theory. — S. 92.

2. The liquidator cannot charge in his disbursements, the premium paid by him on the bond filed by him as security for his proper distribution of the estate. This is the ordinary practice, although there is no direct authority. (Parker & Clark, 432).

3. If assets are insufficient costs incurred must be paid before liquidator's remuneration. (Parker & Clarke, 432).

4. *Semble* (in the preceding case): That the liquidator has a recourse for his remuneration against the creditors. The liquidator represents the creditors and acts for them.

JURISPRUDENCE.

1. The intention of this section is that the remuneration is not necessarily to be increased because three are to be paid instead of one. The recompense for services is usually a percentage based on the time occupied, work done, and responsibility imposed, and when fixed goes to the liquidator, and, if more than one, is distributed amongst them.

(Central Bank of Canada, 15 O.R., 309.)

2. In fixing the liquidator's remuneration, it is proper to take into consideration amounts adjusted or set-off, but not actually received by the liquidator. The amount allowed should be equally spread over the whole period of the liquidation so as to secure vigilance and expedition, at all stages of the liquidation as well as proper distribution among the liquidators, if there are more than one. It is not proper to pay a large part of the compensation at an early stage of the liquidation.

(Central Bank of Canada, Lyle's Claim, 22 O.R., 247.)

3. La rémunération et les frais du liquidateur et de ses avocats, agissant en vertu de l'acte des liquidations, seront taxés contradictoirement avec les par-

ties intéressées ou leurs procureurs, si des créanciers s'objectent à la feuille de dividende telle que préparée.

Le paragraphe 7 de la clause 67, de l'Acte des liquidations, exigeant un cautionnement pour les frais, ne s'applique pas à une objection faite par un créancier au montant des frais du liquidateur et de ses avocats, et à l'homologation d'une feuille de dividende basée sur ces montants.

(Tellier, J.C.S., Montreal, 1906, *The Laurie Engine Co. vs Mackie et al.*, 8 R.P., 59.)

3a. The liquidator is not entitled to any remuneration if the assets of the Company are insufficient for payment of the costs payable in priority, including the costs of his own solicitor.

(Dronfield Coal Co., 23 Ch. D. 511).

3b. L'avocat du liquidateur d'une Compagnie insolvable, n'a pas de recours contre les créanciers de la faillite, pour le cas où l'actif de la faillite aurait été épuisé.

(C.C., Dorior, J., 1912, Québec, *Bcaubien vs The Corticelli Silk Co.*, 14 R.P., 194.)

4. The general rule is to allow a liquidator a commission upon the corpus, which is finally distributed by him, such commission being paid, when the distribution of the corpus takes place from time to time, and he is further allowed a reasonable annual allowance for care and management. The Court may, instead of fixing the remuneration by way of percentage, allow one lump sum, to include and cover the percentages upon the receipts and disbursements of the corpus and the allowance for the care and management of the estate. The usual commission allowed for the receipts and disbursements of the corpus allowance for care and management, but each case must depend upon its own circumstances.

(Farmers' Loan and Savings Co., 3 O.W.R., 837.)

5. Que sous l'art. 1713 C.C., le liquidateur à une Compagnie insolvable n'a aucun droit de rétention sur les livres, papiers ou meubles de la Compagnie pour le montant de ses avances et de son salaire.

(B.R., Montréal, 1899, *Ross vs Walker*, 10 R.P., 428.)

6. Where there are mortgages or debentures existing against the assets, the rights of encumbrances are in priority to the remuneration of the liquidator. (Oriental Hotels, 12 Eq., 126.)

7. A liquidator must not make any profit by means of the Company beyond his remuneration; if he does, he may be removed.

(Devonshire Silkstone Coal Co., W.N., 1878, 71 and R., 155.)

8. Avant de fixer le salaire des liquidateurs, il leur sera ordonné de fournir telle preuve qu'ils jugeront à propos.

(Mathieu, J.S.C., Montréal, 1885, *La Banque d'Echange du Canada vs Campbell*, 15 R.L., 373.)

41. The court shall determine the remuneration, if any is deemed just, of the Inspector or inspectors.

Origins. — 62-63 Vict., c. 42, s. 2.

Theory. — s. 39.

DEPOSITING IN BANK.

42. The liquidator shall deposit at interest in some chartered bank or post office savings bank, or other Government savings bank designated by the court, all sums of money which he has in his hands belonging to the company, whenever and so often as such sums amount to one hundred dollars.

Origins. R.S., (1886), c. 129, s. 35; 45 Vict., c. 23, s. 39.

Theory. — Ss. 67, 137, 142, 148.

43. Such deposits shall not be made in the name of the liquidator individually, on pain of dismissal; but a separate account shall be kept for the company of the moneys belonging to the company in the name of the liquidator as such liquidator.

Origins. — R.S., (1886), c. 129, s. 36; 45 Vict., c. 23, s. 10.

Theory. — Ss. 32, 140, 142.

44. The liquidator shall, within three days after the date of the final winding-up of the business of the company, deposit at interest in the bank appointed or designated, as heretofore provided, any money belonging to the estate then in his hands not required for any other purpose authorized by **this Act**, with a sworn statement and account of such money, and that the same is all that he has in his hands.

Origins. — R.S., (1886), c. 129, s. 40; 45 Vict., c. 23, s. 11.

45. In case any liquidator shall not, within three days after the date of the final winding-up of the business of the company, deposit in the bank, appointed or designated as heretofore provided, any money belonging to the estate of which he is such liquidator, then in his hands, he shall be deemed a debtor to His Majesty for such money, and may be compelled as such to account for and pay over the same.

Origins. — R.S., (1886), c. 129, s. 40; 45 Vict., c. 23, s. 44.

Theory. — S. 142.

COURT DISCHARGING FUNCTIONS OF LIQUIDATOR.

46. If at any time there is no liquidator, all the property of the company shall be deemed to be in the custody of the court.

Origins. — R.S., (1886), c. 129, s. 25.

47. Whenever a company is being wound up, and the realization and distribution of its assets has proceeded so far that in the opinion of the court it becomes expedient that the liquidator should be discharged, and that the balance remaining in his hands of the moneys

and assets of the company can be better realized and distributed by the court, the court may make an order discharging the liquidator, and for payment, delivery and transfer into court, or to such officer or person as the court may direct, of such moneys and assets, and the same shall be realized and distributed, by or under the direction of the court, among the persons entitled thereto, in the same way, as nearly as may be, as if the distribution were being made by the liquidator.

2. In such case the court may an order directing how the books, accounts and documents of the company and of the liquidator may be disposed of, and may order that they be deposited in court or otherwise dealt with as may be thought fit.

Origins. — 55-56 Vict., c. 28, s. 2.

Theory. — S. 33.

JURISPRUDENCE.

1. In 1866, the Bank of Upper Canada became insolvent and assigned all its property and assets to trustees. By 31 Vict., c. 17, the Dominion Parliament incorporated said trustees, giving them authority to carry on the business of the bank so far as was necessary for winding-up the same. By 33 Vict., c. 40, all the property of the Bank vested in the trustees was transferred to the Dominion Government, which became seized of all the powers of the trustees.

1a. *Held*, (affirming the judgment appealed from 17 O. App. R., 421.)

That these Acts were *intra vires* of the Dominion Parliament.

1b. Per Richie, J.:

That the legislative authority of Parliament over *Banking and the incorporation of banks* and over *Bankruptcy and insolvency* empowered it to pass said Acts.

1c. Per Strong, Taschereau and Patterson:

That authority to pass said Acts cannot be referred to the legislative jurisdiction of Parliament over banking and incorporation of banks but to that over bankruptcy and insolvency only.

(Quirt vs The Queen, 19 C.S.C., 510.)

2. Defendant, as general manager of a Company, engaged a timber cruiser to cruise and locate certain timber, which he did. On his way home from this work, the cruiser discovered a quantity of timber, which he disclosed to defendant, and entered into an arrangement with him for staking and acquiring it, but declined to deal with defendant as representative of the Company. Defendant drew a cheque on the funds of the Company for the government dues on this timber, but did not cash the cheque, and the transaction appeared on the books as "Kitimat limits."

Held:—(in an action to account for the proceeds of the sale of this timber.)

That defendant was not acting as the representative of the Company, and was not a trustee; and that the making of the entries in the books did not estop him from explaining the circumstances.

(Kendall vs Webster, 14 B.C.R., 390.) (reversed by 15 B.C.R., 268.)

3. Defendant, as general manager of a Company, engaged a timber cruiser to cruise and locate certain timber, which he did. On his way home from this work, the cruiser discovered a quantity of timber, which he disclosed to the defendant, and entered into an arrangement with him for staking and acquiring it, but declined to deal with defendant as representative of the Company. Defendant drew a cheque on the funds of the Company for the Government

dues on this timber, but did not cash the cheque, and the transaction appeared in the books as "Kitimat limits."

Held:—That as the limits were acquired for the Company in the first instance, and the Company's funds used for that purpose, that the defendant was merely a trustee for the company, to which he was bound to account.

4. That the transaction was one within the scope of the company's operations.

(Kendall vs Webster, 15 B.C.R., 268.) (reversing 14 B.C.R., 390.)

CONTRIBUTORIES.

48. As soon as may be after the commencement of the winding-up of a company, the court shall settle a list of contributors.

Origins. — R.S., (1886), c. 129, s. 42; 45 Vict., c. 23, s. 46.

Theory. — 1. S. 2.

2. The question whether underwriters have been properly put on the register of members by the company, or can be put on the list of the contributors by the liquidator, depends on the nature of the underwriting contract.

(Emden, 189.)

JURISPRUDENCE.

1. A notice that the Court will proceed to fix the list of the contributors on a certain day, at the Court House, without untreating the hour at and the room in which such operation will take place, is insufficient, and that the same should be in the form usually followed for notices of proceedings before the Superior Court.

(Tait, C.J., Montreal, 1904, Citizens Insurance Co. vs Montreal Trust and Deposit Co., 6 R.P., 275); (10 R.L., n.s., 442.)

2. La nomination d'un liquidateur, en vertu de l'acte des liquidations, peut être faite quand même la liste des contribuables n'aurait pas encore été préparée; cette liste ne doit pas nécessairement être faite par le liquidateur provisoire.

(Lemieux, J.C.S., Québec, 1909, La Cie Villeneuve and Price and Brothers, 10 R.P., 307.

3. Chaque contribuable dans une faillite a droit d'avoir une liste complète de tous les contribuables; car il est de son intérêt, et il a le droit, d'exiger que tous les contribuables soient *in limine* sur la liste des contribuables, afin que la Cour puisse déterminer jusqu'à concurrence de quel montant il devra être appelé à payer sur sa contribution. Une exception dilatoire, demandant que les procédures soient suspendues jusqu'à ce que cette liste soit fournie, sera maintenue.

Une exception à la forme, demandant le renvoi de la requête du liquidateur pour les mêmes raisons, sera renvoyée, parce qu'alors il n'y a pas lieu de déclarer la procédure nulle, mais simplement de la faire amender.

(Monet, J.C.S., St-Jean, 1908, La Banque de St-Jean vs Bienvenu, 10 R.P., 223.)

4. Contributory does not include a mere stranger, who is a debtor to a Company, but contemplates one, who is liable to contribute in the character of a partner or member.

(Central Bank of Canada, York's case, 15 O.R., 625.

5. Any application, to take a contributory off the list, must be made by motion under the winding-up, notwithstanding the pendency of substantive proceedings for that purpose.

(Wilson vs The Natal Investment Co., 36 L.J., Ch., 312.)

6. When an application is made to the Court to substitute one person for another on the list of contributories, and both parties are equally solvent, so that it is a matter of indifference to the creditors and contributories which of them is made a contributory, it is the duty of the liquidator to appear by one counsel only, and to take no part in the argument and it seems that, in such a case, the unsuccessful party will be ordered to pay the costs of the liquidator.

(Overend, Gurney, and Co., *Musgrave and Hart's* case, *Law Rep.*, 5 Eq., 193.)

6a. Where a liquidator on winding-up the affairs of a bank places, the names of the transferees of stock made after the proceedings were commenced upon the list of the contributories, who are liable upon a deficiency in the property and assets of the bank, under s. 125 of the Bank Act, instead of the names of the holders of the stock on the day, the proceedings were begun, he is not estopped from later placing the names of the original holders of stock on the list, though he had already obtained judgments against the transferees.

(C.A., Ontario, 1912, *Ontario Bank*, 8 D.L.R., 244.)

7. Where a person's name has been wrongfully placed on the list of contributories, his right to have it removed is not affected by the fact that no person is in existence, whose name can be substituted for his.

(*Joint Stock Discount Co., Fife's Case*, 38 L.J., Ch., 725; *Law Rep.*, 4 Ch. App., 768.)

8. Where a liquidator applied to have his name removed from the list of contributories on the ground of variance between the prospectus and the Memorandum and Articles of Association, and it appeared that

he was acquainted with the circumstances, which, he said, entitled him to have his name removed nearly 12 months before his application, and had submitted to have calls made on him, his application was refused with costs.

(Accidental and Marine Ins. Corporation, Davis's case, W.N., 1866, pp. 363 and 406.)

9. A shareholder, being in a position to file a bill against a Company to have his name removed from the register, wrote to the secretary declining to have anything further to do with the Company, and requesting that his deposit might be returned. The deposit was returned, but his name remained on the register of shareholders. 18 months afterwards, on the Company being ordered to be wound-up, he was held not to be a contributory.

(Canadian Native Oil Co., Fox's case, Law Rep., 5 Eq. 118.)

10. Two persons, an original allottee of shares, separately moved the Court to discharge an order, declaring them contributories in the matter of a Company, which was being wound-up. Their motions were refused with costs, and the Vice-Chancellor's order contained a direction requiring them (jointly in point of form) to pay costs to the liquidators; on appeal to the House of Lords, this form was held to be erroneous, and it was held that each must be made answerable for the costs incurred in his own petition.

(Oakes vs Turquand and Harding, Law Rep., 2 H.L., 325.)

11. Where, under an order of a High Court Judge, a reference has been directed to an officer of the Supreme Court of Judicature to take all neces-

sary proceedings for the due winding-up of a Company, and delegating to him for such purpose the powers conferred on the Court therefor by the Winding-up Act, such officer has jurisdiction, in settling the list of contributories, to inquire into and decide as to whether stockholders, holding certificates declaring the stock to have been duly paid up, have in fact paid anything thereon.

(Cornwall Furniture Company. 18 O.L.R., 101.)

12. Semble, that the decision of the Judge in settling the list of contributories in winding-up proceedings, is as to all questions involved *res judicata*.

(Red Deer Mill and Elevator Co., vs Hall, 1 Alta. R., 530.)

13. The general rule of the Court, that costs follow the result, applies in the absence of special circumstances, to cases of contributories under a winding-up, who have unsuccessfully opposed application to place them on the list.

(Birkbeck Life Ass. Co., Ex parte Barry, 2 Green and Sm., 321; 11 Jur. N.S., 76, Ch.; 11 L.R. 5, 691.)

14. When the holders of fully paid-up shares, who had successfully resisted on application that their names should be placed on the list of contributories, applied to have the costs paid out of the assets, after the petitioners in the winding-up had been paid theirs, the Master of the Rolls refused the application with costs, saying that the petitioners were the only persons to whom he gave any priority in respect of costs.

(Marlborough Club Company. Ex parte Percival. Law Rep., 6 Eq., 519.)

15 There is nothing to prevent a limited Company from becoming a member of another limited Company, if its own Memorandum and Articles of Association authorize it to do so, and being made a contributory on the winding-up of the latter.

(Barned's Banking Co., *Ex parte* Contract Corporation, Law Rep., 3 Ch., App. 105.)

49. In the list of contributories, persons who are contributories in their own right shall be distinguished from persons, who are contributories as representatives of or liable for the debts of others.

Origins. — R.S., (1886), c. 129, s. 42; 45 Vict., c. 23, s. 46.

50. It shall not be necessary, where the personal representative of any deceased contributory is placed on the list, to add the heirs or devisees of such contributory, but such heirs or devisees may be added as and when the court thinks fit.

Origins. — R.S., (1886), c. 129, s. 42; 45 Vict., c. 23, s. 47.

51. Every shareholder or member of the company or his representative, shall be liable to contribute the amount unpaid on his shares of the capital, or on his liability to the company, or to its members or creditors, as the case may be, under the Act, charter or instrument of incorporation of the company, or otherwise.

2. The amount which he is liable to contribute shall be deemed an asset of the company, and a debt due to the company, payable as directed or appointed under this Act.

Origins. — R.S., (1886), c. 129, s. 44; 45 Vict., c. 23, s. 48.

THEORY.

1. The rule may be safely laid down as the result of the English decisions, viz: that unless an action to remove a shareholder's name from the list is actually

pending, at the time the winding-up commences, the holder, no matter under what circumstances he became so, must be held contributory. And this, whether the order be for a compulsory winding-up or involuntary liquidation.

(Stephens, On Corporations, 405.)

2. Persons on the register, at the time of winding-up, cannot oppose a call on the ground that their names ought to be removed, they should apply for the suspension of the call as against themselves, but they will probably have to pay the amount of their calls into Court.

(Emden, 232.)

3. Transferees of shares by way of mortgage are liable as contributories, although the Company itself is the mortgagor, but not an equitable mortgagee, where there is no transfer registered.

(Emden, 204.)

4. A shareholder may transfer his shares, although he knows that the Company is insolvent, and transfers with the object of avoiding liability, and although the shares are worthless, the transferee a man of straw, although a valuable consideration be expressed but be not in fact paid, or even although the transferor has paid the transferee to take them, provided the transaction is not colourable and fictitious, but *bona fide* an absolute out-and-out disposal of the property, without any trust or reservation for the benefit of the transferor, but the test is not confined to the question whether the transfer is out-and-out, or subject to reservation, or with the benefit of indemnity; the Court must also consider the *bona fides* of the transaction; and where the relationship between transferor and transferee is such

that the transferee would have an equity to set aside the transfer, the name of the transferor will, at the instance of the liquidator, be restored to the register. (Emden, 196.)

JURISPRUDENCE.

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General Cases.

1. After a winding-up order is made, the power of collecting the assets of the Company is vested solely in the liquidator; a judgment creditor of the Company cannot then take proceedings against a shareholder for unpaid calls.

(Shaver vs Cotton, 23 A.R., 426.)

2. Qu'il n'est pas nécessaire pour intenter cette action (pour versements) d'attendre que la liste des contributeurs soit complètement terminée, ni que l'actif de la banque soit réalisé.

(B.R., Montréal, 1910, Lapierre vs La Banque de St-Jean, 17 R.L., n.s., 428.)

3. Shareholders of railway Companies, incorporated after the passing of *The Railway Clauses Consolidation Act*, are liable to the creditors to an amount equal to the amount unpaid on their stock, and, in an action to recover the same, it is not necessary to allege that the directors called in all such stock.

(Mondelet, J.C.S., Montréal, 1857, Cockburn vs Starnes, 11 C.J., 114.)

4. The liquidator of an insolvent Corporation is entitled to intervene in an action by a creditor against a shareholder of such Corporation for unpaid calls.

(Loranger, J., Montreal, 1885, Banque d'Hoche-laga vs Garth, 2 M.L.R.C.S., 201.)

5. Un actionnaire, poursuivi sur des appels de versements par une Compagnie mise en liquidation subséquemment à l'action, ne peut s'opposer à la requête du liquidateur pour permission de reprendre l'instance au nom de la Compagnie, en alléguant que l'obligation du défendeur de contribuer à l'actif

de la Compagnie ne peut être exécutée qu'en vertu d'un nouvel appel de versements faits par le liquidateur, lequel doit être basé sur le montant nécessaire pour acquitter les dettes de la Compagnie et les frais de liquidation, ce qui rendrait sans effet les appels antérieurs, mais il sera permis à l'actionnaire de plaider ces moyens à l'action continuée par le liquidateur.

(Pagnuelo, J.C.S., Montréal, 1902, *The Victoria-Montreal Fire Ins. Co. vs Derome*, 21 C.S., 319.)

6. A contributory is not allowed to set up all defences against the liquidator which he might have been allowed to set up against the Company in an action for calls. The liquidator represents the creditors as well as the Company, and the rights of the creditors must be considered.

(*Central Bank of Canada. Henderson's Case*. 17 O.R., 110.)

7. Under "Bank Act" persons, whose names appear in the books of the Bank as holders of stock, are liable as contributories under the Winding-up Act; although the person, whose name so appears, may have supposed that he held such stock in pledge and as collateral security to secure the payment of an advance, it not appearing in the books of the bank that the stock was so held.

(*Lynch*, J.C.S., Montreal, 191, *La Banque Ville-Marie vs Peddington*, 8 R. de J., 182.)

8. A creditor who, prior to the granting of a winding-up order, has served a garnishee summons on a shareholder, and obtained judgment against the Company, is entitled to be paid the amount of his judgment out of moneys due by the shareholder for calls on stock, at the time of the service of the garnishee summons, in priority to the claims of the liquidator in the winding-up proceedings.

(Cross vs Alberta Brick Co., 1 Alta. R., 103.)

9. On the application of the liquidator of a Company directed to be wound-up, an order was made by a local Judge directing two persons to be placed on the list of contributories, which was affirmed by a Judge of the High Court and by the Court of Appeal, but was reversed by the Supreme Court of Canada with costs to be paid by the liquidator as well of that Court as of the prior appeals:

Held:—That the successful appellants were entitled to their costs out of the assets of the estate in priority to those incurred by the liquidator—the reasonableness of the liquidator's claim forming no element in the matter—but subject to certain costs payable by the liquidator to the petitioning creditors, and to such costs of litigation as were incurred by the liquidator in the realization of certain assets, as well as a reasonable sum as compensation for his care and trouble in such realization, payable out of the assets so realized.

(Baden Machinery Co., 12 O.L.R., 634.)

No Binding Contract to take Shares

10. Although a person's allowing his name to remain for a length of time on the list of contributories of a Company, without making any objection, may be used as evidence against him, that it was rightly placed there; yet, where he is not, and never was, a shareholder, it does not raise any equity against his applying to have it removed, where no loss is sustained by the estate, which would have been avoided, if the application had been made earlier. And it is questionable whether even in the case of such loss being sustained, any such equity would arise.

(Mexican and South American Co., Shewell's case, Law Rep., 2 Ch., App., 387.)

10a. Application to have defendants placed on the list of contributories.

Held:—That the letters signed by defendants were most improper and were only intended to be used to induce others to subscribe for stock on the supposition that they had subscribed for a large amount of stock; that there had been no allotment of stock to defendants, therefore application should be dismissed, but under the circumstances without costs.

(Nutter Brewery, 15 O.W.R., 265.)

11. "I do not understand that, if a Company says "to a man to induce him to enter into its services, we "will give you \$1000. of stock and \$50. a month as "long as we can get on, and he agrees to that, that "is not a bargain with consideration on both sides, or "while the whole bargain must not stand."

(Publishers' Syndicate, Paton's Case, 5 O.L.R., 392.)

11a. G. agreed with a director to take \$2,000. stock and to pay for same by a rebate of 10% from each month's account. This was in writing signed by a director, but never signed by the Company. No allotment of stock was ever made. He never attended meetings as a stockholder.

Held:—He is not a contributory.

(Canadian MeVicker Engine Co., 13 O.W.R., 916.)

12. If a shareholder attend and vote at a meeting of the Company, after he has knowledge that he has a right to repudiate his contract, he thereby affirms the contract and loses his right to repudiate.

(Sharpley vs Louth, 2 C.D., 663.)

13. The offer for shares need not be in writing; nor need it be a formal offer. The Company may make the offer as by allotting shares to a person and

if, after it is brought to his notice, he does not repudiate them, but rather, has voted as a shareholder, he will be held liable.

(Standard Mutual Fire Co., 12 O.A.R., 486.)

14. Celui qui se joint à d'autres pour solliciter leur incorporation, par lettres patentes, comme société par actions, et se laisse porter dans ces lettres comme souscripteur d'un nombre spécifique d'actions, est actionnaire, et, au cas de mise en liquidation, ne peut répudier sa qualité de contributaire, sous le prétexte que la société n'a pas été définitivement organisée et n'a pu encourir les obligations qui ont provoqué sa liquidation.

(B.R., Montréal, 1908, Lafleur and Saint-Amour, 18 B.R., 400.)

15. An infant shareholder attained her majority 6 months after the commencement of the winding-up of the Company, and was after due notice settled on the list of contributories, more than a year after the filing of the certificate of the settlement of the list, and nearly 3 years after she came of age, she applied to have her name removed from the list. It was held: (following Sheriff's case) that she had not by delay waived her right to have her name removed from the list.

(Alexandra Park Co., Hart's case, Law Rep., 6 Eq., 512.)

16. The appellant, who agreed to take one share in a Company, received and accepted a certificate of 5 shares expressed to be fully paid-up, 4 of which the managing director of the Company informed him, were intended only as security for certain paper to which he had become a party for the accommodation

of the Company. No stock was subscribed for by, or allotted to, him, but a dividend on the one share was paid to him.

Held:—That he was a contributory in respect to the one share only.

(Charles H. Davies Co., Ltd., 18 O.L.R., 240.)

17. Promoters of a manufacturing Company agreed with a town corporation to form the Company and establish an industry in the town, and the town corporation agreed, upon certain conditions, to give a bonus of \$15,000. to the Company. The Company was formed, a by-law was passed authorizing the issue of debentures to procure the money to pay the bonus, and the money was procured and paid over to the Company. Pursuant to a resolution of shareholders, shares called *bonus shares* were allotted as paid-up shares to the persons, who were shareholders at the date of the resolution, to the amount of \$15,000, in proportion to the stock held by them at that date. Certificates of these bonus shares were issued to the respective persons named therein as the holders thereof, and they received the same with full knowledge of the circumstances. With that knowledge, they accepted the certificates, gave receipts for them, assented to their names being on the register in respect of them, and treated and dealt with their respective shares as their property.

Held:—That they had accepted the shares and become shareholders in respect thereof; and, on the fair construction of the agreement and by-law, the \$15,000 was the property of the Company, and not of the promoters, and was part of the assets of the Company; the bonus shares could not be regarded as paid-up by the application of the \$15,000 in payment

thereof; the persons to whom the bonus shares were allotted, although they acted under a mistaken belief, were not entitled to be relieved from the obligation to pay for the shares which they had accepted; and they were properly placed on the list of contributors in respect thereof, in the winding-up of the Company.

(Cornwall Furniture Co., 20 O.L.R., 520.)

18. An agreement to take shares in a Company, although accompanied by the giving of a promissory note in part payment, is nothing more than an application for the shares and is not binding on the applicant until acceptance by the Company and notice thereof given to him; and, if the applicant gives notice of withdrawal of his application before notice of acceptance reaches him, he will be released from any obligation under his agreement or under the promissory note in the hands of any person having no better right to it than the Company would have had. Notice of such withdrawal, if given to the general agent of the Company, who procured the subscriptions, will be sufficient notice to the Company.

(Kruger vs Harwood, 16 Man. R., 433.)

19. An agent of the Company canvassed the respondents to subscribe for shares and took them to the Company's office, where they signed and handed to the manager an application, not under seal, by which they subscribed for 25 shares of the common stock of the Company, at the par value of \$100. per share, for which they agreed to pay upon the delivery of the regular stock certificates. In the stock ledger of the Company, under the names of the respondents and the heading *Common Stock* of the same date as the application, an entry was made: *Allotted*

bought Dr. 25 shares, amount \$2500. balance 25 shares, Dr. \$2500. On the same day, the respondents gave the canvassing agent a cheque for \$100. on account of the payment for the shares, but on the following morning, they determined to withdraw from the application, and stopped payment of the cheque, which had been already presented and payment refused for want of funds. On the same day, they told the agent that they would have nothing more to do with the stock they had applied for, but they gave no written or other notice of withdrawal. The Company's minute book contained no note or entry, nor was any evidence given of any resolution of the directors allotting stock to the respondents or directing notice of allotment to be sent to them and a formal notice of allotment was not sent. No attempt was made to enforce payment of their cheque, and they receive no further communication on the subject of the shares until three months later, when the Company's manager sent them notice of a call and demanded payment. There were two subsequent calls, of which notices were also sent to the respondents, and all three were authorized by resolutions of the directors.

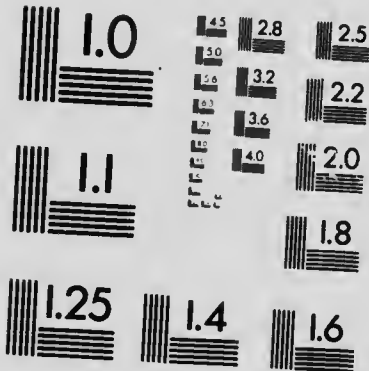
*Held:—*That neither of the respondents ever became a shareholder of the Company, and that they were therefore properly struck off the list of contributories in a winding-up.

20. Per Osler, J.A.: That there had been no allotment or appropriation of specific shares to the respondents; the entry of their name in the stock ledger was not conclusive; the resolutions authorizing the calls, dealing with stock, which had been already allotted, could not be regarded as equivalent to an allotment; the fact that notices of calls were sent to the respondents amounted to nothing, if the stock had not been already allotted to them by the directors.



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21. Semble, also, per Osler, J.A.: That, on the evidence, the respondents, as they had a right to do, withdrew their application, and that this came to the notice of the Company on the day after the application was signed, which would be another answer to the liquidator's demand.

22. Per Osler: *Quære*: whether notice of a call can be regarded as equivalent to notice of allotment.

Per Meredith, J. A.: The real question is not whether there was or was not a formal allotment of stock; but is whether there was a concluded bargain for the sale of the shares; the onus of proof of the Company's binding acceptance of the offer to buy was upon the liquidator, and that was not clearly proved. Upon the whole evidence, it ought to be found that there was no acceptance binding upon the Company, at the time of the withdrawal of the offer to buy.

(Canadian Tin Plate Decorating Co.; Morton's Case, 12 O.L.R., 594.)

22a. After a person has subscribed in the ordinary manner for shares in a Company incorporated by letters patent under the Manitoba Joint Stock Companies, and they have been allotted to him it is not competent for the Company to release him from his liability to pay for the shares in cash, by entering into an agreement, even under seal, to issue to him fully paid and non-assessable shares in consideration of his covenants to do something in the future.

When such an transfer included, with such covenants, a transfer of assets of doubtful value, but the circumstances surrounding the agreement were such as to make it a fraud upon the company, it

was held void, and it was ordered that the subscribers for the shares should be settled upon the list of contributories in the winding-up of the Company for the full amount of their shares.

(*Jones & Moore Electric Co.*, 18 Man. R., 549.)

23. Subscribers for shares in the stock of a Company, who have already paid one call, cannot be heard to deny the allotment of their shares.

(*Morden Woolen Mills Co. vs Heckels*, 17 Man. R., 557.)

24. On an application to settle the list of contributories of a Company, one Robertson, who had made application for shares and whose application had been accepted, objected that his application was conditional upon his appointment as agent of the Company, and his acceptance of that agency. He also objected that his membership in the Company had not been properly proved, as the register had not been produced.

Held:—That the register of the Company is not conclusive or the only evidence of membership therein, but membership may be proved without reference to the register.

25. That the application for shares being an unconditional one, and there being no evidence that any notice of a condition attached had ever been given to the Company, Robertson's name must be placed on the list of contributories.

(*Globe Fire Insurance Co.; Robertson's Case*, 2 Sask. R., 266.)

26. The respondent, by a writing under seal, dated the 29th July, 1903, subscribed for one share in the capital stock of the Company, and agreed to pay \$100 for it, 10 per cent. on application, 15 per cent. on

allotment, 25 per cent. two months thereafter, and the balance as the directors might deem advisable. It was arranged that the Company should draw upon the respondent for the amount payable on application. On the next day, and before anything had been done by the Company, the respondent wrote to the Company, cancelling his subscription. The Company drew on the respondent for the 10 per cent., but he refused to accept the draft, and, being pressed by the Company, by letter of the 16th September, 1903, to accept the draft, again declined to do so. On the 8th September, 1903, a resolution was passed by the directors "that the stock now subscribed be allotted and notice sent to each subscriber that we are drawing on them for their second payment." The Company did not draw on the respondent for the second payment, and he was not notified of the allotment, but his name was recorded in the book required by s. 71 of the Ontario Companies Act to be kept by the Company, as a shareholder holding one share. He was not afterwards in any way treated or dealt with as a shareholder. In a proceeding for the winding-up of the Company, it was sought to make him liable as a contributory.

Held:—(following *Nelson Coke and Gas Co., vs Pellatt* (1902), 4 O.L.R., 481)

That the instrument signed by the respondent was not a mere offer, which he could withdraw before acceptance; but that the Company never accepted or intended to accept him as a shareholder unless the down payment of 10 per cent. was made, and, after the refusal to make that payment, they made it evident that they had not accepted him; and, even if they had accepted him, it was not shown that the acceptance was communicated to him: and he was not, therefore, liable as a contributory.

(Meredith, C.J., Provincial Grocers, Limited, Calderwood's Case, 10 O.L.R. 705.)

27. The shareholders of the Company passed a resolution in favour of the creation of preference stock, with a direction to the directors to pass a by-law, which the directors failed to do.

Held:—That s. 22 of the Ontario Companies' Act not having been complied with, there is no valid creation of preference stock, and G., a person, who had signed an application for 15 shares of preference stock, could not be held liable as a contributory in respect of these shares, there being no acquiescence, delay or conduct on this part to stop him from alleging and shewing that, at the time when he made his application, and thenceforth until the liquidation proceedings, the company were not in a position to give him that for which he applied. G. also applied in writing for 8 shares of the common stock, and undertook to accept the same or any less amount, paying therefor \$60.00 per share according to the terms named in the prospectus. But in lieu of these terms, it was arranged between G. and an agent of the Company that he should give a promissory note at 12 months for the whole amount, which was done. The application was never brought before or dealt with by the directors, but the secretary notified G. that the directors had allotted him the shares in accordance with his application. They had not, however, passed a by-law or otherwise ordained, as required by s. 26; they had merely passed a resolution that *the secretary be instructed to allot all stock as applications are passed in.*

Held:—That the directors could not delegate their duty to a subordinate officer, and there never was any valid acceptance of G's application, and he was, therefore, not liable as a contributory in respect of the 8 shares.

Held (also):—Upon the evidence, that at the time of G's application, the Company held no shares of the common stock, which they could validly allot to him. In the case of R., another person charged as a contributory.

30. That is was covered by the decision in G's case, the additional circumstances set out in the report making no difference.

31. In the case of H., another person charged as contributory, the allotment of shares was professed to be made by the secretary and the notice thereof was given in the same manner and under the same circumstances and authority as in the other cases. But at the time of H.'s application, there were shares of the common stock, which could have been allotted. H. gave his promissory note for the price of shares for which he applied, and afterwards made payments thereon, and he attended meetings of shareholders and moved resolutions thereat. He had no notice, however, until after the liquidation, of any irregularities in the creation of the preference stock, and was not aware of the irregularities in connection with the allotment of shares:—

That, as there was no contract in fact, both by reason of there being no preferred stock in existence and the want of allotment, making payments in ignorance of these facts was not a conclusive act, and the attendance and conduct at the meetings, was not such an active participation in the affairs and business as to debar any question as to the status of an alleged shareholder. If there was any holding of himself out as a shareholder by H., it was not under circumstances, which could affect creditors or create any change of position to their prejudice.

(Pakenham Pork Packing Co., 12 O.L.R., 100.)

32. A contributory can waive notice expressly or impliedly as *e. g.* when he pays calls, receives dividends, votes or otherwise acts as a member.

(*Crawley's Case*, 4 Ch., 322.)

33. That one, who was infant at the commencement of the winding-up of a Company, in which he was registered as a shareholder, was not bound by the fact that solicitors had appeared on his behalf at chambers on the question of a call, the Master of the Rolls saying that this did not amount to confirmation or acquiescence, and that some distinct act must be shown, to create liability in such a case.

(*Commercial Bank of India and the East, Wilson's case*, Law Rep., 8 Eq., 240.)

34. An agreement for the sale of shares entered into, after a petition for winding-up the Company has been presented, and in ignorance of the fact, is not enforceable or valid in equity, and the purchaser will not be made a contributory.

(*London, Hamburg and Continental Exchange Bank, Emmerson's case*, Law Rep., 1 Ch. App., 433.)

35. After the issue of the order for the winding-up of a joint stock Company incorporated under the *Companies Act*, a shareholder cannot avoid his liability as a contributory by setting up defects or illegalities in the organization of the Company; such grounds can be taken only upon direct proceedings, at the instance of the Attorney General.

(*Common vs McArthur*, 29 C.S.C., 239, reversing 8 B.R., 128.)

36. In proceedings to put an alleged shareholder on the list of the contributories and to obtain payment of the balance of stock subscribed by him, he is not entitled to plead that conditions precedent to the organization of the Company were not fulfilled, and the Company never validly existed.

(Davidson, J., Montreal, 1904, Victoria-Montreal Ins. Co. vs Hyde, 6 R.P., 302.)

37. A subscription of shares in a Company to be formed is not binding.

(B.R., Montreal, 1878, Rascony vs The Union Navigation Co., 1 L.N., 191.)

38. That a shareholder, in a chartered joint stock Company, may, to an action brought by such Company, plead a non-compliance with its act of incorporation, and that by reason of such non-compliance the Company is not legally in existence.

(Duval, J.C.C., 1851, The Quebec and Richmond Railroad Co., vs Dawson, 1 L.C.R., 366.)

39. A demand to have the name of a defendant settled on the list of contributories as a shareholder, and a demand by way of a call, to have him condemned to pay a sum in respect of his shares, may be made by the liquidator by one and the same proceeding, notwithstanding the words *for the time being settled on the list of contributories* in sect. 57 of the Winding-up Act.

In defence to an action for a call on shares of La banque de St-Jean, a Company which is being wound-up in insolvency, a holder of the shares is not entitled to plead non existence of the Bank and lapse of its charter, before commencement of its business by reason of failure to comply with the statutory requirements, imposed upon banks as a condition of obtaining the certificate of the Treasury Board.

(B.R., Montreal, 1910, Lapierre vs Bienvenu, 17 R. de J., 86; 17 R.L., n.s., 428.)

40. That the irregularities in the nomination or appointment of the directors of a Railway Company, incorporated under a special charter, or in

the time of holding its first meeting, will not discharge the liability of the shareholders under the 14 and 15 Vict., c. 51, s. 19.

(Mondelet, C.J., Montreal, 1858, Ryland vs Ostell, 2 L.C.J., 29; 7 R.J.R., 28.)

11. The liability of shareholders, under *the railway clauses consolidation act*, cannot be affected by any irregularities in the nomination or appointment of the original directors.

(Mondelet, J.C.S., Montreal, 1858, Ryland vs Ostell, 11 L.C.J., 271).

(Smith, J.C.S., Montreal, 1858, Cockburn vs Tatle, 11 L.C.J., 285.)

42. The defendant subscribed for stock in a Company about to be formed, and received a letter from the secretary stating that his stock was taken on the same condition as subscribed by 3 persons, whose names preceded his on the book, and who had appended the condition to their subscription that the Company was to be a hydraulic Company. The defendant did not append such condition. The hydraulic Company was not formed, but a cotton mill Company.

Held:—That the defendant, having signed the book unconditionally, was not entitled to be relieved from the liability for calls.

(Ramsay, J.C.S., Montreal, 1878, Jones vs The Montreal Cotton Co., 1 L.N., 150.)

43. Defendants are without lawful right to allege irregularities in the incorporation of a Company in a plea to the merits of an action for calls on shares, when the action impleads them as representatives of a shareholder, and an inscription in law as to that part of the plea will be maintained with costs.

(Davidson, J.C.S., Montreal, 1901, Victoria Montreal Fire Ins. Co., vs O'Neil, 4 R.P., 451.)

44. In an action by an incorporated Company to enforce payment of calls on shares subscribed for, the defendants cannot plead that the conditions of the Act of incorporation have not been complied with, and that the Company has for more than a year carried on the business of insurance in violation of the conditions of the statute incorporating it.

(Davidson, J., Montreal, 1901, *Victoria-Montreal Fire Ins. Co., vs O'Neil* 5 R.P., 5.)

45. In proceedings to put an alleged shareholder on the list of contributories and to obtain payment of the balance of stock subscribed by him, he is not entitled to plead that conditions precedent to the organization of the Company were not fulfilled, and that the Company never validly existed.

(Davidson, J.C.S., Montreal, 1904, *Victoria-Montreal Fire Ins. Co., vs Bickerdike*, 10 R.L., n.s., 464.)

46. Where a contributory applied for stock and was notified that the directors had allotted him the stock in accordance with his application, but as a matter of fact the directors had not passed a by-law providing for or "otherwise ordained" the allotment of stock as required by the old Ontario Companies Act, and had merely passed a resolution that "Secretary be instructed to allot stock as applications are passed in", it was held that he was not liable upon a winding-up, on the ground that the directors could not delegate to a subordinate officer their duty to allot stock. There was no valid acceptance of his application.

(Galloway's Case, 12 O.L.R., 100.)

47. An incorporated Company brought an action against McK., as the holder of shares of the capital stock, to recover money alleged to be due by him in respect of calls.

McK. pleaded several defences, among others:

That he was not the holder of the shares, and that the calls were not duly made.

The action came on for trial, and, upon consent, a judgment dismissing it was pronounced, signed and entered. Afterwards, the Company being in liquidation under a winding-up order, the liquidator sought to make McK. a contributory in respect of the same shares upon which the calls had been made.

Held:—That, as it was impossible from the pleadings and judgments to ascertain upon which of the grounds of defence McK. succeeded, the Court might look at the admissions made before the referee in the winding-up; and those admissions, coupled with the judgment and record, warranted the conclusion that, the ground upon which McK. succeeded in the action, was that he was not a shareholder in the Company; and, therefore, the former recovery was a bar to the claim of the liquidator, which was based upon its being established that McK. was a shareholder at the commencement of the winding-up.

(*Ontario Sugar Co.; McKinnon's Case*, 22 O.L.R., 621.)

48. Under the circumstances of this case, where an applicant had agreed to take shares in a Company conditional on his receiving certain moneys to pay for them, that he had the right to withdraw his application, as he did, not having received any formal notice of allotment, by informing the Company of his inability owing to non-receipt of the moneys to pay for the shares, and that he was not liable as a contributory.

(*Publishers' Syndicate, Mallory's Case*, 3 O.L.R., 552.)

49. On the day after signing an application for shares, in a Company, the applicant decided to withdraw and mailed a notice of such intention to the

party, who had taken the application, which in the ordinary course of the mail should have reached him the following day. There was no evidence that this letter did reach the party to whom it was addressed on that day or that he was an agent or officer of the Company authorized to receive such a notice. In the meantime and without notice of withdrawal, the Company accepted the application and allotted the shares, but notice of allotment was not given until twelve days later. On an application to settle contributories.

Held:—That an application for shares cannot be withdrawn after allotment.

50. That in the absence of a statutory provision or custom of business to the contrary, a notice sent by mail is not operative in the absence of evidence that it was actually received.

(Globe Fire Ins. Co., 2 Sask. R., 234.)

Shares Subscribed by Fraud, Misrepresentations.

51. H. and others, interested as creditors and otherwise in a struggling firm, agreed to purchase the latter's assets and form a Company to carry on its business. They severally subscribed for stock in the proposed Company to an amount representing the value of the business after receiving financial aid, which they undertook to furnish. A power of attorney was given to one of the parties to purchase said assets, which was done, payment being made by the discount of a note for \$2000., made by H. and indorsed by another of the parties. The Company having been formed, the said assets were transferred and the said note was retired by a note by the Company for \$4000. indorsed by H., which, he, afterwards

have to pay. H. also or the Company in Buffalo of which he was manager, advanced a money to a considerable amount for the Company which eventually went into liquidation. After the Company was formed, in pursuance of the original agreement between the parties, stock was issued to each of them as fully paid-up according to the amounts for which they respectively subscribed, and in the winding-up proceedings they were respectively placed on the list of contributories for the total amount of the said stock. The ruling of the local master in this respect was affirmed by a judge of a High Court and by the Court of Appeal.

Held:—(reversing the judgment of the Court of Appeal, Davies and Nesbitt, J.J., dissenting.)

That as all the proceedings were in good faith and there was no misrepresentation of material facts and as H. and S. had paid full value for their shares, the agreement, by which they received them as fully paid-up, was valid and the order making them contributories should be rescinded.

52. *Held*:—(by Davies and Nesbitt,

That as they did not pay cash or its equivalent for any portion of the shares as such the order should stand.

(C.S.C., 1905, Hood vs Eden, 36 C.S.C., 476.)

53. Les souscripteurs d'actions dans une Société par actions, qui seraient fondés à demander la nullité de leurs engagements à l'égard de la Société, parce qu'ils auraient été obtenus par des manœuvres frauduleuses, n'ont pas le même droit à l'égard du liquidateur de la Société mise en liquidation, agissant non dans l'exercice des droits de la Société mais comme représentant ses créanciers.

(B.R., Montreal, 1906, *Brownlee vs Hyde*, 15 B.R., 221.)

54. A shareholder cannot be relieved from shares in a Company upon the ground of misrepresentations in the prospectus, on a bill in equity filled after the representation of a petition for winding-up on which an order was subsequently made.

(*Kent vs Freehold Land and Brickmaking Co.*, Law Rep., 3 Ch. App., 493.)

55. Les directeurs d'une Société par actions sont responsables envers ses créanciers de tout préjudice direct ou immédiat qu'ils peuvent leur causer par leur faute, et de tout dommage leur résultant du paiement d'un dividende, qui diminue le capital de la Compagnie, lorsque ce paiement a été fait sans leur concours. Ils sont aussi responsables vis-à-vis les tiers, qui ont été ainsi trompés et qui, par suite, ont acheté des actions de la Compagnie à des prix exagérés.

Mais les créanciers ou les tiers, qui ont eu connaissance de ces faits, qui ont assisté aux assemblées annuelles des actionnaires, qui ont autorisé le paiement de ces dividendes, qui ont pris connaissance des états et inventaires soumis par les directeurs, sont non recevables à se plaindre et à prétendre qu'ils ont été trompés. Les actionnaires, qui n'ont pas assisté aux assemblées, sont également non recevables, puisqu'ils avaient le droit d'y assister et de s'y renseigner; et ils sont coupables de négligence de n'avoir pas surveillé leurs mandataires.

(*Pagnuelo*, J.C.S., Montreal, 1890, *La Banque d'Epargne de Montréal vs Geddes et al.*, 19 R.L., 685.)

56. Action against a shareholder for calls. Defendant pleaded that he had been induced to take the shares by fraudulent misrepresentations on the part of the agents of the Company.

The proof established that the defendant, when he subscribed for the shares, did not know the nature or extent of the liability which he assumed. but on the same day or the day following, he became aware of his true position, and applied to the Secretary and another officer of the Company for relief, but without success. Two elapsed without his taking any legal proceedings; at the end of the first year, a dividend of 10 per cent. was declared, which the defendant received; at the end of the second, two extensive fires occurred, which required heavy calls to be made.

Held:—That, under these circumstances, it was too late for the Defendant to be relieved from his contract.

(Meredith, C.J., Quebec, 1879, Stadacona Ins. Co., vs Coté, 5 Q.L.R., 133.)

57. An action for 3 calls of 10 per cent. each on the \$1,000. of stock subscribed by the defendant. The plea was that the defendant's signature had been got by improper representations of the agent of the Company, a Mr. McDonald, and that, in point of fact, he was not held by his subscription. The evidence shows that although Chevrier may have subscribed incautiously and without sufficient enquiry, he did so deliberately and freely in the hope of profit, and it is no defence, of course, to say that the stock has turned out temporarily unprofitable. Now, that is the proper effect of the evidence in this cause, for the verbal testimony of what McDonald said, at the time of subscription, cannot be received against the written consent of the party; therefore, there must be judgment for the amount demanded, with costs.

(Johnson, J.C.S., Montreal, 1878, The National Ins. Co., vs Chevrier, 1 L.N., 591).

58. Plaintiffs were induced to sign an agreement to take stock in a proposed Company upon the representation of P., acting for the promoters in securing subscriptions, that one of the plaintiff G. would be appointed agent and representative of the Company for the Province of Prince Edward Island. After the incorporation of the Company, notices were sent out to subscribers, requiring payment of a first call upon the stock subscribed for by them. Plaintiffs paid the amount of the call, but subsequently, the Company, having refused to appoint G. as their agent, as agreed by P., at the time the agreement to take shares was signed, claimed a rescission of the contract and a return of the money paid by them.

58a. *Held*:—That plaintiffs could not recover.

Per Longley: That the Company was not responsible for representations made prior to the incorporation, unless such representations were expressly adopted by the Company after incorporation.

59. That plaintiffs could not escape liability as shareholders on the ground of the misrepresentations alleged, their remedy being against P. personally.

(Gourlie vs Chandler, 41 N.S.R., 341.)

60. If a person is induced to take shares on the faith of a promise by the promoter of a Company, which promise is not kept, he is nevertheless a contributory, his remedy being only against the persons, who made the promise.

(United Kingdom Ship Owning Co., Felgate's case, 2 De G.J. and S., 456.)

61. When a person agrees to become a member of a Company, is placed upon the registry and afterwards acts as a shareholder, he cannot resist being placed upon the list of contributories, whatever may have been the circumstances under which the shares were transferred or allotted to him. The transfer, being bad as a deed, would not affect the question of his liability, nor even dishonest conduct on the part of officers of the Company.

(International Contract Co., Langer's case, 37 L. J. Ch. App., 292.)

62. Certain alleged contributories moved, on the ground of fraud in the prospectus, to have their names taken off the list. The motions were refused with costs, and the order then made was enrolled for appeal to the House of Lords. Pending the appeal, the application was renewed in the Court below on several grounds, impugning the constitution of the Company, the validity of the winding-up order, and the appointment of liquidators, and on the ground of variance between the prospectus and the Memorandum of Association, the applicants averring that the objections so raised had been discovered since the hearing of the previous motions. It was held that the motions could not be reheard on the alleged discovery of a variation between the prospectus and Memorandum of Association, and that until the winding-up order was discharged, (which could not, after the enrolment be done by the Court below), no question could be raised affecting the constitution of the Company, or the validity of proceedings in the winding-up. And the motions were dismissed, with costs.

(Overend, Gurney, and Co., Ex parte Oakes and Peek, 36 L.J., 413 Ch.; W.N., 1867, p. 101; 16 L. T.N.S., 148, Ch.)

63. An applicant for shares resisted the application to place his name on the list of contributories, on the ground that he had been induced to take the shares by misrepresentations.

Held:—That fraud was no answer to the application, as the applicant should have taken proceedings to have the shares cancelled before winding-up.

(Globe Fire Ins. Co., 2 Sask. R., 234.)

64. Where a registered Memorandum of Association differs from the prospectus on which it professes to be founded, and on which, as setting forth the true objects of the association, a person has become a shareholder, though, on discovering the difference, he may repudiate his shares, he cannot, after the failure of the Company, relieve himself from liability to contribute to the debts of the association, on the ground that he has been ignorant of something which, with proper diligence, he might have known. It is the duty of a person taking shares in a Company to use reasonable diligence in making himself acquainted with the provisions of the Memorandum of Association. He must take the consequences of neglect.

(Oakes vs Turquand and Harding, Re Overend, Gurney and Co., Law Rep., 2 H.L., 325.)

Shares Forfeited.

65. Where the regulations of a Company provide for the forfeiture of shares, and all the acts of forfeiture are complete, the mere fact that the name of the shareholder has not been removed from the register will not make him liable as a contributory in respect of the shares forfeited.

(Tavistock Ironworks Co., Lyster's case, Law Rep., 4 Eq., 233; 36 L.J., Ch., 616.)

66. *Semble*:—Shareholders whose shares have been forfeited, while not liable to be placed on the list of contributories, are still liable (if the articles of association so provided), to be sued for the amount unpaid on calls made.

The liquidators of a Company in course of being wound up under the Dominion Winding-up Act, R.S.C., c. 144, have not, nor have the creditors of the Company, any right to take any advantage of any irregularities in the proceedings for the forfeiture of shares; and shareholders, whose shares have been forfeited to the Company, cannot be placed on the list of contributories merely because there have been irregularities in the proceedings prior to forfeiture. Proceedings for the forfeiture of shares cannot be taken for the benefit of a shareholder; the duty of the directors, when a call is made, is to use all reasonable means to compel every shareholder to pay the call, and the directors must *bona fide* believe that payment cannot be obtained before they are justified in invoking the power of forfeiture.

(*D. Wade Co.*, 2 Alta. R., 117.)

66a. Directors cannot forfeit shares for the purpose of relieving a member from liability, but only where the cancellation is *bona fide* for the benefit of the Company.

(*Standhope's Case*, Ch. 161.)

66b. If shares have been irregularly forfeited and the irregularity not cured by acquiescence and lapse of time, the holder will remain a contributory.

(*Esparto Trading Co.*, 12 Ch. D., 191.)

66c. When the vendor has unnecessarily delayed to compel the purchaser to complete the transfer, the vendor cannot have his own name removed and that of the purchaser inserted on the A list.

(*Ward and Henry's Case*, 2 Ch., 431.)

66d. A power of annulling a forfeiture cannot be exercised adversely to the former holder of the forfeited shares.

(Larkworthy's Case, 1903, 1 Ch., 711.)

67e. Where the shareholder brings an action to rescind the contract to take shares the Company will be restrained from forfeiting pending the trial of the action, the plaintiff paying the amount of the unpaid call into Court.

(Lamb vs Sambas Rubber Co., 1908, 1 Ch., 815.)

Shares Transferred.

67. That a former holder of bonus shares, which he had before winding-up transferred to persons entitled to hold them as fully paid-up, is not liable to be placed on the list of contributories in respect to them, unless subjected to such liability by the Act under which the Company was created or some Act relating thereto.

68. Semble:—That such a shareholder, if a director commits a breach of trust in being a party to the allotment of the shares as fully paid-up, as in putting them off on his transferees to the prejudice of the Company as fully paid-up shares; and such a case is a proper one for an order under s. 83 of the Winding-up.

(Warton Beet Sugar Co., 12 O.L.R., 149.)

69. Where a transfer of shares was made to an infant, before the passing of a resolution to wind-up voluntarily, and the infant had not attained majority until after the resolution, the transfer was held, (at the instance of the liquidator), to be avoided although the infant after attaining 21 wished to retain the shares.

(Continental Bank Corporation, Castello's case, Law Rep., 8 Eq., 504.)

70. Where a transfer of shares in a Company has been made with perfect *bona fides* on both sides, and has been registered, but there has been some defect in the form of the transfer, the question arising upon that is not one which the official liquidator of the Company has a right to bring forward, in order to rectify the register of shareholders by striking off a name, that is upon it. The question being simply one between the transferor and transferee.

(General Floating Dock Co., 15 L.T.N.S., 526, Ch.; W.N., 1867, p. 27.)

71. The certificate is not the title, but evidence of the title to the shares, and an assumed act of cancellation, where there is no proper assignment of transfer, does not divest the title to the shares.

(Société Générale de Paris vs Walker, 11 A.C. 20.)

72. A member of a syndicate in whose name with the addition of the words "Trustee for syndicate", share certificates are issued for stock in a trading corporation, organized by the members of the syndicate for the purpose of taking over the syndicate business is not exempt from personal liability as a contributory in respect of unpaid shares included in his stock holding by the addition of the word "trustee" "for syndicate" upon the face of the certificate.

73. The general rule is that a shareholder, who has duly transferred his shares on the books of the Company, and whose transferee has been registered as a shareholder in his stead, is discharged as between himself and the Company from all liability upon such transferred shares as well in respect of past as of future transactions, and he is not liable to be put on the list of shareholder contributories on

the insolvency and winding-up of the Company except under the terms of statutory enactments making past shareholders liable.

74. Where shares in an incorporated Company are issued to one of the promoters of the Company in alleged consideration of the transfer to the Company of patent rights, which were already known to be of no real value to the Company, the transaction may be declared a fraud upon the Company, and the promoter, in whose name the shares remain, may be held liable as a contributory upon a liquidation proceeding under the Winding-up Act, R.S.C., 1906, ch. 144.

75. Where the person, to whom a share certificate has been issued, has regularly become a shareholder of a Company incorporated under the Manitoba Joint Stock Companies Act, the Company cannot reacquire the title to its own shares by a transfer or surrender thereof from the shareholder apart from the remedies it is authorized to enforce for non-payment of calls; and the shareholder surrendering the shares remains liable as a contributory in a compulsory liquidation in respect of the amount not paid up, although uncalled thereon.

(K.B., Winnipeg Hedge and Wire Fence Co., 1 D.L.R., 316.)

75a. In the same meaning, see:

(Smith vs Gow-Ganda Mines, 44 C.S.C., 621.)

75b. The death of a transferee without personal representatives does not make transferor liable where the transfer has not been registered through default of the Company.

(Fyfe's Case, 4 Ch., 768.)

76. After a winding-up order has been made, it is too late for holders of shares entered as such in the books of the Company to escape liability by shew-

ing irregularities in the transfers to more or less remote predecessors in the title. There is no responsibility upon the part of the creditors of **showing** a lawful issue in the original acquisition of the stock and of faultless regularity in every transfer down to the liquidation.

(Central Bank of Canada, Home Savings and Loan Co.'s Case, 18 A.R., 489.)

77. When a person is placed upon the register by his own act as the holder of shares, and his name is on it when the Company is wound-up, he cannot escape liability as a contributory, on the ground that he is only a trustee of the shares for another, no notice of any trust being admissible on the register.

(Imperial Mercantile Credit Association, Chapman and Barker's case. Law Rep., 3 Eq., 361.)

78. He who possesses bank stock as institute may be held liable as contributory, if the bank is put into liquidation.

(Davidson, J.C.S., Montreal, 1901, La Banque Ville-Marie vs Archambault, 4 R.P., 429).

79. Where 10 shares were standing on the register of a Company in the name of an infant, upon the Company being wound-up the Court, on the application of the liquidators, removed the name of the infant from the register in respect of the shares, and substituted that of the transferor, although the 10 shares originally formed part of a batch of 80 shares had, prior to the winding-up, been sold by the infant, the purchaser money received, and the transfers executed by all the purchasers, and the transferees of all (except the 10 shares in question) entered on the register of shareholders.

(Imperial Mercantile Credit Association Curtis's Case, Law Rep., Eq., 455.)

80. Notwithstanding a statutory requirement to the effect that transfers of shares shall be made and accepted in the books of the bank, a holder of shares is not entitled, after a winding-up order has been made, to dispute the validity of his acquisition of the shares in respect of which he is sought to be held responsible as a contributory, on the ground that the transfer to himself was not accepted in the books of the Bank, but, instead was signed outside, on a sheet of paper, which was afterwards pasted into bank transfer-book.

(B.R., Montreal, 1910, *Lapierre vs. Bienvenu*, 11 R. de J., 86.)

81. Application to place the name of T. C. Musson on the list of contributories in respect of the amount unpaid on 20 shares of stock standing in his name in trust for the Union Fire Agency, Limited. The referee found that Musson was the nominee of the United Fire Agencies, Limited, holding shares for them in trust. It was urged that Musson was simply the agent for a disclosed principal, and that the principal should be placed on the list of contributories and not the agent. See Winding-up Act, s. 51, and Ont. Ins. Act, R.S.O. 1897, c. 203, and Ont. Companies Act, ss. 56, 71, 72.

*Held:—*That, where as in this case, A. holds shares in trust for B., in the absence of any statutory provision to the contrary, even although B. is named, A. must be put on the list of contributories as the shareholder liable. B. is not the shareholder, A. is. The case is governed by Ont. Ins. Act, R.S.O. 1897, c. 203, s. 21. The sole question is, who is the legal owner of the shares, and Musson, in this case, is the owner and the shareholder in respect of these shares, and is therefore liable to contribute the amount unpaid thereon.

(Standard Mutual Fire Ins. Co.; *Musson's Case*, 16 C.L.J., 505.)

81a. The liability of a trustee, who is a shareholder, does not cease upon his resignation, but he must also transfer his shares or take such other step may be necessary to terminate such liability.

(*Mitchell's Case* and *Rutherford's Case*, 1 A.C., 518.)

Shares Paid for in Full.

82. Where a shareholder, in a banking Company, under an arrangement for reconstituting the bank, exchanged his shares, with the knowledge and consent of the directors, for shares in the new concern upon the faith that he should be under no further liability in respect of the shares given up by him, and his name was removed from the register of shareholders, it was held, on the winding-up of the banking Company, that he was not relieved from his liability in respect of its debt, and that his name must be placed on the list of contributories.

(*Continental Bank Corporation*, *Austen's case*, W. N., 1867, p. 138.)

83. A holder of fully paid-up shares in a Company cannot be put on the list of contributories for the purpose of enforcing payment of the debt.

(*Marlborough Club Company*, *Law Rep.*, 5 Eq., 365.)

84. D. made an application in writing to the Company for 130 shares of stock, of the par value of \$1,300.00, "on the condition that no further call be made thereon." At a directors' meeting, the application was accepted by resolution, and the shares allotted to D., in consideration of \$1,300.00 to be paid on demand. In the minutes of the proceedings, at the meeting, there was a memorandum, following the

resolution, that the shares "were allotted and issued "on the condition that no further call would be made "thereon."

The meaning was that the shares were to be considered as fully paid-up. No written notice was given to D., but H., the president, informed him of the action of the directors, and D. gave the Company his cheque for the \$1,300.00, and gave a proxy in favour of another shareholder to vote at a meeting of shareholders. The proxy was used for voting for directors at the meeting, but objection was raised as to the right of D. to vote on these shares. H. informed D. of the objection raised, and D. at once stopped payment of his cheque, and informed H. that he would have nothing more to do with the shares. Three months later, a winding-up order was made. It appeared that D.'s name was on the register as the holder of 130 shares and there was among Company's papers a certificate, signed by the president and secretary, stating that D. was the owner of 130 shares, but not stating whether they were fully paid-up or not. There was no evidence that D. was aware either of the entry or the certificate.

Held.—That D. was not liable as a contributory.

85. Per MacLaren:—That it was not necessary, in the circumstances, for D. to bring an action to have his name removed from the register; his repudiation was sufficient.

Held also:—That D. not being liable, H. could not be liable for misfeasance for acquiescing in the stopping of payment of D.'s cheque, and thereby causing a loss to the Company of \$1,300.00.

(Lake Ontario Navigation Co., 20 O.L.R., 191.)

87. The directors of a Company, incorporated under the Ontario Companies Act, R.S.O., 1897, c. 191, in 1906 made a ratable distribution of treasury

or Company stock, to be treated as paid-up, to the extent of \$7,500.00, among the existing shareholders. For this, nothing was given to the Company by the shareholders or by any one. In the annual return to the Government made by the Company in January, 1907, and in the Company's books, the transaction appeared as if \$7,500.00 had been paid on account stock in 1906. The names of the shareholders were placed on the register in respect of these shares, and they (or some of them) accepted the shares and allowed their names to remain on the register, and they appeared there at the time when an order was made for the winding-up of the Company.

Held: That the issue of the unissued stock belonging to the Company, to the extent of \$7,500.00, as paid-up stock, was in violation of the statute and *ultra vires*; and the shareholders, and not merely the directors, were affected with notice or knowledge of this; and, whatever remedy they might have had before the winding-up order, they had no right, as against the liquidators, representing creditors to say that the shares were fully paid-up. The names of the shareholders, who had accepted the shares were, therefore, placed on the list of contributories.

(*Clinton Trencher Co.*, 20 O.L.R., 555.)

88. An allotment *pro rata* amongst shareholders' stock in a Company, incorporated under the Manitoba Joint Stock Companies Act, R.S.M. (1902), c. 30, as fully paid stock, made after incorporation, will, in a proceeding under the Dominion Winding-up Act, entitle the liquidator to place each subscriber on the list of contributories for the full amount not actually paid in cash, if there is no binding agreement with the Company showing other valuable consideration in lieu of cash.

(*Northern Constructions Ltd.*, 19 Man. R., 528.)

89. Where a person purchases shares as fully paid-up in good faith without notice that they have been issued at a discount, he is not liable to pay the balance.

(McCracken vs McIntyre, 1 C.S.C., 479.)

90. C. subscribed for 4 shares of the capital stock of a Company, incorporated under the Ontario Companies Act, the par value of each share being \$50.00. The Company issued to him a certificate for 8 paid-up shares, upon his paying them \$200.00. He gave a receipt for the certificate and accepted a dividend based upon a holding of 8 shares or \$400. In the winding-up of the Company, he contested his liability as a contributory to the extent of the \$200.00 actually unpaid on the shares, but did not offer to return the dividend.

Held:—That as the Company had no power to issue shares at a discount, the shares must be regarded as only half paid, and C. was estopped from denying that he was a member of the Company in respect of the 8 shares; and he is therefore properly made a contributory.

(Mulock, C.J., Ex. D., Niagara Falls Heating and Supply Co., 1 O.W.N., 439.)

91. Payment in cash for shares may be effected without any money passing. It is sufficient if there is a debt presently and unconditionally due on either side, and the parties agree to set it off and the transaction is completed in the books.

(Spargo's Case, 8 Ch., 407.)

91a. A contributory cannot, after winding-up, set off his liability to pay calls against debts due by the Company to him, because, whether the calls were made before or in the winding-up, the moment the winding-up takes place the whole administration is carried on with a view to the payment of the debts

of the creditors *pari passu*, and the liquidator receives the calls, whenever made, as statutory trustee for the equal and rateable payment of all the creditors, and to allow a set-off would be inconsistent with this main principle of winding up.

(Black and Co., 8 Ch., 254..)

92. Shares in a joint stock Company may be paid for in money or in money's worth and, if paid for by a transfer of property, they must be treated as fully paid-up; in proceedings under the Winding-up Act, the master has no authority to inquire into adequacy of the consideration with a view to placing the holder on the list of contributories.

93. If a promoter purchases property for the Company from a vendor, who is to be paid by the Company when formed, and by a secret arrangement with the vendor a part of the price, when the agreement is carried out, comes into the hands of the promoter, that is a secret profit, which he cannot retain; and if any part of such secret profit consists of paid-up shares of the Company issued as part of the purchase price of property, such shares may, in winding-up proceedings, be treated, if held by the promoter, as unpaid shares for which the promoter may be made a contributory.

(Hess Mfg. Co., *Edgar vs Sloan*, 23 C.S.C., 644.)

94. The appellant was secretary-treasurer of the Company and the holder of shares upon which 50 per cent. of the value had been paid. On the 6th October, 1905, the balance due upon the shares, \$275., was called up by the directors, and was payable on the 10th October. The appellant, on the 31st December, 1905, entered to his credit in the Company's cash-book, for "services rendered", \$275, thereby showing his shares as having been paid-up in full. In fact, the Company at that date owed the appel-

lant \$271.06, moneys properly disbursed for the Company. The appellant acted in good faith. A winding-up order was made on the 31st March, 1906, and it was sought to make the appellant liable as a contributory in respect of the whole balance of \$275.

Held:—That the disbursements, made by the appellant, constituted a good payment in fact upon his shares, and that the effect was the same as if he had credited the sums from time to time as they were disbursed. It was not necessary to consider the effect of the winding-up order upon the general right of set off.

(Ottawa Cement Block Co., Mascorn's case, 14 O.L.R. 389.)

95. M. and C. each agreed to take shares in a joint stock Company, paying a portion of the price in cash on receiving receipts for the full amount, the balance to be paid for in future services. The Company afterwards failed:

Held:—(affirming 27 O.A.R. 396):

That, as there was no agreement in writing for the payment of the difference by money's worth instead of cash, under s. 27 of the Companies Act, M. and C. were liable to pay the balance of the price of the shares to the liquidator of the Company.

(Morris vs Union Bank of Canada; Union Bank of Canada vs Morris; Code vs Union Bank of Canada, 31 C.S.C., 594.)

96. An act of incorporation of a joint stock Company provided that *no subscription for stock should be legal or valid until 10 per cent. should have been actually and bona fide paid thereon*. C. gave to the manager of the Company a power of attorney to subscribe for him 10 shares in the Company containing

the words: *and I herewith enclose 10 per cent. thereof, and ratify and confirm all that my said attorney may do by virtue thereof.*

The 10 per cent. was not, in fact, enclosed; amount was placed to the credit of C., in the books of the Company, and a certificate of stock issued to him, which he held for several years. The Company having failed, proceedings were taken to have C. placed on the list of the contributors. The sum to his credit was for professional services to the Company as solicitor, and there had been an arrangement that his stock was to be paid for by such services.

Held:—(Affirming 12 O. App. R., 486):

That C. was rightly placed on the list of contributors.

(*Caston's Case*, 12 C.S.C., 644.)

97. An agreement to pay for stock by performing services for the Company is valid, and acceptance of the shares for such services will not render a contributory liable to pay in cash for them.

(*English vs Wellington*, 29 C.P., 387.)

52. If a shareholder has transferred his shares under circumstances which do not, by law, free him from liability in respect thereof, or if he is by law liable to the company or its members or creditors, as the case may be, to an amount beyond the amount unpaid on his shares, he shall be deemed a member of the company for the purposes of this Act, and shall be liable to contribute, as aforesaid, to the extent of his liabilities to the company or its members or creditors, independently of this Act.

2. The amount which he is so liable to contribute shall be deemed an asset and a debt as aforesaid.

Origins. — R.S., (1886), c. 129, s. 45; 45 Vict. c. 23, s. 49.

JURISPRUDENCE.

1. Que lorsque, dans un transport d'actions de banque, il se commet des irrégularités celui, qui y est partie, ne peut en prendre avantage.

(B.R., Montreal, 1910, Lapierre vs Banque de St-Jean, 17 R.L., n.s., 128).

2. Shareholders of railway Companies, incorporated as above mentioned (The Railway Clauses Consolidation Act), are liable, notwithstanding they may have transferred their stock, if the plaintiff's debt accrued and was due whilst the shares stood in defendant's name.

(Badgley, J.C.S., Montréal, 1857. Cockburn vs Beaudry, 11 L.C.J., 283.)

3. *Held*:—That a former holder of bonus shares, which he had before winding-up transferred to persons entitled to hold them as fully paid-up, is not liable to be placed on the list of contributories in respect to them, unless subjected to such liability by the Act under which the Company was created or some Act relating thereto.

4. *Semble*: That such a shareholder, if a director, commits a breach of trust in being a party to the allotment of the shares as fully paid-up, as well as in putting them off on his transferees to the prejudice of the Company as fully paid-up shares; and such a case is a proper one for an order under s. 83 of the Winding-up Act.

(Meredith, C.J., Warton Beet Sugar Co., 12 O. L.R., 149.)

53. The liability of any person to contribute to the assets of a company under this Act, in the event of the business of the same being wound up, shall create a debt accruing due from such person at the time when

his liability commenced, but payable at the time or respective times when calls are made, as hereinafter mentioned, for enforcing such liability.

Origins. — R.S., (1886), c. 129, s. 46; 45 Vict., c. 23, s. 50, in part.

Theory. — S. 5.

54. In the case of the bankruptcy or insolvency of any contributory, the estimated value of his liability to future calls, as well as calls already made, may be proved against his estate.

Origins. — R.S., (1886), c. 129, s. 46; 45 Vict., c. 23, s. 50, in part.

55. 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 as trustee, receiver, banker, agent or officer of the company, to pay, deliver, convey, surrender or transfer forthwith, or within such time as the court directs, to or into the hands of the liquidator, any sum or balance, books, papers, estate or effects which are in his hands for the time being, and to which the company is *prima facie* entitled.

Origins. — R.S., (1886), c. 129, s. 47; 45 Vict., c. 23, s. 51.

Theory. — Ss. 33, 139.

JURISPRUDENCE.

1. When the person, in possession of property demanded by the liquidator, has a lien on it, his lien will not be disturbed without his consent.

(Capital Fire, 24 C.D., 408.)

2. G. was manager for the Ottawa district of a Company whose headquarters were in Edinburgh, and head office for Canada, in Toronto. The Company having gone into liquidation, an order was obtained

from the Court of Sessions in Edinburgh for the delivery of its books by the manager to the liquidator or to some person appointed by him. This order not having been obeyed, an action was brought by the Company to recover possession of the books from G., who set up the defence that he had already given them up, and also that the Company had no *locus standi* to maintain the action. After proceedings in liquidation were commenced, G. was dismissed as manager, whereupon he demanded an audit of the books, which was commenced but never completed, and G. swore that after handing over the books to auditors he had never had possession of them. He also swore that they had never been in his control, having been kept in a safe, of which a clerk of the Company and the new manager alone had the combination. Some time after the audit, an agent of the liquidator went to Ottawa to get the books and saw G., who first agreed but afterwards refused to deliver them up, giving as the ground of his refusal that he was liable for rent of the office and other debts of the Company, and wished to retain what property of the Company he had to protect himself. The agent, with the assistance of G.'s landlord, then obtained access to the office, where he saw some books which he took to belong to the Company, and a safe in which he believed there were others, but G. coming in refused to allow him to remove them and ejected him from the office. On this evidence, the trial judge made an order against G. directing him to deliver to the liquidator all the books and papers of the Company in his possession or under his control. This decision was affirmed by the Divisional Court and the Court of Appeal for Ontario.

Held:—That the books having been shewn to have been in the possession of G. at the date of the visit of the liquidator's agent to Ottawa, and the defen-

dant not having attempted to shew what became of them after that date, and his testimony that he did not know what had become of them having been discredited by the trial judge, there was no reason for interfering with the order appealed from.

(Grant vs British Canadian Lumber Co., 18 C. S.C., 708.)

56. The court may, at any time after making a winding-up order, make an order on any contributory for the time being settled on the list of contributories, directing payment to be made, in manner in the said order mentioned, of any moneys due from him or from the estate of the person whom he represents, to the company, exclusive of any moneys which he or the estate of the person whom he represents is liable to contribute by virtue of any call made in pursuance of this Act.

Origins. — R.S., (1886). c. 129, s. 48; 45 Vict., c. 23, s. 52.

Theory. — Ss. 51, 116, 130.

JURISPRUDENCE.

1. The amount of the dividend improperly paid to a shareholder would be a sum of money due within the meaning of this section, and in respect to which an order may be made.

(Stringer's Case, 4 Ch., 475.)

2. A holder of fully paid-up shares cannot be put on the list of contributories for the purpose of obtaining an order against him under this section, for payment of money due by him to the Company.

(Marlborough Club Co., Law Rep., 5 Eq., 365.)

3 A subscriber to a Company to be incorporated under Letters Patent, but who never subscribed after

the incorporation, nor paid calls after such incorporation is not liable to be sued on the stock thus subscribed for.

(B.R., Montreal, 1877, *The Union Navigation Co. and Couillard*, 21 L.C.J., 71.)

4 The Company plaintiff brought action for unpaid calls on stock subscribed by the defendant. Plea, that defendant never subscribed for any stock in the Windsor Hotel Company, but in another Company called the: *Royal Hotel Company*. He admitted his signature in a book produced at the trial, in which the name Windsor had been substituted for *Royal* and the capital had been changed from \$600,000 to \$500,000.

Held:—That, in default of proof by the plaintiffs that the alterations were made before the defendant signed the book, the action could not be maintained.

(Mackay, J.C.S., Montreal, 1878, *Windsor Hotel vs Laframboise*, 1 L.N., 63.)

57. The court may, at any time after making a winding-up order, and either before or after it has ascertained the sufficiency of the assets of the company, make calls on and order payment thereof by 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 all or any sums it deems 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.

Origins. — R.S. (1886), c. 129, s. 49; 45 Vict., c. 23, s. 50, in part, and 53.

Theory. — s. 51.

JURISPRUDENCE.

1. Section 49 of the winding-up Act provides that no calls shall compel payment before maturity thereof and that the extent of the liability of any contributory shall not be increased by anything in the section contained.

Under the above section, the liquidator of a Company in liquidation cannot, with or without the authorization of the Court, make calls of such a nature as to make the obligations of the contributory more onerous than provided by the charter incorporating the Company.

(Dunlop, J.C.S., Montreal, 1904, Victoria-Montreal Fire Ins. Co., vs Hyde, 26 C.S., 282.)

2 Les syndics à la liquidation d'une Compagnie d'assurance ont le pouvoir d'appeler des versements sur les actions souscrites, et les ayant régulièrement ordonnées, ils ne sont pas, sur une poursuite pour le paiement des fonds appelés, tenus d'établir la nécessité des appels.

(Casault, J.C.S., Québec, 1882, Ross vs Fiset, 8 Q.L.R., 251.)

3. The Court is not obliged to put off making a call until the claims made against a Company, which is in course of winding-up, have been established as debts, even where these claims are likely to be contested. The Court of appeal will not, unless a strong case is made, interfere with the discretion of the judge to whose Court the winding up is attached, by reducing the amount of a call ordered by him.

(Contract Corporation, Law Rep., 2 Ch. App., 95; 36 L.J., Ch., 79; 12 Jur. N.S., 931.)

4 Where a Company is wound-up under this act, and calls have been made on the shareholders, interest after the date of the winding-up can be paid out of the calls, only on those debts, which carry interest at law.

The Court refused to allow interest on the notes of a banking Company, where the notes were payable on demand, and no demand for payment had been made before the Company was ordered to be wound-up.

(Herefordshire Banking Co., Law Rep., 4 Eq., 250.)

4a If the notice of call states that interest will be charged on non-payment by a certain day, interest is payable.

(Lintott's Case, 4 Eq., 184.)

5. Upon a winding-up order being made, all unpaid balances on stock immediately become due and payable, and when a contract provided for payment of shares to be made by instalments, some of which were not due at the date of the order, calls may at once be made for the amounts unpaid.

(Cordova Co., 2 Ch., 580.)

6 In an action by a joint stock Company for calls on shares.

Held:—That the certificate, which the law makes *prima facie* evidence, is not rendered ineffectual by the mere denial of the defendant, but continues to be operative until some evidence be adduced tending to disprove the facts of which the certificate is offered as evidence.

(C.R., Quebec, 1879, Stadacona Ins. Co., vs Trudel, 6 Q.L.R., 31.)

7. Where an application is made to the Court to stay proceedings to enforce a call, for the purpose of enabling a shareholder to bring forward evidence in opposition to the call, the general rule is that the amount of the call must be paid into Court before the application will be granted.

(Overend, Gurney, and Co., Ex parte Oakes and Peeke, W.N., 1866, p. 361.)

8. "I quite think that if any error has been committed as to the mode of making or ascertaining the amount of the call, the error ought, if possible, to be corrected by the Court of Appeal; but to a very great extent, the *quantum of call must be a matter, that is to be left to the discretion of the judge, who has the conduct of the winding-up of the Company from first to last.*"

(Contract Corporation, Law Rep., 2 Ch. App., 99.)

58. The court may, in making a call, take into consideration the probability that some of the contributors upon whom the same is made may partly or wholly fail to pay their respective portions of the same: provided that no call shall compel payment of a debt before the maturity thereof, and that the extent of the liability of any contributory shall not be increased by anything in this section contained.

Origins. — R.S., (1886), c. 129, s. 49; 45 Vict., c. 23, s. 50, in part, and 53.

Theory. — Ss. 53, 54.

59. The court may order any contributory, purchaser or other person from whom money is due to the company, to pay the same into some chartered bank or post office savings bank, or other bank or Government savings bank, to the account of the court, instead of the liquidator.

2. Such order may be enforced in the same manner as if it had directed payment to the liquidator.

Origins. — R.S., (1886), c. 129, s. 50; 45 Vict., c. 23, s. 54.

Theory. — S. 51.

JURISPRUDENCE.

1. Where an order has been made on a contributory for payment of money into the bank to the account of the official liquidator, and it is desired to enforce that order by issuing a writ of *fi fa*, the course prescribed by the 38th Order of November, 1862, must be followed, and an order obtained for payment of the sum in question to the official liquidator himself.

(Leeds Banking Co., Law Rep., 1 Ch. App., 150; 35 L.J., Ch., 311.)

60. The court shall adjust the rights of the contributories among themselves.

Origins. — R.S., (1886), c. 129, s. 51; 45 Vict., c. 23, s. 55.

Theory.—Ss. 48, 54, 56.

JURISPRUDENCE.

1. If a creditor, who is also a shareholder, assigns his debt after the winding-up has commenced, the liquidator may, if he so desires, set off against the debt any moneys due from the shareholder on unpaid stock.

(Mackensie's Case, 7 Eq., 240.)

2. Where the liquidator or a creditor claims to set-off an assigned debt, the onus lies on the claimant to shew that the assignment was made before the commencement of the winding-up.

(Dickson vs Evans, 6 T.R., 57.)

3. Where the Company places money in a person's hands for a specific purpose and, after satisfaction of it, a balance remains, the person, in whose hands the money was placed, cannot, after the

winding-up order is made, set-off a debt owing to him, unless he can shew that the balance was retained with the Company's consent.

(Mid-Kent Fruit Factory, 1 Ch., 567.)

4. If there is a surplus and the shares are not all fully paid-up, the assets must *prima facie* be distributed to throw the loss of capital on the members in proportion to the nominal amount of the capital held by them respectively.

(Maude's Case, 6 Ch., 51.)

MEETINGS OF CREDITORS

61. The court may, if it thinks expedient, direct meetings of the creditors, contributories, shareholders or members to be summoned, held and conducted in such manner as the court directs, for the purpose of ascertaining their wishes, and may appoint a person to act as chairman of any such meeting, and to report the result of such meeting to the court.

Origins.—R.S., (1886), c. 129, s. 19; 45 Vict., c. 23, s. 223.

Theory. — Ss. 13, 27, 65, 124, 131, 153, 156.

2. Meetings subsequent to the first meeting of creditors and contributories are summoned by sending notices to them, and by advertisement.

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 of the Company.

(Emden, 77.)

3. The costs of summoning a meeting of creditors or contributories, at the instance of any person other than the Official Receiver or liquidator, are to be paid by the person, at whose instance, it is sum-

moned, who must, before the meeting is summoned, deposit with the Official Receiver or liquidator (as the case may be) security for the payment of such costs.

(Emden, 77.)

FORM

NOTICE TO CREDITORS OR CONTRIBUTORIES.

UNDER THE WINDING-UP ACT

District of Montreal.	}	SUPERIOR COURT.
Province of Quebec,		
No.		

In re

In Liquidation.

Notice is hereby given that Mr. Justice . of our Superior Court, has directed a meeting of the creditors (or contributories) of the above-named Company to be summoned pursuant to the above statute, for the purpose of ascertaining their wishes as to

certain matters relating to the winding-up of the said Company, and that such meeting will be held on day, the day of 191 , at o'clock in the noon, at Montreal, in the district of Montreal, at which time and place, all the creditors (or contributories) of the said Company are requested to attend.

Montreal, 191 .

Liquidator.

JURISPRUDENCE.

Held:—That where the Judge has exercised his discretion under s. 19 and refused to regard the request of a majority of the creditors and shareholders opposed to the petition, who did not offer or pro-

pose to continue business, but intended to allow the trust mortgage to be foreclosed, it should not be reviewed on appeal.

2. That the refusal to regard the wishes of all the unsecured creditors and the great majority of the secured creditors and shareholders was not a reasonable exercise of judicial discretion under s. 19, and the appeal should be allowed on that ground.
(Cushing Sulphite Fibre Co., 37 N.B.R., 254.)

3. If the liquidator were to follow the directions made at such meetings, and the directions were unreasonable, he may possibly be ordered to pay the resulting costs personally.

(Brown's Case, 17 Q.B.D., 488.)

4. If the creditors pass resolutions, which are not in the interest of the winding-up, but are for some other object, the liquidator may get the leave of the Court to disregard the resolutions.

(Poole's Case, Ch. D., 397.)

5. Where the Master orders a meeting of creditors to be held for the discussion of specific questions in connection with a winding-up, there is no right to discuss other questions at this meeting.

(Sun Lithographing Co., 5 O.W.R., 509.)

62. In such case regard shall, as to creditors, be had to the amount of the debt due to each creditor and as to shareholders or members, to the number of votes conferred on each shareholder or member by law or by the regulations of the company.

2. The court may prescribe the mode of preliminary proof of creditors' claims for the purpose of the meeting.

Origins. — R.S., (1886), c. 129, s. 19; 45 Vict., c. 23, s. 23.

Theory.—Ss. 2, 66, 154, 155.

JURISPRUDENCE.

1 Lorsque, dans une assemblée de créanciers, la majorité de tous les créanciers n'est pas présente, on doit supposer que ceux qui sont absents ont voulu s'en rapporter à l'opinion de la majorité de ceux qui étaient présents.

(Mathien, J.C.S., Montreal, 1885, *La Banque d'Echange du Canada vs Campbell*, 15 R.L., 373.)

63. Where any compromise or arrangement is proposed between a company in course of being wound up under this Act and the creditors of the company, or by and between any such creditors or any class or classes of such creditors and the company, the court, in addition to any other of its powers, may, on the application, in a summary way, of any creditor or of the liquidator, order that a meeting of such creditors or class or classes of creditors shall be summoned in such manner as the court shall direct.

Origins. — 62-63 Vict., c. 43, s. 3, in part.

Theory.—Ss. 36, 37, 131.

JURISPRUDENCE.

1. La transaction entre le liquidateur autorisé par le juge et un réclamant sous la section, 61 S.R. C., lie les créanciers de la Compagnie en liquidation et les autres intéressés; elle ne peut être attaquée que pour cause de nullité.

La loi 62 et 63 Vict., c. XLIII, qui permet la convocation et la consultation des créanciers en certains cas, n'a ni abrogé ni modifié la section 61 précitée, quoiqu'elle y ait ajouté.

(B.R., Montréal, 1904. *Ward vs Mullin*, 14 B.R., 49.)

64. If a majority in number, representing three-fourths in value, of such creditors, or class or classes of creditors, present either in person or by proxy at such meeting, agree to any arrangement or compromise, such arrangement or compromise may be sanctioned by an order of the court, and in such case shall be binding on all such creditors, or on such class or classes of creditors, as the case may be, and also on the liquidator and contributories of the company.

Origins. — 62-63 Vict., c. 43, s. 3, in part.

Theory.—Ss. 131.

JURISPRUDENCE.

1. Une compagnie en liquidation, qui a transigé avec plusieurs de ses créanciers, et si cette transaction est déclarée valide et exécutoire par la Cour Supérieure, la Compagnie a alors repris la direction de ses affaires et les pouvoirs du liquidateur ont cessé.

Si elle est poursuivie, elle ne peut, par exception à la forme, alléguer que la poursuite n'a pas été autorisée par la Cour et que le liquidateur n'a pas été mis en cause.

(Bruneau, J.C.S., Sorel, 1908, Beauchemin vs La Cie de Navigation du St-Laurent, 10 R.P., 41.)

65. In directing meetings of creditors, contributories, shareholders or members of the company to be held as provided in this Act, the court may either appoint a person to act as chairman of such meeting, or direct that a chairman be appointed by the persons entitled to be present at such meeting; and, in case the appointed chairman fails to attend the said meeting, the persons present at the meeting may elect a chairman qualified who shall perform the duties prescribed by this Act.

Origins. — 52 Vict., c. 32, s. 13.

Theory.—Ss. 27, 61, 152.

66. No contributory, creditor, shareholder, or member shall vote at any meeting unless present personally or represented by person acting under a written authority, filed with the chairman or liquidator, to act as such representative at the meeting, or generally.

Origins. — R.S., (1886), c. 129, s. 13; 45 Vict., c. 23, s. 18.

Theory.—S. 62.

PRODUCTION OF PASS-BOOKS

67. At every meeting of the contributories, creditors, shareholders or members, the liquidator shall produce a bank pass-book, showing the amount of the deposits made for the company, the dates at which such deposits were made, the amount withdrawn and dates of such withdrawal.

Origins. — R.S., (1886), c. 129, s. 37; 45 Vict., c. 23, s. 41.

Theory.—Ss. 42, 148.

68. The liquidator shall also produce such pass-book whenever ordered so to do by the court.

Origins. — R.S., (1886), c. 129, s. 38; 45 Vict., c. 23, s. 42.

Theory. — S. 140.

CREDITORS' CLAIMS

69. When the business of a company is being wound up under this Act, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, and for liquidated or unliquidated damages, shall be admissible to proof against the company.

2. In case of any claim subject to a contingency or for unliquidated damages or which for any other reason does not bear a certain value, the court shall determine the value of the same and the amount for which it shall rank.

Origins. — R.S., (1886), c. 129, s. 56; 49 Vict., c. 46, s. 1; 45 Vict., c. 23, s. 60, in part.

Theory. — 1. See: ss. 2, 75, 76, 80, 83.

2. A person, who has incurred liabilities as trustee for a Company, has a right to be indemnified, in the winding-up of the Company, against liabilities.

(Cox, 241.)

3. If the performance of a contract becomes impossible on account of the Company being wound-up, the person, with whom the contract was made, can prove for the damages consequent upon its non-performance, but cannot prove merely on the ground that the winding-up constituted in itself a breach of contract, inasmuch as permission might be given to the liquidator under the winding-up to perform the contract. (Emden, 170.)

JURISPRUDENCE.

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1. A Company, which had taken a lease of a quarry and covenanted for payment of the rent, was ordered to be wound-up and the leasehold interest was sold under the winding-up. On the application of the lessor for leave to enter a claim for future rent, it was ordered that a claim should be entered for the whole value of the future rent, with the qualification that the lessee should not receive more than the amount which the Company might become liable to pay under the covenant; the order to be without prejudice to any application to dissolve the Company, but no order of dissolution to be made without notice to the lessor.

(Haytor Granite Co., Law Rep., 1 Ch. App., 77; 35 L.J.L. Ch. 154; 12 Jur. N.S., 1; 13 L.T.N.S., 515.)

1a. The claimants sold the Company a machine upon an order signed by the Company, the conditions of which were that the Company should pay a part of the price in cash and the balance in instalments payable with the last of them, and that the title should not pass to the Company until the moneys payable by them under the order, as well as under any other orders which might be given by the Company to the claimants, should be paid. At the time of the commencement of the winding-up of the Company, one instalment, the interest, and a further sum for goods ordered after the first order, remained unpaid. The liquidator came into possession of the machine, and sold it to H. subject to an alleged lien in favour of the claimants for the amount of the unpaid instalments only.

Held:—That the rights of the claimants under the contract still existed, and they were entitled to recover the full amount due under the terms of the order out of the estate.

(Canadian Camera and Optical Co., 2 O.L.R., 671.)

2. A secured creditor is entitled to prove for the amount of his debt, as it stands at the time when his claim is sent in, without regard to securities which have been realized by him, between the sending in of his claim, and its being adjudicated upon.

(Breech Loading Armoury Co., Wragge's case, Wine Shipping Co., Ex parte Alliance Bank, Law Rep., 3 Ch. App., 769.)

3. An assignee of a debt due from a Company in course of winding-up does all that is necessary to complete his title and to take the debt out of the order and disposition of the assignor by giving notice to the official liquidator.

(Breech Loading Armoury Co., Wragge's case, Law Rep., 5 Eq., 281.)

4. A municipality's right to prove a claim for taxes against a Company in liquidation depends upon a municipality's right to maintain an action therefor. Under the Assessment Act, this right of action only exists when the taxes cannot be recovered in a special manner provided for by the Act and after these special manners have been exhausted. Where therefore, a claim was made for arrears of taxes against a Company in liquidation and it was shown that, before the date of the winding-up order, the taxes might have been, but were not recovered by distress, the claim was disallowed.

(Ottawa Porcelain and Carbon Co., 31 O.R., 679.)

5. The Master has the same jurisdiction in a winding-up to try claims of unliquidated damages arising out of a breach of contract as he would have in an administration proceeding.

(Clarke vs Union Fire Ins. Co., Caston's Case, 10 O.P.R., 339.)

6. Claims are proved by affidavit in the ordinary way. The affidavit may be made by the creditor himself or some person duly authorized by him, if the latter, he should state his authority and the means of his knowledge.

(Hare's Case, 10 Ch., 218.)

7 If a creditor, who makes a claim, will not submit to produce all the documents in his possession relating to his claim, it will be disallowed.

(Constantinople and Alexandria Hotel Co., 35 Beav., 349.)

8. That there is nothing in s. 56 of the Dominion Winding-up Act, which alters or interferes with the *lex loci contractus*; and therefore, in the case of a lease entered into in Montreal, where the Quebec law provided that on the insolvency of the lessee, the rent not yet exigible by the terms of the lease should become so by reason of the insolvency of the tenant, a claim for the whole rent to the end of the term must be allowed to the lessors, in the liquidation proceedings, which were being carried on under the Dominion Statute.

(Robertson, J., Ontario, 1892. Hart vs The Ontario Express and Transportation Co., 16 L.N., 30.)

9. Where the taxed costs of a successful application against a Company were directed to be paid by the Company, which was being wound-up, the official liquidator was held justified in refusing payment of the costs in preference to the other debts of the Company.

(Scottish Universal and Finance Bank, Ex parte Ship, 11 Jur. N.S., 619; Ch.; 12 L.T.N.S., 728.)

9a. A Company incorporated by a special Act are not liable for the expense of procuring incorporation, in the absence of a provision in the Act that the Company shall be so liable, unless after incorporation they agree to pay such expenses; and solicitors have no equitable claim against a Company for the costs of procuring such an Act, on the ground that the Company have taken benefit of their services.

(Crown Mutual Hail Ins. Co., 18 Man. R., 51.)

10. The declaration of a dividend, when the Company is insolvent, contrary to s. 32 of the Act, and the application of such dividend in payment of shares in full, cannot be allowed to stand, and, in the winding-up, the shareholders are entitled to no credit in respect thereof.

(Northern Constructions, Ltd., 19, Man. R., 528.)

11 Shareholders in a loan Company, in answer to a proposal from the Company, paid to the Company, towards the reserve fund dividends paid to them by the Company and various other sums of money, with a view to increase the reserve fund to the same amount as the paid-up stock.

Held:—That such shareholders were not entitled to rank as creditors upon the assets of the Company with the other creditors, depositors and debenture holders, and that any claim they had against the Company and its reserve fund was subject to the payment of the debts of the Company.

(Atlas Loan Co., Claims on Reserve Fund, 9 O. L.R., 468.)

12. Where a claim was made for a certain sum by a financial agent for negotiating the purchase of a business by a Company, and it appeared on the evidence that the money claimed was to be paid on the completion of the negotiation, but the negotia-

tion had not been completed before the winding-up of the Company, the claim was disallowed, without prejudice to the claimant applying for payment for his services upon a *quantum meruit*.

(English Joint Stock Bank, Bradlaugh's case, W. N. 1861, p. 12.)

13. Where a sum of money was paid into a branch bank, on the same day on which the intelligence arrived that the head office had stopped payment, and it appeared on the evidence that the money was paid before the message had been received, the court refused to order the money to be paid in preference to other claims.

(Agra and Masterman's Bank, Ex parte Waring, W.N., 1866. p. 399.)

14. That a creditor is not entitled to rank for the full amount of his claim upon the separate estates of insolvent debtors jointly and severally liable for the amount of the debt, but is obliged to deduct from his claim the amount previously received from the estates of the other parties jointly and severally liable therefor.

15 That a person, who has realized his claim of his debt upon the insolvent estate of his co-debtors, cannot be allowed to rank upon the estate (in liquidation under the Winding-up Act, of his other co-debtors jointly and severally liable without first deducting the amount he had previously received from the estate of his other co-debtors.

16 That a person, who makes a deposit with a bank after its suspension, the deposit consisting of cheque of third parties drawn on and accepted by the bank in question, is not entitled to be paid by privilege the amount of such deposit.

(Confirming, 5 M.L.R.Q.B., 407: Ontario Bank vs Chaplin: In re Exchange Bank of Canada, 20 C.S.C., 152.)

17. After the winding-up order, a judgment creditor of the Company cannot bring an action against a contributory for payment of the amount unpaid on his shares. The winding-up order is a complete bar to his recovery and he must come in with the other creditors and receive whatever may be coming to him on a fair division of all available assets.

(Shaver vs Cotton, 23 A.R., 126.)

18. Where a bank has issued a letter of credit, on the terms that the bills, which they agree to accept, are to be covered by bills of lading to a like amount, suspension of payments by the bank before there has been time for the letter of credit to be used, is not a breach or repudiation of contract; inasmuch as permission might have been given to the liquidators under the winding-up to negotiate the bills; and a claim by the holders of the letter of credit, under this act, for damages for the alleged breach, was disallowed.

(Agra Masterman's Bank, Tondeur's Case, Law Rep., 5 Eq., 160.)

70. Clerks or other persons in, or having been in the employment of the company, in or about its business or trade, shall be collocated in the dividend sheet by special privilege over other creditors, for any arrears of salary or wages due and unpaid to them at the time of the making of the winding-up order, not exceeding the arrears which have accrued to them during the three months next previous to the date of such order.

Origins. — R.S., (1886), c. 129, s. 56; 49 Vict., c. 46, s. 1.

Theory. — 1. If an officer or servant is engaged at a fixed stipend for a certain term, and a winding-up takes place before its expiration, he will be entitled to prove for the value of an annuity equal to

the amount of the salary for the remainder of the term, and in addition he can also claim the pecuniary value of any other benefits, which he would have enjoyed under his contract.

(Einden, 164.)

JURISPRUDENCE.

1. The expression "other person" must be interpreted as meaning: **Persons of a companionable class** or associate occupations.

(Ritchie-Hearn Co., 6 O.W.R., 424.)

But not as meaning:

(a) An auditor (Ontario Forge Co., Townsend's case, 27 O.R., 230.)

(b) A person employed as a mechanical expert and inspector of departments of the Company.

(American Fire Co., Dingman's case, 2 O. R., 29.)

1a. That commercial travellers are within the meaning of "clerks and other persons" mentioned in s. 70.

That a "dummy" director, who is in fact a commercial traveller, is excluded from the above class of preferred creditors, as it would not do to allow a director to better his position by asserting that he had not done his duty as a director.

(Lee vs Freidman, 14 O.W.R., 1139; 20 O.L.R., 49.)

2. Where the business is continued after the winding-up order, and the former servants are actually employed, the old contract between the Company and its servants continues in force, and notice of discharge must be given them in accordance with it.

(English Joint-Stock Bank, Harding's case, Law Rep., 3 Eq., 341.)

3. A compulsory winding-up discharges all servants, although the liquidator, without actually continuing the business, employs the servants in analogous duties with a view to reconstruction.

(MacDowall's Case, 32 C.D., 366.)

71. The law of set-off, as administered by the courts, **whether of law or equity, shall apply to all claims upon the estate of the company, and to all proceedings for the recovery of debts due or accruing due to the company at the commencement of the winding-up, in the same manner and to the same extent as if the business of the company was not being wound up under this Act.**

Origins. — R.S., (1886), c. 129, s. 57; 45 Vict., c. 23, s. 60, in part.

Theory.—S. 100.

2. A secured debt can set-off against one that is not secured, and a debt on bond against a debt on simple contract.

(Emden, 179.)

JURISPRUDENCE.

1. Un dépôt fait dans une banque est un prêt à la dite banque, et l'art. 1190 C.C., qui rend incompensable la dette née d'un dépôt, n'empêche pas que la somme déposée soit compensée par une dette due à la banque par le déposant.

La compensation, entre une dette due à une banque et la créance résultant d'un dépôt à cette banque, peut s'effectuer jusqu'à la signification de la requête demandant la mise en liquidation de la banque, pourvu que les 2 dettes soient également liquides et exigibles.

Cependant, le terme d'une lettre de change ou d'un billet est censé stipulé en faveur du créancier et du débiteur, et, partant, le faiseur ou l'endosseur d'un billet escompté dans une banque, ne peut en renonçant au bénéfice du terme du billet, qui n'est pas encore échu, compenser la dette née de ce billet par la somme qu'il a en dépôt à la banque.

Bien qu'un créancier d'une banque en liquidation ait le droit d'intervenir dans une instance pendante entre les liquidateurs et un débiteur de la banque qui prétend que sa dette a été éteinte par compensation, pour surveiller la procédure et prendre les mesures nécessaires pour la protection de ses droits, ce créancier sera condamné aux dépens encourus par le débiteur de la banque s'il produit, à l'encontre de la demande de celui-ci, une contestation inutile fondée sur les moyens, qui ont déjà été invoqués par les liquidateurs.

(B.R., Montreal, 1902, Vanier vs Kent, 11 B.R., 373) ; (conf. 20 C.S., 545.)

2. After a bank has suspended payments, and its insolvency is notorious, compensation of a debt due to the bank cannot be effected by a transfer to the debtor of debts due by the bank to third parties, where such transfer has been made to the debtor, after the suspension and within 30 days prior to winding-up proceedings under the Winding-up Act.

This rule is not affected by the circumstances that the amounts offered in compensation consisted of monies deposited with the bank by such third parties, for the special purpose of aiding the debtor to meet his indebtedness to the bank, but not transferred to the debtor until after the suspension of payments.

(B.R., Montreal, 1904, Communauté des Soeurs de la Providence vs Kent et al., 13 B.R., 483.)

3. S. 57 of the Winding-up Act, R.S.C., c. 129, provides that "the law of set-off as administered by the Courts, whether of law or equity, shall apply to all claims upon the estate of the Company, and to all proceedings for the recovery of debts due or accruing due to the Company at the commencement of the winding-up, in the same manner, and, to the same extent, as if the business of the Company was not being wound up under this Act."

Held: (reversing the judgment of the Supreme Court of New Brunswick.)

That this section does not give a right to a contributory to set-off an independent debt owed to him by a Company against calls, made in the course of winding-up proceedings either for capital or double liability.

(*Maritime Bank vs Troop*, 12 L.N., 1889, 16 C. S.C., 456.)

4. Where drafts and notes are placed with a bank by a debtor of the bank, not as collateral security, but for collection, the compensation does not take place until the bank has received the amounts collected by them on such notes; and, in the present case, the debtor having become insolvent before any amounts were received on such notes, compensation did not take place between the amount collected by the bank and the debt due to it.

(*Q.B., Montreal, 1886, Exchange Bank vs Canadian Bank of Commerce*, 2 M.L.R.B.R., 476.)
(Reversing, 1 M.L.R.C.S., 225.)

3 Where one bank creditor of another bank for the amount of a note discounted for it, received from the bank indebted to it (then solvent) sundry drafts

for collection; that compensation took place in favour of the creditor from the moment of the delivery of the drafts, and therefore the latter was not bound to bring back to the estate what it received on account of the drafts, after the insolvency of the debtor bank.

That compensation did not take place in favor of the creditor for the amount of a draft received from the debtor bank, within thirty days before the commencement of the winding-up order.

(Torrance, J., Montreal, 1885, The Exchange Bank vs Canadian Bank of Commerce, 1 M.L.R.C.S., 225.) (Reversed by 2 M.L.R.B.R., 476.)

6. Compensation takes place, *pleno jure*, of the debt due by a shareholder in a Bankrupt Railway Co., with a debt due by the Co., of the Shareholder for arrears of salary as President of the Company.

(B.R., Montreal, 1868, Delisle vs Ryland, 12 L.C. J., 29.)

6a. Subscribers for shares in the Company are not entitled in the winding-up to set-off, against their liability to pay up the shares, claims for goods supplied to the Company under such an agreement.

(Jones and Moore Electric Co., 18 Man. R., 549.)

7. Against a claim of a person upon the assets of a Company in liquidation, based upon a lease, the Company cannot set-off damages, which it alleges it has suffered at the hands of the claimant; and allegations of such damages will be struck out upon demurrer.

(Montreal Cold Storage, and Freezing Co., Mullin's claim. 4 R.P., 341.)

8. A shareholder set up that the Company was indebted to him in a large amount, being for amount due under one of the Company's policies upon property destroyed by fire, and claimed the right to set-off each amount.

Held:—That, in view of the provisions of sub-s. 2 of s. 44 of the Companies Ordinance and par. 2 of s. 14 of the Winding-up Ordinance, the shareholder was entitled to set-off such debt.

(Globe Fire Insurance Co., 2 S R., 234.)

9. A certificate of 238 shares of stock was issued to one McN. described as fully paid-up, pursuant to an understanding between him and the directors. He paid for 171 shares, and accepted the certificate knowing that 67 shares were not paid for, but believing that there was no further liability on him in respect to them. There was no evidence of any application for them by him or any allotment to him. He transferred one share, surrendered his certificate, and got a new one for 237 shares, and acted as director of the Company. His name was in the stock ledger and stock register as a holder of 237 shares.

Held:—That he was a shareholder with all the rights and liabilities of a shareholder and that he was properly put upon the list of contributories for the amount actually unpaid in respect of the shares. McN. had paid \$1,500.00, on a guarantee given for the Company, and claimed to set off the amount against his liability on the shares.

(Warton Beet Sugar Mfg. Co., McNeil's case, 10 O.L.R., 219.)

10. A covenant or agreement with the Company, to perform some future act still unperformed in consideration for paid-up shares in an incorporated Company, cannot be pleaded in set-off to a claim by the liquidator of the Company against the shareholder as a contributory in a winding-up proceeding for the amount of the shares issued to and accepted by the shareholder and remaining registered in his name upon the stock register although the shares may be described as fully paid up.

(K.B., Winnipeg Hedge and Wire Fence Co., Ltd.,
1 D.L.R., 316.)

11. The misfeasant cannot set-off money due
from the Company against sums due for misfeasance.
(Pelly's case, 21 C.D., 492.)

72. The court may fix a certain day or certain days
on or within which creditors of the company may send
in their claims, and may direct notice thereof to be
given by the liquidator, and determine the manner in
which notice of the day or days so fixed shall be given
by the liquidator to the creditors.

Origins. — R.S., (1886), c 129, s. 59; 45 Vict.,
c. 23, s. 62.

Theory.—Ss. 76, 80, 181.

FORM

Motion to Fix Delay for Filing Claims

UNDER THE WINDING-UP ACT

Province of Quebec,	}	SUPERIOR COURT.
District of Montreal.		
No.		

In re

In Liquidation.

and

Liquidator.

MOTION OF THE LIQUIDATOR:

That a delay of thirty days be fixed within which
creditors of said Company shall send in their claims,
after insertions in one french and one english news-
papers published in the City of Montreal: the whole
with costs,

Montreal, day of , 191 .

Attorney for the Liquidator.

JURISPRUDENCE.

1. Double ranking is not permissible on the liquidation of a Company.

The sureties for a debt due from a Company to their principal are entitled to rank on liquidation if they pay the claim before the claim is filed by the principal; but if the principal proves his claim, the sureties cannot also prove but upon payment they would be subrogated to the principal, at the date of payment.

2. Where under the terms of a guarantee, a creditor of a Company had the right to compromise his claims against the Company, and still hold the sureties for the balance, the sureties are not entitled to rank on the liquidation of the Company, after a compromise had been entered into between the liquidator of the Company and the creditor, for a balance for which they are responsible to the creditor, since the creditor himself would not be entitled to rank after the compromise was made, the compromise being in satisfaction of all the claims against the funds in the liquidator's hands, and the rule being that the sureties can have no higher rights than the creditor himself had.

(*Strafford Fuel Co., Ltd.*, 8 D.L.R., 146.)

73. The liquidator may give notice in writing to creditors who have sent in their claims to him, or of whose claims he has notice, and whose claims he considers should not be allowed without proof, requiring such creditors to attend before the court on a day to be named in such notice and prove their claims to the satisfaction of the court.

2. In case any creditor does not attend in pursuance of such notice his claim shall be disallowed, unless the court sees fit to grant further time for the proof thereof.

3. If any creditor attends in pursuance of such notice, the court may on hearing the matter allow or disallow the claim of such creditor in whole or in part.

Origins. — R.S., (1886), c 129, s. 59; 45 Vict., c. 23 s. 62.

Theory.—S. 83.

JURISPRUDENCE.

1. S. 46 of the Bank Act, 1890, 53 Vict., c. 31 (D.), providing that "no person, who is not a director, shall be allowed to inspect the account of any person dealing with the bank," does not enable a bank to refuse to disclose its transactions with one of its customers, when the propriety of those transactions is in question in a Court of law between the bank and another customer who attacks them, and shows good cause for requiring the information he seeks. The Company had an account with the bank (claimant), and the manager of the Company (who had power to sign notes for the Company) had also an account at the same office of the bank. The claim of the bank against the Company in winding-up proceedings included a number of promissory notes made by the manager and indorsed by the Company. The liquidator showed that notes so made and indorsed had been charged at maturity to the Company's account by the direction of the manager, and that renewals of these notes formed part of the bank's claim:—

Held:—That the liquidator, in examining the agent of the bank for the purpose of showing that the original consideration for several of the notes, included in the bank's claim, was an advance to the manager for his own private purposes, and that the agent, knowing these notes to be the private debt of the manager, had, at his request, charged them to the Company's account, was entitled to refer to the manager's own account with the bank, though the manager was not a party to the proceeding; more especially as the bank had set up certain transfers of cash from one account to the other as justifying them in charging the Company's account with the manager's liabilities.

2. That there was nothing to prevent the liquidator, who stood in the place of the Company, from impeaching the consideration for the notes offered in proof by the bank, just as the Company itself might have done, but no further.

3. That periodical acknowledgments given by the manager to the bank of the correctness of the Company's account could not be set up as a bar to an inquiry into the account, where specific errors in it were charged, to the knowledge of the bank.

(D.C., Chatham Banner C.; Bank of Montreal's Claim, 2 O.L.R., 672.)

74. After the notices required by the two last preceding sections have been given, and the respective times therein specified have expired, and all claims of which proof has been required by due notice in writing by the liquidator in that behalf have been allowed or disallowed by the court in whole or in part, the liquidator may distribute the assets of the company or any part thereof among the persons entitled thereto and without reference to any claim against the company which shall not have then been sent to the liquidator.

2. The liquidator shall not be liable to any person whose claim shall not have been sent in at the time of distributing such assets or part thereof for the assets or part thereof so distributed.

Origins. — R.S., (1886), c. 129, s. 60; 45 Vict., c. 23 s. 63.

Theory.—S. 93.

JURISPRUDENCE.

1. "If the liquidator had knowingly and wilfully left unpaid a debt, of which he had notice, I am not prepared to say that he is not personally answerable to the creditor who has been unpaid, because the liquidator has violated a plain statutory duty to pay the debts *pari passu* out of the assets of the Company, as they came to his hand."

(London and Caledonian Co., 11 C.D., 140.)

75. In case any claim or claims shall be sent in to the liquidator after any partial distribution of the assets of the company, such claim or claims, subject to proof and allowance as required by this Act, shall rank with other claims of creditors in any future distribution of assets of the company.

Origins. — R.S., (1886), c. 129, s. 60; 45 Vict., c. 23 s. 63.

Theory. — S. 69.

SECURED CLAIMS

76. If a creditor holds security upon the estate of the company, he shall specify the nature and amount of such security in his claim, and shall therein, on his oath, put a specified value thereon.

Origins. — R.S., (1886), c. 129, s. 62; 45 Vict., c. 23 s. 65.

Theory.—Ss. 70, 79, 83.

JURISPRUDENCE.

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1. That a person, who has realized a portion of his debt upon the insolvent estate of his co-debtors, cannot be allowed to rank upon the estate (in liquidation under the Winding-up Act) of his other co-debtors jointly and severally liable without first deducting the amount he has previously received from the estate of his other co-debtors.

(Ontario Bank vs Chaplin, 20 C.S.C., 152.)

2. A person, who makes a deposit with a bank after its suspension, the deposit consisting of cheques of third parties drawn on and accepted by the bank in question, is not entitled to be paid by privilege the amount of such deposit.

(Q.B., Montreal, 1889, Ontario Bank vs Chaplin, 5 M.L.R., B.R., 407). (Conf. by Supreme Court, 20 C.S.C., 152.)

3. A person, who has guaranteed a debt of the Company, may prove in respect to his liability to be called upon to make payment under his guarantee, even though payment has not yet been made by him. The claim which he proves is practically a claim to indemnity.

(Dahnar's Case, 38 W.R., 752.)

4. Inter by money representing the gage of particular creditors during the winding-up proceedings falls into the mass and cannot be claimed by such creditors.

(Archibald, J.C.S., Montreal, 1902, Bulmer and Bros., 22 C.S., 46.)

5. An insurance Company, in order to deposit \$50,000.00 with the Minister of Finance and receive a license to do business in Canada, according to the provisions of the Insurance Act (R.S.C., c. 124), deposited the money in a bank and forwarded the deposit receipt to the minister. The money in the

bank drew interest which, by arrangement, was received by the Company. The bank having failed, the Government claimed payment in full of this money as money deposited by the Crown.

Held:—(reversing the judgment appealed from, 27 N.B.R., 351):

That it was not the money of the Crown but held by the Finance Minister in trust for the Company; it was not, therefore, subject to the prerogative of payment in full in priority to other creditors.

(*Maritime Bank vs The Queen*, 17 C.S.C., 657.)

5a. The Crown prerogatives can only be taken away by express statutory enactment. Therefore, Her Majesty's right to payment in full of a claim against the assets of an insolvent bank in priority of all other creditors, is not interfered with by the provisions of the Bank Act (R.S.C., c. 120, s. 79) giving note-holders a first lien on such assets, the Crown not being named in such enactment.

Held: (Per Gwynne):

That under legislation of the old Province of Canada, left unrepealed by the B.N.A. Act, no such prerogative could be claimed in the Provinces of Ontario and Quebec; the Court would not, therefore, be justified in holding that such a right attached, under the B.N.A. Act, in one Province of Canada, which does not exist in them all. (*Maritime Bank vs The Queen*, 17 C.S.C. 657).

6. The Bank of P. E. Island become insolvent, and a winding-up order was made. The bank was indebted to her Majesty in \$93,494.20, public money of Canada on deposit to the credit of the Receiver-General. The first claim filed at request of the respondent (liquidator of the bank) interfered with the provisions of the Bank Act (R.S.C., c. 120, s. 79), giving note-holders a first lien on such assets, the Crown did not especially notify the liquidator that

Her Majesty would insist upon the privilege of being paid in full. Two dividends of 45 per cent. each were afterwards paid, and on the 28th February, 1884, there was a balance due of \$65,426.95, and respondent was notified that Her Majesty intended to insist upon the prerogative right to be paid in full. At this time, there was on hand a sum sufficient to pay the claim in full. The Supreme Court (P.E.I.) held that Her Majesty the Queen, represented by the Minister of Finance, and the Receiver-General, had no prerogative or other right to receive dividends as an ordinary creditor of the bank.

6a. *Held*:—(reversing the judgment appealed from):

That the Crown, claiming as a simple contract creditor, has a right to priority over other creditors of equal degree. This prerogative privilege belongs to the Crown as representing the Dominion of Canada, when claiming as a creditor of a provincial Corporation in a provincial Court, and is not taken away in proceedings in insolvency by 45 Vict., c. 23.

7. That the Crown had not waived its right to be preferred in this case by the form in which the claim was made and by the acceptance of two dividends.

(The Queen vs Bank of Nova Scotia, 11C.S.C., 1.)

8. The commencement of a mechanics lien is coincident with the commencement of the work. Liens claimed by different lien-holders were in respect of the work done in building upon the lands of a Company prior to the date of the service of a petition for the winding-up of the Company, but some of the claims for liens were not registered until after that date, though all within 30 days after the commencement of the liens:

Held:—That all the liens existed by force of the Mechanics' Lien Act prior to the service of the petition, and their efficacy and precedence were not disturbed by the subsequent winding-up proceedings; and the lien-holders had a valid claim attaching upon the land and to be paid in priority to ordinary creditors.

(Clinton Tresher Co., 1 O.W.N., 445.)

8a. The holders of mechanics' liens filed against mineral claims owned by a Company, which was subsequently ordered to be wound up, recovered judgment thereon in a County Court on the day on which the winding-up order was made. In the list of creditors made up by the liquidator the lien claimants did not appear as secured creditors, but as judgment creditors. The winding-up order was made on the petition of H., a surveyor who held the field notes of the survey made by him, and who afterwards proposed that the advances the moneys necessary to obtain Crown grants of the claims, and retain a lien on them until he was paid; the liquidator applied to the Court for leave to accept the proposal, and an order was made, without notice to the lien holders, giving H. a first charge on the claims for his debt and the amount advanced afterwards on H's application, an order was made, on notice to the liquidator, but without notice to the lien-holders, that the claims be sold to pay his charge. The lien-holders did not appeal from either of the last orders, but applied for leave to enforce their security, and that be declared to have priority over H.

Held:—That the order giving H. priority over the lien-holders was made without jurisdiction, and the lien-holders were not bound by it.

(Ibex Mining and Development Co. of Siocan, 23 C. L. T. 301; 9 B. C. R. 557).

9. Under s. 79 of the Bank Act, R.S.C., c. 120, the note-holders have the first lien on the assets of an insolvent bank in priority to the Crown.

(Liquidators Maritime Bank vs Receiver-General of New-Brunswick, 20 C.S.C., 695.)

9a. Claims for arrears of salary, made by persons occupying the positions of president and vice-president of a Company, such salary being made payable under resolutions duly passed therefor, are valid; and upon the liquidation of the Company are payable in priority to the claims of the general body of creditors.

(Fane vs Langley, 20 C. L. T. 9; 31 O. R. 254).

10. A creditor, whose debt is guaranteed by some third party, is not to be considered a secured creditor and bound to value the guarantee as a security, even if the Company has contracted to indemnify the surety.

(Sheffield Bank vs Clayton, 1 Ch., 621.)

11 Creditors holding fully secured claims and content to rely on their security, without seeking to share in their distribution of the other assets, cannot be compelled to file their claims in winding-up proceedings under the Dominion Winding-up Act, R.S.C., 1886, c. 129, and have them adjudicated upon therein; and where such creditors, without any attention to submit to such adjudication, had filed with the liquidator affidavits stating their claims as fully secured, leave was given them to withdraw the same.

(D.C., Ontario, 1902, Brampton Gas Co., 4 O.L.R., 509.) (8 R.L. n.s., 515)

12 A person, who *bona fide* takes a security in the ordinary course of business from an incorporated Company, is not bound to inquire into the regularity

of the directors' proceedings leading up to the giving of the security; he is entitled to assume that everything has been done regularly. In this respect, a shareholder stands on the same footing as a stranger.

(*Jackson vs Cannon*, 10 B.C.R., 73.)

13. Where the liquidator retains possession of the property with a view to sale, he may be ordered to pay taxes subsequently following due as part of the expenses of the winding-up.

(*National Arms*, 28 C.D., 474.)

13a. Taxes imposed before the winding-up of a Company has commenced can only rank as ordinary debts, in the absence of statutory lien or charge, but taxes imposed after the commencement of the winding-up must be paid in full, as part of the expenses of the winding-up, if the liquidator has remained in possession, and such possession has been "a beneficial occupation".

(*Ideal House Furnishers, Ltd.*, 18 Man. R., 717).

14. A secured creditors, who realizes his security, may apply the proceeds towards payment of his principal, interest and costs, but he cannot apply the proceeds first in payment of interest due after the winding-up and then in reduction of principal and prove for the balance.

(*London-Windsor, etc., Co.*, 1 Ch., 639.)

15. On a petition of a mortgagee, asking for the liquidator's reconveyance to him of the Company's equity of redemption in the mortgaged property, the Court has jurisdiction to make the usual order of foreclosure or sale.

(*Essex Land and Timber Co.*, 21 O.R., 367.)

15a. *Held*:—That the Ontario Bank was entitled to certain securities assigned to them by the insolvent Company notwithstanding notice of the assignment had not been given to those liable on the securities.

(*William Hamilton Mfg. Co.*, 1 O.W.N., 61) (*aff.* by 1 O.W.N. 421.)

16. La rémunération et les frais du liquidateur et de ses avocats, agissant en vertu du présent acte, seront taxés contradictoirement avec les parties intéressées ou leurs procureurs, si des créanciers s'objectent à la feuille de dividendes telle que préparée.

(Tellier, J.C.S., 1906, Montreal, The Laurie Engine Co., and Mackie, 8 R.P., 59.)

17. Where an action is commenced, before the winding-up, and is continued by the plaintiff, after the winding-up, by leave of the Court, the plaintiff has not a preferred claim for his costs, but is in the same position as if he had prosecuted his suit to judgment, before the winding-up, *i. e.* he must add his costs to his debt and rank for them.

(Thurso New Gas Co., 42 C. D., 486.)

77. The liquidator, under the authority of the court, may either consent to the retention by the creditor of the property and effects constituting such security or on which it attaches, at such specified value, or he may require from such creditor an assignment and delivery of such security, property and effects, at such specified value, to be paid by him out of the estate so soon as he has realized such security, together with interest on such value from the date of filing the claim till payment.

Origins. R.S., (1886). c. 129, s. 62; 45 Vict., c. 23, s. 65.

Theory. — S. 82.

78. In case of such retention, the difference between the value at which the security is retained and the amount of the claim of such creditor shall be the amount for which he may rank as aforesaid.

Origins. R.S., (1886). c. 129, s. 62; 45 Vict., c. 23, s. 65.

Theory.—S. 83.

79. If a creditor holds a claim based upon negotiable instruments upon which the company is only indirectly or secondarily liable, and which is not mature

or exigible, such creditor shall be considered to hold security within the meaning of the three last preceding sections, and shall put a value on the liability of the person primarily liable thereon as being his security for the payment thereof.

2. After the maturity of such liability and its non-payment, he shall be entitled to amend and revalue his claim.

Origins. — R.S., (1886), c. 129, s. 62; 45 Vict., c. 23, s. 65.

Theory.—Ss. 76, 83.

80. If the security consists of a mortgage upon ships or shipping, or upon real property, or of a registered judgment, or an execution binding real property which is not by some other provisions of this Act invalid for any purpose of creating a lien, claim or privilege upon the real or personal property of the company, the property of the company, the property mortgaged or bound by such security shall only be assigned and delivered to the creditor,—

(a) subject to all previous mortgages, judgments, executions, hypothecs and liens thereon, holding rank and priority before his claim; and,

(b) upon his assuming and binding himself to pay all such previous mortgages, judgments, executions, hypothecs and liens; and,

(c) upon his securing the estate of the company to the satisfaction of the liquidator against any claim by reason of such previous mortgages, judgments, executions, hypothecs and liens.

Origins. — R.S., (1886), c. 129, s. 63; 45 Vict., c. 23, s. 66.

Theory.—S. 84.

JURISPRUDENCE.

1 Where debenture-holders, in a suit against a Company to enforce their mortgage security, obtained the appointment of a receiver before, but subsequently to an application for, an order to wind-up the Company, and there was a dispute between the receiver and the liquidator in the winding-up as to what property was conveyed by the mortgage, and

the liquidator had obtained liberty to dispute in the suit the validity of the mortgage, the Court declined to discharge the receiver, to appoint the liquidator receiver in his place.

Order, appointing receiver in a debenture-holders' suit, varied by limiting property to be received by him to property conveyed by the mortgage security.

(New Brunswick, 1901, Bank of Montreal vs The Maritime Sulphite Fibre Co., 2 N.B.R., 328); (8 R.L., n.s., 480.)

2. A Company being in liquidation, the mortgagees went into possession prior to the issue of the winding-up order. On an application to restrain the mortgagees from selling under their security, objection was taken that the attendance of the mortgagees on the application and the approving of the winding-up order was such a taking part in the winding-up as gave the Court jurisdiction to restrain them. This being overruled, the liquidator sought to restrain the mortgagees from selling without the sanction of the Court, on the ground that such sale would be a "proceeding against the Company" under s. 22 of the Winding-up Act, R.S.C., c. 144:

Held:—That the mortgagees were proceeding rightfully.

(B.C., Tie and Timber Co., 14 B.C.R., 81.)

3. A secured creditor has a right to apply for and obtain leave to bring an action to enforce his security.

It is not optional for secured creditors to either prove his claim in a winding-up or else proceed with an action to enforce it, and if he does commence an action, it is still under sect. 63 et seq. of the Act.

(C. Sup., B.C., 1902, The Lenora Mount Sicker Copper Mining Co., 9 R.L., n.s., 549.) (2 Can. L.R., 423.)

81. If there are mortgages, judgments, executions, hypothecs, or liens upon such ships or shipping or real property subsequent to those of such creditor, he shall only obtain the property.—

(a) by consent of the subsequently secured creditors; or,

(b) upon their filing their claims specifying their security thereon as of no value; or,

(c) upon his paying them the value by them placed thereon; or,

(d) upon his securing the estate of the company to the satisfaction of the liquidator against any claim by reason of such subsequent mortgages, judgments, executions, hypothecs and liens.

Origins. — R.S., (1886), c. 129, s. 63; 45 Vict., c. 23, s. 66.

82. Upon a secured claim being filed, with a valuation of the security, the liquidator shall procure the authority of the court to consent to the retention of the security by the creditor, or shall require from him an assignment and delivery thereof.

Origins. — R.S., (1886), c. 129, s. 64; 45 Vict., c. 23, s. 67.

Theory. — S. 76.

DIVIDEND SHEET

83. In the preparation of the dividend sheet, due regard shall be had to the rank and privilege of every creditor, but no dividend shall be allotted or paid to any creditor holding security upon the estate of the company for his claim until the amount for which he may rank as a creditor upon the estate, as to dividends therefrom, is established as herein provided.

Origins. — R.S., (1886), c. 129, s. 64; 45 Vict., c. 23, s. 68.

Theory. — Ss. 70, 78, 126, 137, 168, 181.

LIENS

84. No lien or privilege shall be created—

(a) upon the real or personal property of the company, for the amount of any judgment debt, or of the interest thereon, by the issue or delivery to the sheriff of any writ of execution, or by levying upon or seizing under such writ the effects or estate of the company;

(b) upon the real or personal property of the company, or upon any debts due or accruing or becoming due to the company, by the filing or registering of any memorial or minute or judgment, or by the issue or taking out of any attachment or garnishee order or other process or proceeding;—

if before the payment over to the plaintiff of the moneys actually levied, paid or received under such writ, memorial, minute, attachment, garnishee order or other process or proceeding, the winding-up of the business of the company has commenced: Provided that this section shall not affect any lien or privilege for costs which the plaintiff possesses under the law of the province in which such writ, attachment, garnishee order or other process or proceeding was issued or taken out.

Origins. — 7-8 Ed. VII, c. 75, s. 1; R.S., (1886), c. 129, s. 66; 45 Vict., c. 23, s. 69, in part.

Theory. — S. 80.

JURISPRUDENCE.

1. A winding up order does not defeat a valid lien, claimed by the solicitor of the Company on documents belonging to the Company in his hands, before the service of the petition.

(Capital Fire, 24 C.D., 408.)

2. S. 84 of the Winding-up Act, R.S.C. 1906, c. 144, does not apply to mechanics' liens. The lienholders had, therefore, preferential claims upon the assets of the Company in liquidation.

(Clinton Tresher Co., 1 O.W.N., 445.)

3. Sub-s. 1 of s. 84 of the Winding-up Act, R. S.C., 1906, c. 144, so far as applicable to the rights of an execution creditor, under a writ of execution against the goods of a company placed in the sheriff's hands, after the commencement of the winding-up, is not different in effect from s. 66 of the Winding-up Act as it stood in the former revised statute of 1886, and the execution creditor cannot proceed to realize his judgment out of the goods of the Company.

4. *Quære*:—What would be the result in a case where the sheriff had sold the goods and had the proceeds of the sale in his hands, when notice of the petition was served? Under the Act, as it stood before the last revision, the money would have gone to the liquidator, but, to obtain that result under the present Act, sub-s. 2 of s. 84 would have to be read into sub-s. 1.

(Ideal Furnishing Co., 17 Man. R., 576.)

5. The defendant Company leased a house to the plaintiff, the lease containing a clause, "Provided that if the lessors obtain during the said term an offer to purchase the said premises, before accepting the same the lessee shall be given the option of purchasing on same terms as in said offer". Subsequently an order for the winding-up of the defendant Company was made, and the liquidator sold the premises without giving the plaintiff an opportunity to exercise his option.

Held:—That the winding-up order did not in any way cut down the rights of the plaintiff or change his position; that the liquidator was authorised to sell the premises, but only subject to the terms and conditions of the lease; and that he was bound to

submit to the plaintiff, who had not waived his rights, the offer received, and, not having done so, the defendant Company were liable in damages, notwithstanding that the plaintiff was aware that the liquidator was making efforts to sell the premises.

(*McCarter vs York County Loan Co.*, 10 O.W.R. 165).

CONTESTATION OF CLAIMS

85. Any liquidator, creditor or contributory, or shareholder or member may object to any claim filed with the liquidator, or to any dividend declared.

Origins. — 52 Vict., c. 32, s. 15; R.S., (1886), c. 129, s. 67; 45 Vict., c. 23, s. 70.

Theory. — Ss. 69, 88, 90.

2. Unliquidated damages, arising otherwise than by reason of contract, promise, or breach of trust, are not provable against an insolvent Company unless or at least a verdict has been obtained before the winding-up.

(*Emden*, 171.)

JURISPRUDENCE.

1. Shareholder of a Company, from the day on which it is put in liquidation, must be considered a creditor, on a contestation of a claim made against the Company, and he is entitled to demand, by direct action, what he might have demanded on a contestation of a claim against the Company.

(*C.R.*, Montreal, 1904, *Ward vs The Montreal Cold Storage and Freezing Co.*, 26 C.S., 310.)

2. In proceedings under the winding-up Act, a claim by a shareholder against an insolvent Company for an amount alleged to be due for interest on calls paid before their due date, will be rejected from collocation as against the creditors of the Company, the same being an equity between him and his co-shareholders, and as such cannot be allowed, after a winding-up order, to prejudicially affect the creditors of the company.

(White, J.C.S., St-François, 1896, *Mitchell vs Royal Pulp and Paper Co., et al.*, 2 R. de J., 215.)

86. If a claim or dividend is objected to, the objections shall be filed in writing with the liquidator, together with the evidence of the previous service of a copy thereof on the claimant.

2. The claimant shall have six days to answer the objections, or such further time as the court allows, and the contestant shall have three days to reply, or such further time as the court allows.

Origins. — R.S., (1886), c. 129, s. 67; 45 Vict., c. 23, s. 70.

JURISPRUDENCE.

1. La rémunération et les frais du liquidateur et de ses avocats, agissant en vertu du présent Acte, seront taxés contradictoirement avec les parties intéressées ou leurs procureurs, si des créanciers s'opposent à la feuille de dividendes telle que préparée.

(Tellier, J.C.S., Montreal, 1906, *The Laurie Engine Co., and Mackie*, 8 R.P., 59.)

87. Upon the completion of the issues upon the objections, the liquidator shall transmit to the court all necessary papers relating to the contestation, and

the court shall then, on the application of either party **fix a day for taking evidence upon the contestation, and hearing and determining the same.**

Origins. — R.S., (1886), c. 129, s. 67; 45 Vict., c. 23, s. 70.

88. The court may make such order as seems proper in respect to the payment of the costs of the contestation by either party or out of the estate of the company.

Origins. — R.S., (1886), c. 129, s. 67; 45 Vict., c. 23, s. 70.

Theory. — S. 117.

89. If, after a claim or dividend has been duly objected to, the claimant does not answer the objections, the court may, on the application of the contestant, make an order barring the claim or correcting the dividend, or may make such other order in reference thereto as appears right.

Origins. — R.S., (1886), c. 129, s. 67; 45 Vict., c. 23, s. 70.

90. The court may order the person objecting to a claim or dividend to give security for the costs of the contestation within a limited time, and may, in default, dismiss the contestation or stay proceedings thereon, upon terms as the court thinks just.

Origins. — R.S., (1886), c. 129, s. 67; 45 Vict., c. 23, s. 70.

Theory. — S. 85.

JURISPRUDENCE.

1. Que le cautionnement, requis par l'acte des liquidations, ne s'applique qu'aux contestations de réclamations produites ou admises par la feuille de dividende, et non à une contestation de la feuille de dividendes entière.

(Loranger, J.C.S., Montréal, 1904, *Union Brewery and Hyde and Windindale*, 6 R.P., 395.)

2. Le cautionnement pour les frais ne s'applique pas à une objection faite par un créancier au montant des frais du liquidateur et à ses avocats, et à l'homologation d'une feuille de dividendes basée sur ces montants.

(Tellier, J.C.S., Montréal, 1906, *The Laurie Engine Co., and Mackie*, 8 R.P., 59.)

3. Aux termes de l'Acte des Liquidations, S.R.C., c. 129, s. 61, par. 1, la Cour peut ordonner que la personne, qui conteste une réclamation pour dividende, soit obligée de donner cautionnement de frais, mais, pour obtenir tel ordre, il faut que celui qui demande ce cautionnement fasse voir qu'il est exposé à perdre les frais qu'on lui fera faire sur cette contestation. A défaut de cette preuve, la demande de cautionnement sera refusée.

(Mathien, J.C.S., Montréal, 1902, *Stevenson vs Royal Bank of Canada et al.*, 8 R. de J., 186.)

DISTRIBUTION OF ASSETS

91. The property of the company shall be applied in satisfaction of its debts and liabilities, and the charges, costs and expenses incurred in winding-up its affairs.

Origins. — R.S., (1886), c. 123, s. 58; 45 Vict., c. 23, s. 61.

Theory. — 1. See s. 36.

2. The affairs of a Company are fully wound-up, when all has been done that the liquidators can do to wind them up, even though there may be some assets outstanding, or debts unpaid.

(Stephens, *On Corporations*, 394.)

JURISPRUDENCE.

1. Que le transport d'un jugement et d'un privilège sur un immeuble signifié à une Compagnie insolvable, qui a apparemment liquidé ses affaires, mais qui n'a pas obtenu de jugement en déclaration de clôture de liquidation ou d'abrogation de ses lettres patentes, est valable.

(B.R., *Demers vs Byrd*, 18 R.L., n.s., 288.)

92. All costs, charges and expenses properly incurred in the winding-up of a company, including the remuneration of the liquidator, shall be payable out of the assets of the company, in priority to all other claims.

Origins. — R.S., (1886), c. 129, s. 91; 45 Viet., c. 23, s. 91.

Theory. — Ss. 35, 40.

JURISPRUDENCE.

1. If an action, commenced by the Company before the winding-up, is continued by the liquidator, with the Court's leave, the defendant, if successful, is entitled to his costs in full as a first charge as from the commencement of the action.

(*London Drapery Stores*, 2 Ch., 685.)

2. La rémunération et les frais des liquidateurs et de ses avocats, agissant en vertu du présent Acte, seront taxés contradictoirement avec les parties intéressées ou leurs procureurs, si les créanciers s'opposent à la feuille de dividendes telle que préparée.

(*Tellier*, J.C.S., Montréal, 1906, *The Laurie Engine Co.*, and *Mackie*, 8 R.P., 59.)

3. Where certain creditors applied for an order that the moneys in the hands of the liquidator be retained and set apart to meet preferred claims and that the same be not chargeable with any of the costs of the liquidation, until certain claims were disallowed, it was held that there was no power to make such an order.

(Sun Lithographing Co., 6 O.W.R., 358.)

93. The court shall distribute among the persons entitled thereto any surplus that remains after satisfaction of the debts and liabilities of the company, and the winding-up charges, costs and expenses, and unless otherwise provided by law or by the Act, charter or instrument of incorporation, any property or assets remaining after such satisfaction shall be distributed among the members or shareholders according to their rights and interests in the company.

Origins. — R.S., (1886), c. 129, s. 51, 58; 45 Vict., c. 23, ss. 55, 61.

Theory. — S. 74.

FRAUDULENT PREFERENCES

94. All gratuitous contracts, or conveyances or contracts without consideration, or with a merely nominal consideration, respecting either real or personal property, made by a company in respect to which a winding-up order under this Act is afterwards made, with or to any person whatsoever, whether a creditor of the company or not, within three months next preceding the commencement of the winding-up, or at any time afterwards, shall be presumed to have been made with intent to defraud the creditors of such company.

Origins. — R.S., (1886), c. 129, s. 68; 45 Vict., c. 23, s. 71.

JURISPRUDENCE.

1. The defendants, a chartered bank, advanced \$6,000 to a brewing Company in the ordinary course of dealing. Frequent demands for payment having been made, the Company agreed to secure the amount by mortgage on their lands, and the directors met and passed a by-law for the purpose of implementing the agreement. The by-law contained a recital that s. 73 of the Ontario Companies Act authorized the directors to borrow money for the purposes of the Company. This assertion was unnecessary, and was also inapplicable, as the directors were not about to borrow or give security for a present loan, but to secure by mortgage an existing liability. Aside from this, the by-law contained all that was necessary to authorize the preparation and execution by the president and secretary of a mortgage to secure the liability of \$6,000:

Held:—In an action by the liquidator of the Company for a declaration that the mortgage was valid, that, the debt being an outstanding liability of the Company, and the intention and agreement being to mortgage the Company's real property, s. 73 of the Act gave the directors ample power to do so, and all that was needed was that they should act under the powers vested in them by that section; and the by-law was a sufficient authorization of the mortgage, notwithstanding the recital referring to s. 73 and the failure to refer to s. 78.

2. Per Moss:—That the objection to the by-law was not open to the Company, and, in this respect, the plaintiff, as liquidator under a winding up order, occupied no higher position. The defendants, having received a mortgage apparently duly executed on

behalf of the Company. were entitled to assume that everything necessary to its valid execution had been regularly and properly done.

3. *Per Curiam*:—That the presumption of intent to defraud the Company's creditors, arising from the circumstance that the mortgage was made within three months next preceding the commencement of the winding-up (s. 94 of the Winding-up Act), was rebuttable, and, upon the evidence, was rebutted, pressure being shown. Judgment of Sutherland, J., upon this branch of the case, affirmed.

(*Hammond vs Bank of Ottawa*, 22 O.L.R., 13.)

95. All contracts by which creditors are injured, obstructed or delayed, made by a company unable to meet its engagements, and in respect to which a winding-up order under this Act is afterwards made, with a person whether a creditor of the company or not, who knows such inability or has probable cause for believing such inability to exist, or after such inability is public and notorious, shall be presumed to be made with intent to defraud the creditors of such company.

Origins. — R.S., (1886), c. 129, s. 68; 45 Vict., c. 23, s. 71.

96. A contract or conveyance for consideration, respecting either real or personal property, by which creditors are injured or obstructed, made by a company unable to meet its engagements with a person ignorant of such inability, whether a creditor of the company or not, and before such inability has become public and notorious, but within thirty days next before the commencement of the winding-up of the business of such company under this Act, or at any time afterwards, is voidable, and may be set aside by any court of competent jurisdiction, upon such terms as to the protection of such person from actual loss or liability by reason of such contract as the court orders.

Origins. — R.S., (1886), c. 129, s. 69; 45 Vict., c. 23, s. 72.

97. All contracts or conveyances made and acts done by a company respecting either real or personal property, with intent fraudulently to impede, obstruct or delay the creditors of the company in their remedies against the company, or with intent to defraud the creditors of the company or any of them, and so made, done and intended with the knowledge of the person contracting or acting with the company, whether a creditor of the company or not, and which have the effect of impeding, obstructing or delaying the creditors in their remedies, or of injuring them, or any of them, shall be null and void.

Origins. — R.S., (1886), c. 129, s. 70; 45 Vict., c. 23, s. 73.

98. If any sale, deposit, pledge or transfer is made of any property, real or personal, by a company in contemplation of insolvency under this Act, by way of security for payment to any creditor, or if any property real or personal, movable or immovable, goods, effects or valuable security, are given by way of payment by such company to any creditor, whereby such creditor obtains or will obtain an unjust preference over the other creditors, such sale, deposit, pledge, transfer or payment shall be null and void; and the subject thereof may be recovered back for the benefit of the estate by the liquidator, in any court of competent jurisdiction.

2. If such sale, deposit, pledge or transfer is made within thirty days next before the commencement of the winding-up under this Act, or at any time afterwards, it shall be presumed to have been so made in contemplation of insolvency.

Origins. — R.S., (1886), c. 129, s. 71; 45 Vict., c. 23, s. 74.

99. Every payment made within thirty days next before the commencement of the winding-up under this Act by a company unable to meet its engagements in full, to a person knowing such inability, or having probable cause for believing the same to exist, shall be

void, and the amount paid may be recovered back by the liquidator by suit or action in any court of competent jurisdiction.

2. If any valuable security is given up in consideration of such payment, such security or the value thereof shall be restored to the creditor upon the return of such payment.

Origins. — R.S., (1886), c. 129 s. 72; 45 Vict., c. 23, s. 75.

JURISPRUDENCE.

1. The right of action, on behalf of the creditors of an insolvent joint stock limited liability Company, to have one of the shareholders ordered to restore assets withdrawn from the capital of the Company to the prejudice of its creditors, is not extinguished by the lapse of one year applicable to recatory actions provided by art. 1032 C.C., and following.

Such right of action can be exercised, with the leave of a judge, by the liquidator (appointed in Canada) of a foreign Company against which a winding-up order has been made in Canada, in his quality of liquidator

(B.R., Montreal, 1910. *Hyde vs Thibaudeau*, 10 R.P., 419.)

2. On the 14th October 1905, a sum of \$1,340.57 was deposited in bank to the credit of H., executor, and was, on that day, withdrawn by him and placed to the credit of a Company, of which he was president, in its account with the same bank. This money was held by H. in trust for the children of N., and the placing of the money to the credit of the Company was a breach of trust by him. On the 6th December, 1906, the Company being then insolvent, H. withdrew from the assets of the Company for his *Cestuis que* trust a sum \$51,969.61,

the purpose being admittedly to protect the *Cestuis que* trust and to give them a preference. This sum was debited to an account in the books of the Company, headed: *H. in trust for N., etc.*, at the credit of which there was a large balance, including the \$1,340.57.

A petition for an order for the winding up of the Company was served, on the same day, on the solicitor, who accepted service on behalf of the Company, and, on the 11th December, 1906, a winding-up order was made.

3. *Held*:—That the money handed over by the trustee to the Company was, when the \$1,969.61 was withdrawn, no longer capable of being ear-marked, and it was impossible for the *Cestuis que* trust to follow it; the Company was simply a debtor to the trust estate for the amount, which it had received from the trustee, and the withdrawal of the Company was in substance and effect a payment by the Company to its creditors of so much of what it owed them; and therefore, s. 90, of the Winding-up Act R.S.C., 1906, c. 144, applied and the liquidator of the Company was entitled to recover from the trustee and *Cestuis que* trust the amount withdrawn.

4. By s. 99, the payment is void when made to a person knowing the inability of the Company to meet its engagements, and the view of the debtor in making the payment is not made an element to be inquired into the application of the section.

(Trusts and Guarantee Co., vs Munro, 19 O.L.R., 480.)

100. When a debt due or owing by the company has been transferred within the time and under the circumstances in the last preceding section mentioned, or at any time afterwards, to a contributory, or to any person indebted or liable in any way to the company, who

knows or has probable cause for believing the company to be unable to meet its engagements, or in contemplation of its insolvency under this Act, for the purpose of enabling such contributory, or such person so indebted or liable to the company, to set up, by way of compensation or set-off, the debt so transferred, such debt shall not be set up by way of compensation or set-off against the claim upon such contributory or person.

Origins. — 52 Viet., c. 32, s. 16; R.S., (1886), c. 129, s. 73; 45 Viet., c. 23, s. 76.

Theory. — S. 71.

JURISPRUDENCE.

1. In an action by the bank on a promissory note, defendant pleaded set off of a draft made by the bank and indorsed to him. Replication that the defendant was a contributory on the stock book of the bank and knew that the bank was insolvent, when the draft was purchased. Demurrer that replication did not aver that the debt, for which the action was brought, was due from the defendant in his capacity as shareholder or contributory.

Held:—(reversing the Supreme Court of P.E.I.)

That the replication was bad in law.

2. Appellant gave his note for \$6000.00, which was indorsed to the Bank of P.E.I. The Union Bank held a draft, made by the Bank of P.E.I. for nearly the same amount, which appellant purchased for about \$200.00 less than its face value, on 5th May, 1882. Being sued on the note, he set-off the amount of the draft and paid the difference. He admitted purchase for the purpose of set-off to the claim on his note, which he had made non-negotiable and also that, if he could succeed in a similar transaction, the Union Bank would get in full their claim against the Bank of P.E.I., which had become insol-

vent. The trial judge charged that, if the draft was indorsed to defendant to enable him to use it as a set-off, he could not do so, because he was a contributory within the meaning of s. 76 of the Winding-up Act, which comes into force 17th May, 1882, and was retrospective as regards indorsements before it was passed, but within 30 days before the commencement of winding-up proceedings. The jury, under the direction of the judge, found a general verdict for the plaintiff from the amount of the note and interest, which the Supreme Court refused to disturb.

Held:—(reversing the judgment appealed from).

That the appellant having purchased the draft for value and in good faith prior to the commencement of winding-up proceedings, the Winding-up Act was not applicable, and, therefore, the appellant was entitled to the benefit of his set-off.

3. That the Winding-up Act was not retrospective as to this indorsement.

4. *Held*:—That s.s. 75 and 76 in respect to claims, acquired by contributories within 30 days of winding up proceedings for use as a set-off, only apply to actions against a contributory, when the debt claimed is due from the person sued in his capacity as contributory.

(*Ings vs Bank of P.E.I.*, 11 C.S.C., 265.)

5. Where the sharebrokers of a provisionally registered Company, who were also holders of shares, had borrowed of the directors part of the Company's moneys to enable them to complete a purchase of shares in the market, and had deposited as a security the purchased shares and some of their original shares, it was held that the moneys borrowed were not due from them as members and contributories of

the Company, so as to authorise the master summarily to order them, in that character, to pay the amount under that section.

(Tring, Reading and Basingstoke Railw. Co., Cox's case, 3 De G. and S., 180; 19 L.J. Ch., 167.)

6. The Court will not, under this section, make order *ex parte* for the delivery over of documents by the manager of a Company to the official liquidator.

(Commercial Union Wine Co., 35 Beav., 35.)

APPEALS

101. Except in the Northwest Territories, any person dissatisfied with an order or decision of the court or a single judge in any proceeding under this Act may,—

(a) if the question to be raised on the appeal involves future rights; or.

(b) if the order or decision is likely to affect other cases of a similar nature in the winding-up proceedings; or.

(c) if the amount involved in the appeal exceeds five hundred dollars;

by leave of a Judge of the court, appeal therefrom.

Origins. — R.S., (1886), c. 129, s. 74; 49 Vict., c. 25, s. 16; 45 Vict., c. 23, s. 78, in part.

Theory. — Ss. 2, 13, 14.

JURISPRUDENCE.

1. When the time limited for appeal has expired, the Court of appeal will not enlarge it upon an *ex parte* application, but will require notice to be given to the intended respondent.

(Lama Italian Coal Co., 16 L.T.N.S., 258, Ch.; W.N., 1867. p. 119.)

2. Special or peculiar circumstances must be shown, to induce the Court of Appeal to exercise its power, under this action, of extending the time for appeal.

(Samuel Bastow and Co., ex parte Bastow and Co., 37 L.J., Ch. 51.)

3. The amount involved must exceed \$500.00, exclusive of interest and costs.

(Warton Beet Sugar Co., Kydd's case, 6 O.W.R., 590.)

3a. The policy of the Winding-up, c. 144, as to appeals from orders settling of the list of contributories of an insolvent Company, is that after the first appeal to a Judge in Court from the decision of the referee, leave to appeal from the order of the Judge to the Court of Appeal should not be granted unless the question to be raised upon the appeal involves future rights or is likely to affect other cases of a similar nature in the winding-up proceedings.

(H.C. Ontario, 1912. McGill Chair Co., 5 D.L.R., 393.)

4. Where no useful result can be obtained as the result of an appeal, the discretion of the judge should be exercised by the refusal of special leave to appeal under the Winding-up Act.

(C.S.C., 1907. Cushing Sulphite Fibre Co., vs Cushing, 37 C.S.C., 427.)

5. See also:

(In re Central Bank of Canada, 28 C.S.C., 192.)

(Hogaboom vs Central Bank of Canada, Coutlee's Cases. 119.)

6. The appeal from the order of a judge in charge of winding-up proceedings is to the Court, and cannot be varied or rescinded by an order of a single judge, though made in excess of his jurisdiction under the Winding-up Act.

(Cushing Sulphite Fibre Co., 38 N.B.R., 581.)

7. Le droit d'appel des jugements ne peut être exercé que sous les conditions et de la manière prévues dans la loi qui l'accorde.

Par suite, la loi des liquidations, S.R.C., ch. 144, s. 101, déclarant qu'on peut appeler des ordonnances ou décisions rendues sous son empire, avec la permission d'un juge de la cour de première instance, l'appel interjeté sans cette permission, ou même avec celle d'un juge du tribunal d'appel, est informé et doit être rejeté.

(B. R., Montreal, 1907, *Brayley vs Ross*, 17 B. R., 152; 9 R. P., 103.)

8. No leave to appeal having been obtained under s. 76 of the Winding-up Act, after the case had been argued, appellant, with the consent of the respondent, obtained from a judge of the Court below an order to extend the time for bringing the appeal, and subsequently, before the time expired, obtained, *nunc pro tunc*, an order from the Registrar of the Supreme Court giving leave to appeal in accordance with s. 76, and the order declared that all the proceedings had upon the appeal should be considered as taken subsequently to the order granting leave to appeal.

(*Ontario Bank vs Chaplin*, in re *Exchange Bank of Canada*, 20 C.S.C., 152.)

9. No authorization from the Court is necessary for such appeal.

(C. R., Montreal, 1909, *The Standard Mutual Fire Ins. Co. vs Dominion Mutual Fire Ins. Co.*, 11 R. P., 386.)

10. That the liquidator of an insolvent Company, whose action has been dismissed, may, with the leave of a judge, appeal from that judgment to the Court of Review.

(C. R., Montreal, 1901, *The Montreal Coal and Towing Co. vs The Standard Life Ass. Co.*, 6 R.P., 243.)

10a. Leave to appeal to the Court of Appeal, on the ground that the question raised by the judgment at the trial court, is of great public importance, will not be granted the liquidator of a Company under ss. 101 (e) and 104 of the Winding-up Act, where the question involved is not of a common law or equitable right, but simply of the interpretation of a statute, and where such question is not one of frequent recurrence.

10b. Leave to appeal to the Court of Appeal will not be granted the liquidator of a Company under ss. 101 and 104 of the Winding-up Act, from the decision of the trial Court that the liquidator was not a creditor and as such entitled to the benefits of the Bills of Sale and Chattel Mortgage Act, where, if the Judgment should be reversed he could not prevail in the action unless he could successfully contend, as he must, in order to succeed, that the bills of sale, under which the opposing party claimed, did not satisfy the requirements of such Act, and no case for leave to appeal on that branch of the case was made out.

(H.C., Ontario, 1912, *Canadian Shipbuilding Co.*, 7 D.L.R., 304.)

11. No appeal will be allowed from an order made in chambers, unless the judge certifies that the case has been so fully argued before him in chambers that he does not require it to be re-argued in Court.

(Humber Ironworks, and Shipbuilding Co., Ex parte Warrant Finance Co., No. 2. Law Rep., 5. Ch. App., 89.)

12. A judge other than the judge directing the winding up proceedings may grant leave to appeal from his order, and any has the abstract right to make orders in a winding-up proceeding, but ought not to do so unless specially requested by the judge in charge, or under exceptional circumstances.

13. In winding-up proceedings, leave to appeal is obtainable from a judge of the Court in regard to *an order or decision*, without limitation as to whether it is final or interlocutory.

Therefore, leave to appeal will be allowed from a judgment refusing a jury trial in a winding-up proceeding.

(Davidson, J.C.S., Montréal, 1909, *The Tétrault Shoe Co.*, and *Kent et al.*, and *The United Shoe Machinery Co.*, 10 R.P., 283.)

14. On an appeal by the official liquidator against an order striking off the name of a contributory, leave was given to a shareholder to move to discharge the order.

(*Scottish Universal Finance Bank*, Ship's case, 11 Jur. N.S., 254, Ch. on appeal; 12 L.T.N.S., 256.)

15. Under the Winding-up Act (1906), no appeal to the Privy Council is authorized.

(B.R., Montreal, 1910, *Lapierre vs La Banque St-Jean*, 12 R.P., 152.)

102. Such appeal shall lie,—

(a) in Ontario, to the Court of Appeal for Ontario;

(b) in Quebec, to the Court of King's Bench; and,

(c) in Manitoba, to the Court of Appeal for Manitoba;

(d) in any of the other provinces, of the Yukon Territory, to a superior court *in banc*.

Origins. — 7-8 Ed. VII, c. 74, s. 1; R.S., (1886), c. 129, s. 74; 45 Vict., c. 23, s. 78, in part.

JURISPRUDENCE.

1. There is no appeal to the Court of Review from any order or decision of the Superior Court or of a single judge thereof, in any proceeding under the Winding-up Act but only to the Court of King's Bench.

(C. R., Montreal, 1911, *La Banque de St-Jean vs Bienvenu*, 12 R.P., 353.)

2. Il n'y a pas d'appel à la Cour de Révision d'un jugement rendu par la Cour Supérieure siégeant en vertu des Liquidations.

(C.R., Montreal, 1909, *La Cie des Théâtres and Turgeon and Courval*, 10 R.P., 215.)

3. An appeal lies to the Court of Review from a judgment of the Superior Court, in a case to which an insurance Company, which is being wound-up, is a party.

(C.R., Montréal, 1910, *The Standard Mutual Fire Ins. Co. vs The Dominion Mutual Fire Ins.*, 11 R.P., 386.)

4. Une ordonnance de mise en liquidation d'une Compagnie, étant susceptible d'appel ou d'opposition, ne peut être rétractée pour irrégularités par la voie de la requête civile.

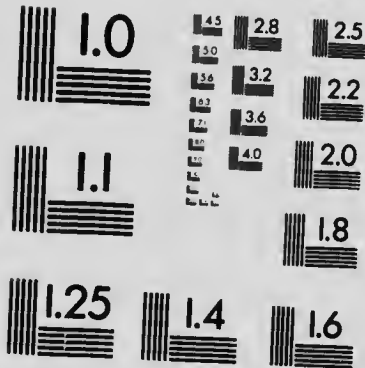
Un ordre de mise en liquidation, émis par un juge de cette cour, ne peut être rescindé, annulé ou infirmé par un autre juge de la même cour, mais doit l'être par la Cour du Banc du Roi. Dans une demande pour faire mettre de côté une mise en liquidation, le requérant ne peut, par tierce opposition, attaquer la légalité des procédures antérieures à l'ordonnance.

(C.S., Bruneau, J., Richelieu, 1912, *La Cie Pontbriand, Ltée, and Cosky*, 14 R.P., 20.)



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103. In the Northwest Territories, any person dissatisfied with an order or decision of the court or a single judge, in any proceeding under this Act may, by leave of a judge of the Supreme Court of Canada, appeal therefrom to the Supreme Court of Canada.

Origins. — R.S., (1886), c. 129, s. 76; 45 Vict., c. 23, s. 78, in part.

104. All appeals shall be regulated, as far as possible, according to the practice in other cases of the court appealed to, but no appeal hereinbefore authorized shall be entertained unless the appellant has, within fourteen days from the rendering of the order or decision, or within such further time as the court or judge appealed from, or, in the Northwest Territories, a judge of the Supreme Court of Canada, allows, taken proceedings therein to perfect his appeal, nor unless, within the said time, he has made a deposit or given sufficient security, according to the practice of the court appealed to, that he will duly prosecute the said appeal and pay such damages and costs as may be awarded to the respondent.

Origins. — R.S., (1886), c. 129, s. 74; 45 Vict., c. 23, s. 79.

Theory. — S. 134.

JURISPRUDENCE.

1. A Company, against which a winding-up order had been made, obtained, at the instance of the large majority of its shareholders and holders of its bonds, an order in an action by it against C., granting leave to appeal to the Supreme Court of Canada from a judgment of the Supreme Court of this province confirming a judgment of the Superior Court in Equity, and entrusting the conduct of the appeal to the Company's solicitors. Subsequently, the liquidators of the Company moved to vary the order by adding a direction that the case on appeal should not

be settled until an appeal to the Supreme Court of Canada from the judgment of the Supreme Court of this Province, refusing to set aside the winding-up order, was determined, and that the Company's solicitors on the appeal in the action against C should act therein only on instructions of the liquidators or their solicitor.

Held:—That as there was no error or omission in the order, resulting from mistake or inadvertence, and the order expressed the intention of the Judge, who made it, the motion should be refused.

(Cushing Sulphite Fibre Co., 3 N.B. Eq., 231.)

2. The Court refused to dismiss an appeal taken under s. 71 of the Act, where an order had been made settling and allowing the appeal, on the ground that the appellants had not complied with the practice governing in similar cases of appeal by serving or filing a notice of the grounds of appeal.

(Cushing Sulphite Fibre Co., 37 N.B.R. 254).

3. Leave to appeal to the Court of Appeal, on the ground that the question raised by the judgment at the trial Court is of great public importance, will not be granted the liquidator of a Company under ss. 101 (c) and 104 of the Winding-up Act, where the question involved is not of a common law or equitable right, but simply of the interpretation of a statute, and where such question is not one of frequent recurrence.

4. Leave to appeal to the Court of Appeal will not be granted the liquidator of a Company under ss. 101 and 104 of the Winding-up Act, from the decision of the trial Court that the liquidator was not a creditor and as such entitled to the benefits of the Bills of Sale and Chattel Mortgage Act, where, if the judgment should be reversed he could not prevail in the action unless he could successfully contend, as he must, in order to succeed, that the bills

of sale, under which the opposing party claimed, did not satisfy the requirements of such Act, and no case for leave to appeal on that branch of the case was made out.

(H.C., Ontario, 1912, Canadian Shipbuilding Co., 7 D.L.R., 304.)

105. If the party appellant does not proceed with his appeal, according to this Act and the rules of practice applicable, the court appealed to, on the application of the respondent, may dismiss the appeal with or without costs.

Origins. — R.S., (1886), c. 129, s. 75; 45 Vict., c. 23, s. 80.

106. An appeal, if the amount involved therein exceeds two thousand dollars, shall, by leave of a judge of the Supreme Court of Canada, lie to that Court from.

(a) The Court of Appeal in the provinces of Ontario, Manitoba and British Columbia; or,

(b) the Court of King's Bench in Quebec; or,

(c) a superior court in banc, in any of the other provinces, or in the Yukon Territory.

Origins. — 9-10 Ed. VII. c. 62, s. 2; R.S., (1886), c. 129, s. 76; 45 Vict., c. 23, s. 78.

JURISPRUDENCE.

1. Appeal lies to Supreme Court of Canada, in proceedings under the Winding-up Act, only where the amount involved is \$2,000 or over.

In this case, there were 6 persons placed on the list by the Master: one for \$1,000.00, and the others for \$900.00 each, and all were released from liability by the decision of the Court of Appeal, from which this appeal was brought. The Supreme Court held that although the aggregate amount, for which the

respondents were sought to be made liable, exceeded \$2000.00, there was no jurisdiction under the Act to entertain the appeal, because the position was the same as if proceedings had been taken separately against each of the contributories. The appeal was quashed with costs.

(Stephens vs Girth: In re Ontario Express and Transportation Co., 21 C.S.C., 116.)

2. Leave to appeal *per saltum*, under sect. 26 of the Supreme Court Act, cannot be granted in a case under the Dominion Winding-up Act.

An application, under sect. 76 of the Winding-up Act, for leave to appeal from a judgment of the Supreme Court of New Brunswick, was refused where the judge had made no formal order on the petition for a Winding-up Order and the proceedings before the full court were in the nature of a reference rather than of an appeal from his decision.

(C.S.C., 1904, Cushing Sulphite Fibre Co., 36 C.S.C., 494.)

3. Leave to appeal to the Supreme Court of Canada, under the seventy-sixth section of the Winding-up Act, can be granted only where the judgment, from which the appeal is sought is, a final judgment and the amount involved exceeds two thousand dollars.

A judgment setting aside an order, made under the *winding-up* . . . for the postponement of foreclosure proceedings and directing that such proceedings should be continued, is not a final judgment within the meaning of the Supreme Court Act, and does not involve any controversy as to a pecuniary amount.

(C.S.C., 1905, Cushing Sulphite Fibre Co., 37 C.S.C., 173.)

4. In a case under the Winding-up Act, R.S.C., c. 129, an appeal may be taken to the Supreme Court of Canada by leave of a judge thereof, if the amount involved exceeds \$2000.00.

Held:—That a judgment, refusing to set aside a Winding-up order, does not involve any amount, and leave to appeal therefrom cannot be granted.

(C.S.C., 1905, Cushing Sulphite Fibre Co., vs Cushing, 37 C.S.C., 427.)

5. In order to give a right to appeal, under sect. 76 of the Winding-up Act, the existing real value of the matter in controversy must be shewn to exceed \$2000.00; mere supposition valuations cannot be accepted.

(Ibid.)

PROCEDURE

107. In all proceedings connected with the company, a liquidator shall be described as the liquidator of the (*name of the company*), and not by his individual **name** only.

Origins. — R.S., (1886), c. 129, s. 29; 45 Vict., c. 23, s. 33.

Theory. — S. 34.

JURISPRUDENCE.

1. Une Compagnie à fonds social, constituée par une charte du gouvernement fédéral, continue d'exister après sa mise en liquidation et la nomination d'un liquidateur, jusqu'au règlement final (**Winding-up**) de ses affaires. Ses recours légaux, actions et défenses, doivent, dans cet intervalle, être exercés en son nom. Mais, quand il s'agit d'attaquer ou de défendre ses actes, dans l'intérêt des créanciers, c'est au nom du liquidateur représentant ces derniers, que la procédure doit être instituée.

(B.R., Montreal, *Stevenson vs Macphail*, 17 B.R., 119.)

2. Where an action is brought by the liquidator of a Company in liquidation, in his own name, he is personally liable for costs; the fact, that he obtained leave from the Court to sue, will not relieve him of his liability in this respect.

(*Jackson vs Cannon*, 10 B.C.R., 73.)

3. Une Société de liquidateurs est un être moral distinct de ses membres, lesquels sont liquidateurs conjoints comme individus et non comme associés, et partant, cette société ne peut être assignée à répondre sur faits et articles, au nom d'une Société dont ils ont été les liquidateurs.

(C.R., 1904, Montréal, *Cité de Montréal vs Gagnon*, 25 C.S., 178.)

4. Que les poursuites pour versements peuvent être faites au nom du liquidateur.

(B.R., Montreal, 1910, *Lapierre vs La Banque de St-Jean*, 17 R.L., n.s., 428.)

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

Origins. — 52 Vict., c. 32, s. 21.

Theory. — Ss. 2, 134.

109. The powers conferred by this Act upon the court may, subject to the appeal in this Act provided for, be exercised by a single judge thereof; and such powers may be exercised in chambers, either during term or in vacation.

Origins. — R.S. (1886), c. 129, s. 77; 45 Vict., c. 23, s. 77, in part.

Theory. — Ss. 2, 13, 130.

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

Origins. — 52 Vict., c. 32, s. 20.

Theory. — Ss. 26, 28, 32, 34 et seq., 41, 55 et seq., 61 et seq., 68, 88 et seq.

JURISPRUDENCE.

1. The Master, to whom the winding-up is delegated, has no power to decide a question as to the propriety and validity of a transfer of property by the Company, which is alleged to be in contravention of sect. 98 of the Act, and to operate an unjust preference.

(Hart vs Ontario Express and Transportation Co., 25 O.R., 247.)

111. The Court shall have the power and jurisdiction to cause or allow the service of process or proceedings under this Act to be made on persons out of the jurisdiction of the court, in the same manner, and with the like effect, as in ordinary actions or suits within the ordinary jurisdiction of the court.

Origins. — 52 Vict., c. 32, s. 19.

Theory. — Ss. 13, 126.

112. Every order of the court or judge for the payment of money or costs, charges or expenses made under this Act shall be deemed a judgment of the court, and may be enforced against the person or goods and chattels, lands and tenements of the person ordered to pay, in the manner in which judgments or decrees of any superior court obtained in any suit may bind lands or be enforced in the province where the court making the same is situate.

Origins. — 58-59 Vict., c. 18, s. 1.

113. The practice with respect to the discovery of assets of judgment debtors, from time to time in force in the superior courts or in any superior court in the province where any such order is made, shall be applicable to and may be availed of in like manner for the discovery of the assets of any person, who by such order is ordered to pay any money or costs, charges or expenses.

Origins. — 58-59 Vict., c. 18, s. 1, § 2.

114. Debts due to any person against whom such order for the payment of money, costs or expenses has been obtained, may, in any province where the attachment and garnishment of debts is allowed by law, be attached and garnisheed in the same manner as debts in such province due to a judgment debtor may be attached and garnisheed by a judgment creditor.

Origins. — R.S., (1886), c. 129, s. 19; 46 Vict., c. 23, s. 2.

JURISPRUDENCE.

1. Un liquidateur à une Compagnie insolvable ne peut, sur une simple requête à cet effet, retirer un dépôt fait par un tiers-saisi au greffe de la Cour Supérieure dans une cause où la Compagnie était partie demanderesse.

(Fortin, J.C.S., Montreal, 1909, *The Imperial Breweries vs Prévost et al.*, 11 R.P., 150.)

115. In any action, suit, proceeding or contestation under this Act, the court may order the issue of a writ of *subpoena ad testificandum* or of *subpoena duces tecum*, commanding the attendance, as a witness, of any person who is within Canada.

Origins. — R.S., (1886), c. 129, s. 80; 45 Vict., c. 23, s. 81.

Theory. — Ss. 118, 119.

JURISPRUDENCE.

1. A mere creditor of a Company, who is not shown to be capable of giving information concerning the trade, etc., of the Company, is not a person to be examined under this section.

(*Cidental and Maritime Ins. Corporation, Mercanti's case*, Law Rep. 5 Eq. 22.)

2. A stockholder, who had lodged a transfer of 823 shares in a Company to an infant of limited means, was held to be a person "capable of giving information, etc.", and was ordered to attend and be examined accordingly.

(*Imperial Mercantile Credit Association. Ex parte Clement*. W.N. 1868, p. 102; 18 W.R., 769, Ch.)

116. The court may, at any time before or after it has made a winding-up order, upon proof being given that there is reasonable cause for believing that any contributory or any past or present director, manager, officer or employee of the company is about to quit Canada or otherwise abscond, or to remove or conceal any of his goods or chattels, for the purpose of evading payment of calls, or for avoiding examination in respect of the affairs of the company, cause such person to be arrested, and his books, papers, moneys, securities for money, goods and chattels to be seized, and him and them to be safely kept until such time as the court orders.

Origins. — R.S., (1886), c. 129, s. 52; 45 Vict., c. 23, s. 56.

Theory. — Ss. 51, 56.

JURISPRUDENCE.

1. Upon evidence consisting of, an affidavit stating that it was commonly reported that a contributory was about to sell off his goods and chattels for

the purpose of evading payment of a call, and a handbill advertising their immediate sale by auction, the Court, reading the section as authorizing a seizure of goods without an arrest of the person, made an order for the seizure of his books, papers, moneys, etc., but refused to order his arrest upon a mere hearsay statement of his intention to leave the United Kingdom.

(Imperial Mercantile Credit Co., Law Rep., 5 Eq. 264.)

117. The court may, after it has made a winding up order, summon before it or before any person named by it, any officer of the company or person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the court deems capable of giving information concerning the trade, dealings, estate or effects of the company.

Origins. — R.S., (1886), c. 129, s. 81; 15 Vict., c. 23, s. 82.

Theory. — Ss. 88, 101, 140, 141.

JURISPRUDENCE.

1. A witness, summoned under this section, must answer questions, which refer to mere hearsay, since the object of the section is to enable the official liquidator to get full information as to all the Company's affairs, and hearsay may be valuable in putting him on the right inquiries.

(Ottoman Co., 15 W.R., 1069; W.N., 1867, p. 161.)

2. Sect. 117 gives the Court power to examine on oath the persons thus summoned before it. The examination is usually made before one of the examiners of the Court, or a special examiner.

If the person summoned as a witness gives unsatisfactory answers, or refuses to produce documents required, he is liable to be committed.

(German Mining Co., Stone's case, 3 De G. and S. 120.)

3. The powers, conferred by sect. 117, are frequently exercised where the liquidator, from an examination of the books and papers, has reason to suspect that there may be any claim against the directors, officers, etc., under sect. 123 or a claim against promoters or others, or where proceedings are pending against the Company and he desires to ascertain whether he can prudently defend the action.

(Massey vs Allen, 9 Ch. D., 165.)

4. Where a special examiner has been appointed, the proper mode of summoning before the examiner "any person whom the Court may deem capable of giving information concerning the trade, dealings, estate, or effects of the Company, under this section", is not by *subpoena*, but by summons in chambers.

(English Joint Stock Bank, Law Rep., 3 Eq. 203; 15 L.T.N.S., 206.)

5. The official liquidator of a Company in liquidation was held to be obliged to answer the questions put by an alleged contributory for the purpose of making out his case to be relieved from liability to the Company.

(Barned's Banking Co., Ex parte Contract Corporation, W.N., 1867, p. 62; Law Rep. 6 Ch. App., 350.)

6. The managing clerk of a bank in which a contributory has an account is a witness compellable to answer as to that account under this section.

(Financial Ins. Co., 36 L.J. Ch., 687.)

7. When a person is examined, at the instance of the official liquidator, under this section, his counsel and solicitor are entitled to be present, at the examination, to examine the deponent when the examination on behalf of the official liquidator is concluded, and to take notes of the proceedings.

(Breech-Loading Armory Co., Re. Merchant's Co., Law Rep., 4 Eq., 453; 13 L.T.N.S., 5, Ch.)

8. Where a solicitor, who had been present when certain securities had been delivered to his client, objected to answer the question "from whom the 'client received them'", on the ground of privilege as it was information obtained in the course of conducting his client's case, the objection was overruled on the ground that the information was not communicated by his client to the solicitor, but was the result of his own observation.

(Land Credit Society of Ireland, 15 W.R., 503.)

118. If any person so summoned, after being tendered a reasonable sum for his expenses, refuses, without a lawful excuse, to attend at the time appointed, the court may cause such person to be apprehended and brought up for examination.

Origins. — R.S., (1886), c. 129, s. 81; 45 Viet., c. 23, s. 82.

Theory. — S. 115.

119. The court may require any such officer or person to produce before the court, any book, paper, deed, writing or other document in his custody or power relating to the company.

Origins. — R.S., (1886), c. 129, s. 81; 45 Viet., c. 23, s. 82.

JURISPRUDENCE.

1. Where a contributory disputed his liability to be placed on the list and called on the official assets of the Company, which had been prepared with a view to making an application for a call, the Court held that the documents should be produced, unless they were protected as confidential communications between solicitor and client.

(Barned's Banking Co., ex parte Contract Corporation, Law Rep., 2 Ch. App., 350.)

120. If any person claims any lien on papers, deeds, writings or documents produced by him, such production shall be without prejudice to such lien, and the court shall have jurisdiction in the winding-up to determine all questions relating to such lien.

Origins. — R.S., (1886), c. 129, s. 81; 45 Vict., c. 23, s. 82.

121. The court or person so named may examine, upon oath, either by word of mouth or upon written interrogatories, any person appearing or brought up in manner aforesaid, concerning the affairs, dealings, estate, or effects of the company, and may reduce to writing the answers of any such person, and require him to subscribe the same.

Origins. — R.S., (1886), c. 129, s. 82; 45 Vict., c. 23, s. 83.

Theory. — S. 115, 117.

122. After a winding-up order has been made, the court may make such order for the inspection, by the creditors, shareholders, members or contributories of the company, of its books and papers, as the court thinks just.

2. Any books and papers in the possession of the company may be inspected in conformity with the order of the court, but not further or otherwise.

Origins. — R.S., (1886), c. 129, s. 54; 45 Vict., c. 23, s. 58.

Theory. — Ss. 33, 76, 139.

JURISPRUDENCE.

1. The books and papers of a Company are the property of its shareholders, who are entitled to inspect them, though there is a secrecy clause in the Articles of Association, and though in the course of inspection they will become acquainted with matters which should be kept secret. But it is their duty not to divulge such information so acquired; and the Court will restrain them by injunction from so doing, and will punish them should they offend.

(Birmingham Banking Co., *Ex parte* Brinsley, 36 L.J., Ch. 150; 15 L.T.N.S., 203.)

2. Where shareholders applied to the Court for leave to inspect and take extracts from the books and papers of the Company, and to employ an accountant for that purpose, leave was granted subject to the limitation that only one inspection would be allowed to go on at once, that the inspection should be made at reasonable times, and that the contents of the documents should not be improperly disclosed.

(Joint Stock Discount Co., *W.N.* 1866, p. 341.)

3. In an action by a Company against an alleged shareholder for calls under a winding-up order, the Court upheld the order of a judge at chambers giving liberty to the defendant, after plea, to inspect the registry of shares, the allotment and *agenda* books in the possession of the Company.

The granting such an order is purely in the discretion of the judge at chambers and the Court will not review his exercise of such discretion, unless they clearly see that the order was wrong.

(The Lancashire Cotton-Spinning Co. vs Greator, 14 L.T.N.S., 290.)

4. Une requête de la part d'un créancier d'une Compagnie en liquidation pour examiner les livres de cette Compagnie ne sera pas accordée, s'il ne fait voir aucune raison spéciale à cet effet.

(C.S. Montreal, 1912, The Colonial Engineering Co., and The Dominion Light, Heat and Power Co., 13 R.P., 436.)

123 When, in the course of the winding-up of the business of a company under this Act, it appears that any past or present director, manager, liquidator, receiver, employee or officer of such company has misapplied or retained in his own hands, or become liable or accountable for any moneys 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 any liquidator, or of any creditor or contributory of the company, notwithstanding that the offence is one for which the offender is criminally liable, examine into the conduct of such director, manager, liquidator, receiver, officer or employee, and, upon such examination, make an order requiring him to repay any moneys so misapplied or retained, or for which he has become liable or accountable, together with interest, at such rate as the court thinks just, or to contribute such sums of money to the assets of the company, by way of compensation in respect of such misapplication, retention, misfeasance or breach of trust, as the court thinks fit.

Origins. — R.S., (1886), c. 129, s. 83; 47 Vict., c. 39, s. 6; 45 Vict., c. 23, s. 84.

THEORY.

1. Misfeasance, is a default in not doing a lawful act in a proper manner.

2. Nonfeasance, is defined to be the non performance of some act which ought to be performed.

(Amer. Enc.)

3. The claim for misfeasance is a close in action, which can be assigned by the liquidator; and an order has even been made in a debenture-holder's action to sell such a claim by auction, moneys recovered on such a claim being covered by debentures charging all the undertaking and property of the Company, subject to costs.

(Emden, 263.)

JURISPRUDENCE.

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1. A bank director is not to be liable for breach of his duty as such in inducing the bank to extend credit to an individual beyond the statutory limit and in making false representations as to paper pre-

sented for discount, where he was not, at the time, acting as director but as agent for the borrower.

(Hicks vs Steel, 12 R.L., n.s., 564.)

2. The liability of directors of a bank for default or negligence of the cashier is held to be inforceable, if they have failed to exercise reasonable supervision.

(Mason vs Moore, 12 R.L., n.s., 565.)

3. A director, who signs cheques for the Company, without inquiring for what purposes the cheques are to be used, is liable under s. 123, if the Company has suffered loss.

(Joint Stock Discount Co., vs Brown. 8 Eq., 381.)

3a. That the powers of the bank, and of the provisional directors acting for it, depended entirely upon the provisions of the Bank Act, and the provisional directors had no power to authorise payment out of the funds of the bank of commissions to persons who obtained subscriptions for shares of the capital stock; and in the winding-up of the bank, under the ground of breach of trust or misfeasance, to pay to the liquidator the sums which had improperly been paid under their authority.

(Monarch Bank, 17 O.W.R., 901; 22, O.L.R., 516).

4. Where a director has received in breach of trust a present of paid-up shares from the Company's vendor, he may be made liable for misfeasance under sect. 123, but he cannot be made liable as a contributory for unpaid shares.

(Carling's Case, 1 C.D., 115.)

4a. The partner of a promoter, who is liable for a secret profit made in the promotion, is not himself accountable, if the promotion of Companies is no

part of the business of the partnership, unless it can be shown that he knew of the profit his partner has made, or that moneys the promoting partner paid him were part of such secret profit.

(Lydney and Wigpool Iron Co., vs Bird, 33 C.D., 85.)

5. The bank of Y., having suspended payment, plaintiff, who was appointed curator, brought an action, under the Winding-up Act, R.S.C., c. 129, against defendants, the former directors of the bank, alleging misfeasance and neglect of duty. The acts chiefly complained of were the advancing of large sums of money to one of the customers of the bank, practically exhausting the capital and reserve of the bank, upon the security of paper drawn upon people, who were insolvent, or who had no existence. and, when the paper was returned unpaid or unaccepted, retaining it and treating it as assets. Also issuing improper balance sheets, and paying dividends out of capital. The evidence showed that, down to a certain date, the directors were misled by their cashier, in whom they had the fullest confidence, but that, after the date referred to, when they became aware that they had been deceived by the cashier and that he had disobeyed instructions and that the resources of the bank were seriously involved, they still continued him in his former position without change

Held:—That the directors, in accepting that position, impliedly undertook that they had reasonable skill and ordinary ability for the discharge of the business in which they engaged, but that, in order to hold them accountable for the acts of their officer, gross negligence must be shown, such negligence being a question of fact to be determined upon the

evidence, and the findings of the trial Judge in relation thereto, founded more or less upon conflict of fact, and inferences from the evidence should not be disturbed.

6. That the directors were not obliged to examine the books of the bank, but that, if they became aware of anything reasonably suggesting the need of inquiry, it was their duty to seek for full information and explanation.

7. That, in retaining the cashier in office, after they became aware of his conduct and the manner in which he had involved the resources of the bank, they were guilty of indefensible misconduct, and were personally liable for all losses sustained as the result of his subsequent acts.

8. That the payment of a dividend, after the directors became aware that the bank wrecked, and that it could not reasonably hope to continue business, was *ultra vires* and they were personally liable in relation thereto.

9. Per Russell: That, in view of the evidence of negligence on the part of the directors in the performance of their duties, their personal liability for losses incurred should commence at an earlier date, and that in this connection, it was not unreasonable to attribute to them knowledge of the statements of the affairs of the bank, prepared for the information of shareholders and the general public.

10. Per Longley: That the principle, which relieves directors from liability, where they had relied upon the representations of their officials, is not to be extended to cases where facts are brought to their attention, leading them to suspect the integrity, skill and competence of such officials.

(*Stavert vs Lovitt*, 42 N.S.R., 449.)

11. It is not a duty cast on the president of a bank to watch the conduct of his cashier and inferior officers, nor to verify the exactness of the calculations of its auditors or of the entries in the books, nor to interfere with the employees, who are put in a position of trust for the express purpose of attending the details of management. He is, therefore, not liable for loss arising from acts of gross mismanagement on their part of which he has no knowledge, and his signature of returns or statements, required by the charter of the Bank Act, prepared and submitted by them, when he has no reason to suspect that they are inaccurate or false, does not amount to the making of approval of wilfully false statements mentioned in sect. 99 of the Bank Act, 1890.

(B.R.. Montreal, Grenier vs Préfontaine, 15 B.R., 143; aff., by P.C., 12 R.L., n.s., 495; 15 B.R., 563.)

12. In an action by the liquidator of an insolvent Company against the directors, specifying several alleged illegal acts, amongst which was that of payment of dividends out of capital, the Master in Chambers, at the instance of two of the defendants, who claimed indemnity over against the shareholders for any amounts so paid, issued the usual third party order, under Con. Rule 209, directing that two out of a large number of shareholders should be joined as third party defendants, as a test case, but no order for their representing the class was obtained, though it was stated that if they appeared such order would be applied for.

13. On appeal by the plaintiff and the third parties, to a judge in Chambers, the order was set aside.

An appeal therefrom by the defendants to a Divisional Court was dismissed, the plaintiff undertaking that any moneys realized in the action would not be distributed without notice to the defendants and without leave therefor being obtained from the local Judge.

(London and Western Trusts Co., vs Loscombe, 13 O.L.R., 34.)

14. An original subscriber and provisional director of a Company, who had only paid \$25.90 on account, joined with the other provisional directors in passing a resolution, at the organization meeting of the Company in 1902, that the shares of the capital stock subscribed for by them should be allotted to them as fully paid-up, which was done. In 1904, he transferred his shares, receiving therefor the sum of \$125.00 more than he had paid. In 1906, the shares were forfeited, by resolution of the directors, for non-payment of a call of 100 per cent. made upon them.

Held:—That the original subscriber for the shares was liable as for breach of trust, under s. 123 of the Winding-up Act, in assuming to accept the shares as fully paid-up; but the measure of damages was the market value of the shares, at the date of the allotment, and the sum of \$125.00 was all that he was for in this proceeding.

15. Per Meredith: The measure of damages was the par value of the shares.

(The Manes Tailoring Co., Crawford's case, 13 O.L.R., 572.)

16. With a view to conceal the financial difficulties of a mining Company and securing control of its property, the manager entered into a

secret arrangement with the respondent, whereby the latter was to acquire the liabilities, obtain judgment thereon, bring the property to sale under execution and purchase it for a new Company to be organized, in which the respondent was to have a large interest. The manager, who was a creditor of the Company, was to have his debt secured and to receive an allotment of shares in the new Company proportionate to those held by him in the old Company and he agreed that he would not reveal this understanding to the other shareholders.

Held:—That the agreement could not be enforced, as the consideration was illegal and a breach of trust by which the other shareholders were defrauded.

(*Lasell vs Hannah*, 37 C.S.C., 324.)

17. A director of a banking Corporation is held to owe no duty in a legal sense, by reason of his office, to the creditors of the bank or to the public.

(*Hart vs Evanson*, 12 R.L., n.s., 473.)

18. Where the collapse of a bank was due to overdrafts, which the cashier, the principal executive officer of the bank under the directors, whose accounts had been duly audited by a board of auditors duly appointed and entirely independent of the directors, had irregularly and improperly allowed to certain customers. By the law of Quebec as by the law of England, a charge of negligence could not be established against the president of the bank simply by reason of his having in good faith failed to detect the cashier's concealment of such overdrafts.

(P.C., 1906, *Préfontaine vs Grenier*, 15 B.R., 563; 12 R.L., n.s., 495.)

124. The court may, by any order after the winding-up order and the appointment of a liquidator, dispense with notice to creditors, contributories, shareholders or members of the company required by this Act, where in its discretion such notice may properly be dispensed with.

Origins. — 52 Vict., c. 32, s. 11.

Theory. — Ss. 27, 61.

JURISPRUDENCE.

1. The power, given to the Court by sect. 11 of 52 Vict., to dispense with notices, etc., does not extend to that required for the appointment of a liquidator under s. 20 of the former Act.

(B.R., Montreal, 1902, *Stimton and The North-West Cattle Co.*, 14 B.R., 279.)

125. The courts of the various provinces, and the judges of the said courts respectively, shall be auxiliary to one another for the purposes of this Act; and the winding-up of the business of the company or any matter or proceeding relating thereto may be transferred from one court to another with the concurrence, or by the order or orders of the two courts, or by an order of the Supreme Court of Canada.

Origins. — R.S., (1886), c. 129, s. 84; 45 Vict., c. 23, s. 86.

Theory. — S. 111.

126. When any order made by one court is required to be enforced by another court, an office copy of the order so made, certified by the clerk or other proper officer of the court which made the same, under the seal of such court shall be produced to the proper officer of the court required to enforce the same.

Origins. — R.S., (1886), c. 129, s. 85; 45 Vict., c. 23, s. 87.

Theory. — S. 111.

127. Such last mentioned court shall, upon such production of the said certified copy of such order, take the same proceedings thereon for enforcing the order as if it was the order of the court required to enforce it.

Origins. — R.S., (1886), c. 129, s. 85; 45 Vict., c. 23, s. 87.

128. The rules of procedure, for the time being, as to amendments of pleadings and proceedings in the court, shall apply, as far as practicable, to all pleadings and proceedings under this Act.

2. Any court before which such proceedings are being carried on shall have full power and authority to apply to such proceedings the appropriate rules of such court as to amendments.

Origins. — R.S., (1886), c. 129, s. 86; 45 Vict., c. 23, s. 48, in part.

Theory. — Ss. 2, 135.

JURISPRUDENCE.

1. Sect. 128 has reference to amendments only.

(The Sun Lithographing Co., 22 O.R., 62.)

129. No pleading or proceeding shall be void by reason of any irregularity or default which may be amended or disregarded; but the same may be dealt with according to the rules and practice of the court in cases of irregularity or default.

Origins. — R.S., (1886), c. 129, s. 87; 45 Vict., c. 23, s. 88, in part.

Theory. — S. 135.

130. Any powers by this Act conferred on the court are in addition to, and not in restriction of any other powers at law or in equity of instituting proceedings against any contributory, or the estate of any contributory, or against any debtor of the company, or his estate, for the recovery of any call or other sum due from such contributory, debtor, or estate; and such proceedings may be instituted accordingly.

Origins. — R.S., (1886), c. 129, s. 90; 45 Vict., c. 23, s. 92.

Theory. — Ss. 56, 59.

131. The court may, as to all matters relating to the winding-up, have regard, so far as it seems just, to the wishes of the creditors, contributories, shareholders or members, as proved to it by any sufficient evidence.

Origins. — R.S., (1886), c. 129, s. 19, in part; 45 Vict., c. 23, s. 23, in part.

Theory. — Ss. 33, 140.

131a. The court if satisfied that, with respect to the whole or any portion of the proceedings, the interests of creditors, claimants or shareholders can be classified, may, after notice by advertisement or otherwise, nominate and appoint a solicitor and counsel to represent each or any class for the purpose of the proceedings, and all the persons composing any such class shall be bound by the acts of the solicitor and counsel so appointed, and service upon such solicitor of notices, orders, or other proceedings of which service is required, shall for all purposes be, and be deemed to be, good and sufficient service thereof upon all the persons composing the class represented by him; and the court may, by the order appointing a solicitor and counsel for any class, or by subsequent order, provide for the payment of the costs of such solicitor and counsel by the liquidator of the company out of the assets of the company, or out of such portion thereof as to the court seems just and proper.

Origins. — 6-7 Edw. VII, c. 51, s. 1.

132. The liquidator shall be subject to the summary jurisdiction of the court in the same manner and to the same extent as the ordinary officers of the court are subject to its jurisdiction; and the performance of his duties may be compelled by order of the court.

Origins. — R.S., (1886), c. 129, s. 39, in part; 45 Vict., c. 23, s. 43, in part.

Theory. — Ss. 33, 140.

JURISPRUDENCE.

1. The liquidator is an officer of the Court and must act in a perfectly impartial manner. It is his duty to make himself thoroughly acquainted with the affairs of the Company; to suppress nothing and to conceal nothing, which has come to his knowledge, in the course of his investigation, which is material to ascertaining 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.

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

2. On a petition by a mortgagee in winding-up proceedings, asking for the conveyance to him by the liquidator of the Company's equity of redemption in certain property, the Court has jurisdiction to make the usual order for foreclosure or sale. The jurisdiction exists by virtue of this section and may be exercised in a summary way. It is a matter of convenience and discretion as to when an action will be directed or summary proceedings sanctioned.

(*The Essex Land and Timber Co.*, 21 O.R. 367.)

133. All remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, lien or right of property upon, in or to any effects or property in

the hands, possession or custody of a liquidator, may be obtained by an order of the court on summary petition, and not by any action, suit, attachment, seizure or other proceeding of any kind whatsoever.

Origins. — R.S., (1886), c. 129, s. 39, in part; 45 Vict., c. 23, s. 43, in part.

JURISPRUDENCE.

1. See: Jurisprudence to section 34.

2. That there was no jurisdiction in the Court, under the Winding-up Act, to make an order summarily declaring the sale void.

(Tobique Gypsum Co., Costigan vs Longley, 6 O. L.R., 515.)

RULES, REGULATIONS AND FORMS

134. A majority of the judges of the court, of which the chief justice shall be one, may, from time to time make and frame and settle the forms, rules and regulations to be followed and observed in proceedings under this Act, and make rules as to the costs, fees and charges which shall or may be had, taken or paid in all such cases by or to attorneys, solicitors or counsel, and by or to officers of courts, whether for the officers or for the Crown, and by or to sheriffs, or other persons, or for any service performed or work done under this Act: Provided that in Ontario the judges of the High Court of Justice, and in Quebec, the judges of the Court of King's Bench, or a majority of such judges of which the chief justice shall be one, shall make and settle such forms, rules and regulations.

Origins. — R.S., (1886), c. 129, s. 92; 45 Vict., c. 23, s. 97.

Theory. — S. 2.

135. Until such forms, rules and regulations are made, the various forms and procedures, including the tariff of costs, fees and charges in cases under this Act, shall unless otherwise specially provided, be the same as nearly as may be as those of the court in other cases.

Origins. — R.S. (1886), c. 129, s. 93; 45 Vict., c. 23, s. 98.

Theory. — S. 129.

JURISPRUDENCE.

1. Upon an application to examine certain directors of a Corporation, the provisions of s. 135 of the Winding-up Act control, and as read with s. 2 (e) and s. 134, render applicable, in the Province of Ontario, the procedure, including rules and regulations and methods of practice, current in the High Court of Justice (Ont.), adopted as nearly as may be as laid down in the Con. Rules (Ont.), it appearing that no other rules have yet been made under s. 134.

2. Upon an application by a Corporation for a winding-up order, under the provisions of the Winding-up Act, the directors of the Corporation are compellable witnesses for examination, under s. 135 of the Act supplemented by Con. Rules (Ont.) 489, 491, 492.

3. Upon a question of practice under the Winding-up Act English cases, decided upon different conditions of practice, may not be applied to frustrate the clear intent of the Act itself.

(H.C., Ontario, 1912, Baynes Carriage Co., 7 D. L.R., 257.)

4. *Held*:—That s. 135 of the Winding-up Act was wide enough to make Con. Rule applicable to

winding-up proceedings, therefore dismissed a petition for winding-up where the affidavit in support of that petition was not filed before the service of the petition as required by above rule.

(Belding Lumber, 18 O.W.R., 668.)

UNCLAIMED DEPOSITS

136. All dividends deposited in a bank and remaining unclaimed at the time of the final winding-up of the business of the company shall be left for three years in the bank where they are deposited, subject to the claim of the persons entitled thereto.

2. If such dividends are unclaimed at the expiration of the three years aforesaid, they shall be paid over by such bank, with interest accrued thereon, to the Minister.

3. If such dividends are afterwards duly claimed they shall, with such interest, be paid over to the persons entitled thereto.

Origins. — R S., (1886), c. 129, s. 94; 45 Vict., c. 23, s. 91.

Theory. — S. 83.

JURISPRUDENCE.

1. Where moneys, belonging to the suppliants, had gone to form part of a fund paid into the hands of the Minister of Finance and Receiver-General as unadministered assets, in the case of the insolvency of a Bank in proceedings under the Winding-up Act, and it was objected that the suppliants were not entitled to such moneys because of judicial decisions to the contrary in other litigation in respect to the fund.

If it was clear that the matter had been really determined, effect should be given to the estoppel, but that were to give effect to it would work in justice, the Court, before applying the rule, ought to be sure that an estoppel arises by reason of such decision.

In this case, there was no estoppel, and a reference to the registrar was directed to ascertain what proportion of the fund in the hands of the minister belonged to the suppliants.

The rule as to estoppel stated by King, J., in *Farwell vs the Queen*, (22 S.C.R., 518), referred to.

One of the equities or conditions attaching to the set-off to H. was that a debtor had a right to set-off against his debt the amount, which he had at his credit in the Bank, at the date of its insolvency. It appeared that, at the time of the Bank's insolvency, certain of its debtors had, at their credit in the Bank's books, sums which they would, on payment or settlement of their debts, have a right to apply in reduction thereof and the suppliants claimed that they were entitled to be indemnified, in respect of such reductions out of the fund in the hands of the Receiver-General.

The suppliants were not entitled to such indemnity.

(*Burbidge, J.C., Eehiquier 1901, Hogaboom vs The King*, 7 Exc. C.R., 292); (8 R.L., n.s., 133.)

2. The liquidators of an insolvent Company passed their final accounts and paid a balance, remaining in their hands, into Courts. It appeared that by orders, issued either through error or by inadvertence, the balance so deposited had been paid out to a person, who was not entitled to receive the money, and the

Receiver-General for Canada, as trustee of the residue, intervened and applied for an order to have the money re-paid, in order to be disposed of under the provisions of the Winding-up Act.

Held:—(Aff. 24 O. App. R., 470.):

That the Receiver-General was entitled to intervene, although the three years, from the date of the deposit mentioned in the Winding-up Act, had not expired. That even, if he was not so entitled to intervene, the provincial Courts had jurisdiction to compel re-payment into Court of the moneys improperly paid out.

(Hogaboom vs Receiver-General of Canada; In re Central Bank of Canada, 28 C.S.C., 192.)

137. The money deposited in the bank by the liquidator, after the final winding-up of the business of a company, shall be left for three years in the bank, subject to be claimed by the persons entitled thereto, and if not then paid out to such persons, shall be then paid over, with the interest accrued thereon, to the Minister, and if afterwards claimed shall be paid, with such interest to the persons entitled to the same.

Origins. — R.S., (1886), c. 129, s. 41; 45 Vict., c. 23, s. 45.

OFFENCES AND PENALTIES

138. When a winding-up order is made, if it appears in the course of such winding-up that any past or present director, manager, officer or member of the company is guilty of an offence in relation to the company for which he is criminally liable, the court may, on the application of any person interested in such winding-up, or of its own motion, direct the liquidator to institute and conduct a prosecution or prosecutions for such offence, and may order the costs and expenses to be paid out of the assets of the company.

Origins. — R.S., (1886), c. 129, s. 96; 45 Vict., c. 23, s. 95.

139. Every person who, with intent to defraud or deceive any person, destroys, mutilates, alters or falsifies any book, paper, writing or security, or makes or is privy to the making of any false or fraudulent entry in any register, book of account or other document belonging to the company, the business of which is being wound up under this Act, is guilty of an indictable offence and liable to imprisonment in the penitentiary for any term not less than two years, or to imprisonment in any goal or in any place of confinement other than a penitentiary for any term less than two years, with or without hard labour.

Origins. — R.S., (1886), c. 129, s. 95; 15 Vict., c. 23, s. 85

Theory. — Ss. 33, 76, 122; 414, 415 and 418 Cr. C.

JURISPRUDENCE.

1. Reports made and accounts rendered by directors, in the course in their duty, though made and issued to the shareholders only, as to the state of the affairs of the Company, are considered the representations of the Company, not only to the shareholders, but to the public, if they are published and circulated by the authority of the directors or general meeting, and the directors are personally liable for injury caused to third parties by false representations contained in a report of the directors to the shareholders; but the injury must be immediate and not the remote consequence of the representations, and it must also appear that the false representations were made with the intent that it should be acted upon by such third parties.

(Johnson, J., Montreal, 1878, Rhodes vs Starnes, 11 L.N., 314, 329; 23 L.C.J., 113.)

2. Individual shareholders in a joint stock Company cannot bring an action against the promoters

for damages caused by alleged misrepresentations by the latter as to the prospects of the Company, not to the respective shareholders.

(Beatty vs Neelon, 13 C.S.C., 1.)

3. Les allégations mensongères, contenues dans des prospectus ou des feuilles publiques, constituent une fraude et rendent passible de dommages l'auteur de ces mensonges envers ceux qui sont induits à agir en conséquence de ces énoncés faux. Il en est de même des ventes fictives faites exprsément pour donner une fausse valeur à des actions dans une Compagnie minière.

(B.R., Montreal, 1885, Dorion and Crowley, 30 L.C.J., 65; 42 D.C.A., 322.)

4. En mars 1898, on a livré à la publicité le prospectus d'une Cie à être constituée, dite "The Trading and Mining Co. of Canada", dont le but était d'établir des postes à Edmonton, Peace River, Dawson City et à d'autres points sur la rivière Yukon. Le défendeur était indiqué comme président de la Cie et le prospectus contenait des assertions fausses. Le défendeur avait consenti à agir comme président de la Cie, moyennant un salaire annuel de \$1.000., il avait approuvé le prospectus et les contrats intervenus avec les ouvriers, et avait déposé en banque, comme fidéicommissaire, des sommes d'argent regnues de ces derniers comme souscription au fonds capital de la Cie. Certains promoteurs avaient engagé le demandeur et d'autres ouvriers au nom de la Cie, les avaient fait souscrire un certain nombre d'actions dans la Cie et verser la moitié du montant de leurs souscriptions, et les avaient expédiés à Edmonton avec un engagement pour deux ans. Le demandeur avait vu le défendeur avant de signer son contrat et celui-ci ne l'avait pas mis en garde contre les assertions fausses du prospectus. Les ouvriers furent

abandonnés à Edmonton, et le demandeur réclamait du défendeur le montant qu'il avait payé sur sa souscription et les dommages qu'il avait éprouvés.

Jugé:—Que, dans ces circonstances, le défendeur était responsable envers le demandeur du montant que celui-ci avait versé sur sa souscription d'actions et des dommages qu'il avait éprouvés par la violation du contrat fait avec avec lui au nom de la Compagnie projetée.

(C.R., Montreal, 1899. Bonhomme vs Biekerdike, 17 C.S., 28.)

140. Any liquidator, director, manager, receiver, officer or employee of a company, failing to comply with the requirements or directions of any order made by the court under this act, shall be guilty of contempt of Court and shall be subject to all process and punishments of such court for contempt.

2. Any liquidator so failing may in the discretion of the court be removed from office as such liquidator.

Origins. — R.S., (1886), c. 129, ss. 38, 39, 40 and 43; 15 Viet., c. 23, ss. 42, 43, 44 and 84.

Theory. — Ss. 32, 117, 132.

JURISPRUDENCE.

1. That, when a judgment has ordered a liquidator to pay immediately a certain sum, and has ordered his imprisonment in default of obedience to said judgment, that liquidator cannot plead to a rule nisi that he cannot be forced to make such payment until the liquidation of the insolvent estate is complete.

(Archibald, J.C.S., Montreal, 1899, The Queen's Hotel Co., vs Radford, 2 R.P., 113.)

141. Any refusal on the part of the president, directors, officers or employees of a company to give all information possessed by them respectively as to the affairs

of the company required by the accountant or other person ordered by the court under this Part to inquire into the affairs of the company and to report thereon, shall be a contempt of court, and such president, directors, officers or employees shall be subject to all process and punishments of such court for contempt.

Origins. — R.S., (1886), c. 129, s. 11; 45 Vict., c. 23, s. 16.

Theory. — S. 117.

142. Every liquidator who shall not within three days after the date of the final winding-up of the business of the company, deposit in the bank, appointed or designated as heretofore provided, any money belonging to the estate of which he is such liquidator, then in his hands and not required for any other purpose authorized by this Act, with an account of such money, and a sworn statement that the same is all that he has in his hands, shall incur a penalty not exceeding ten dollars, and not less than ten per centum per annum interest upon the sums in his hands for every day after the expiration of the said three days on which he neglects or delays such payment.

Origins. — R.S., (1886), c. 129, s. 40; 45 Vict., c. 23, s. 44.

Theory. — Ss. 42, 44, 45.

143. Every person being brought up for examination before the court after the court has made a winding-up order, or appearing before the court for such examination, who refuses without lawful excuse to answer any question put to him or to subscribe any answer made by him on such examination, shall be guilty of contempt of court, and shall be subject to all process and punishments of such court for contempt.

Origins. — R.S., (1886), c. 129, s. 82; 45 Vict., c. 23, s. 83.

Theory. — Ss. 117, 140.

EVIDENCE

144. If the business of a company is being wound up under this Act, all books of the company and of the liquidators shall, as between the contributories of the company, be *prima facie* evidence of the truth of all matters purporting to be therein recorded.

Origins. — R.S., (1886), c. 129, s. 53; 45 Vict., c. 23, s. 51.

Theory. — Ss. 33, 139.

JURISPRUDENCE.

1. Where a liquidator charged persons in his books without giving them notice, the Court ordered the entry to be removed, and threw upon the liquidator the onus of showing that such entry ought to be restored.

(Madrid and Valencia Railw. Co., *ex parte* Chadwick, 15 Jur., 591.)

145. Every affidavit, affirmation or declaration required to be sworn or made under the provisions or for the purposes of this Act, or to be used in the court in any proceeding under this Act, may be sworn or made in Canada before a liquidator, judge, notary public, commissioner for taking affidavits or justice of the peace; and out of Canada, before any judge of a court of record, any commissioner for taking affidavits to be used in any court in Canada, any notary public, the chief municipal officer of any town or city, any British consul or vice-consul, or any person authorized by or under any statute of Canada, or of any province, to take affidavits.

Origins. — R.S., (1886), c. 129, s. 88; 45 Vict., c. 23, s. 89.

146. All courts, judges, justices, commissioners and persons acting judicially shall take judicial notice of the seal, or stamp or signature, as the case may be, of any such court, liquidator, judge, notary public, commis-

sloner, justice, chief municipal officer, consul, vice-consul, or other person, attached, appended or subscribed to any such affidavit, affirmation or declaration or to any other document to be used for the purposes of this Act.

Origins. — R.S., (1886), c. 129, s. 88; 45 Vict., c. 23 s. 90.

147. When any order made by one court is required to be enforced by another court, the production of an office copy of the order so made certified by the clerk or other proper officer of the court which made the same under the seal of such court, shall be sufficient evidence of such order having been made.

Origins. — R.S., (1886), c. 129, s. 85; 45 Vict., c. 23 s. 87.

Theory. — Ss. 111, 125, 126.

148. The absence of mention in the minutes of any meeting of contributories, creditors, shareholders or members under this Act, of the production of the liquidator's bank pass-book, shall be *prima facie* evidence that such pass-book was not produced at such meeting.

Origins. — R.S., (1886), c. 129, s. 37.

PART II**BANKS**

149. The provisions of this Part apply to banks only, not including savings banks.

Origins. — R.S., (1886), c. 129, s. 97; 45 Vict., c. 23, subtitle.

Theory. — S. 8.

150. The application for a winding-up order shall be made by a creditor for a sum of not less than one thousand dollars.

Origins. — R.S., (1886), c. 129, s. 98, in part; 47 Vict., c. 39, s. 7, in part.

Theory. — Ss. 2, 12.

151. The court shall, before making the order, direct a meeting of the shareholders of the bank and a meeting of the creditors of the bank to be summoned, held, and conducted as the court directs, for the purpose of ascertaining their respective wishes as to the appointment of liquidators.

Origins. — R.S., (1886), c. 129, s. 98, in part; 47 Vict., c. 39, s. 7, in part.

Theory. — Ss. 27, 61.

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

Origins. — R.S., (1886), c. 129, s. 99, in part;
47 Vict., c. 39, s. 7, in part.

Theory. — S. 65.

153. The court may also appoint a person to act as chairman of the meeting of creditors, and in default of such appointment, the creditors at the meeting shall appoint a chairman.

Origins. — R.S., (1886), c. 129, s. 99, in part;
47 Vict., c. 39, s. 7, in part.

Theory. — S. 61.

154. In taking a vote at the meeting of shareholders, regard shall be had to the number of votes conferred by law, or by the regulations of the bank, on each shareholder present or represented at such meeting.

Origins. — R.S., (1886), c. 129, s. 100, in part;
47 Vict., c. 39, s. 7, in part.

Theory. — S. 52.

155. In taking a vote at the meeting of creditors, regard shall be had to the amount of the debt due to each creditor.

Origins. — R.S., (1886), c. 129, s. 100, in part;
47 Vict., c. 39, s. 7, in part.

Theory. — Ss. 62, 66.

156. The chairman of each meeting shall report the proceedings of the meeting to the court, and, if a winding-up order is made, the court shall appoint one or more liquidators not exceeding three to be selected, in its discretion, after such hearing of the parties as it deems expedient, from among the persons nominated by the majorities and minorities of the shareholders and creditors at such meetings respectively.

Origins. — 52 Vict., c. 32, s. 17; R.S., (1886), c. 129, s. 101; 47 Vict., c. 39, s. 7, in part.

Theory. — Ss. 24, 61.

JURISPRUDENCE.

1. The Winding-up Act provides that the shareholders and the creditors of a Company in liquidation shall severally meet and nominate persons, who are to be appointed liquidators, and the judge having the appointment shall choose the liquidators from among such nominees. In the case of the Bank of Liverpool, the judge appointed liquidators from among the nominees of the creditors, one of them being the defendant bank.

Held:—That there is nothing in the Act requiring creditors and shareholders to be represented on the board of liquidators. That a Bank may be appointed liquidator.

(Forsythe vs Bank of Liverpool, 18 C.S.C., 101; Cam. Cas., 209.)

157. If no one has been so nominated, the liquidator or liquidators shall be chosen by the court.

Origins. — 52 Vict., c. 32, s. 18.

Theory. — Ss. 24, 140.

158. The liquidators shall ascertain as nearly as possible the amount of notes of the bank intended for circulation and actually outstanding, and shall reserve dividends on any part of the said amount in respect of which claims are not filed, until the expiration of at least two years after the date of the winding-up order, or until the last dividend, if such last dividend is not made until after the expiration of the said time.

2. If claims are not filed and dividends applied for in respect of any part of the said amount before the period by this section limited, the dividends so reserved shall form the last or part of the last dividend.

Origins. — R.S. (1886), c. 129, s. 103; 45 Vict., c. 23, s. 101.

159. Publication in the *Canada Gazette* and in the official gazette of each province, and in two newspapers issued at or nearest to the place where the head office of a bank is situate, of notice of any proceeding of which, under this Act, creditors should be notified, shall be sufficient notice to holders of bank notes in circulation.

2. If the head office is situated in the province of Quebec, one of the newspapers in which publication is to be made shall be a newspaper published in English and the other a newspaper published in French.

Origins. — R.S., (1886), c. 129, s. 104; 45 Vict., c. 23, s. 105.

PART III**LIFE INSURANCE COMPANIES**

160. The provisions of this Part apply only to life insurance companies, and to insurance companies doing life and other insurance, in so far as relates to the life insurance business of such companies.

Origins. — R.S., (1886), c. 129, s. 105; 45 Viet., c. 23, subtitle.

Theory. — S. 9.

161. Whenever a license of a company has expired or been withdrawn under the Insurance Act, and has not been renewed within thirty days after such expiry or withdrawal, the company shall be subject to the provisions of this Act applicable to the case of Insolvency of such a company, except in case of, —

(a) a company which previously to the twenty-eighth day of April, one thousand eight hundred and seventy-seven, was licensed to transact the business of life insurance in Canada and ceased to transact such business before the twenty-first day of March, one thousand eight hundred and seventy-eight, having before that date given written notice to that effect to the Minister; or,

(b) a company licensed under the Insurance Act to transact the business of life insurance in Canada which has, in manner provided by the said Act, procured the transfer of its outstanding policies in Canada to some company or companies licensed under the said Act, or obtained the surrender of its policies as far as practicable.

Origins. — R.S., (1886), c. 129, s. 106; 45 Viet., c. 42, s. 15, in part.

162. In case of the insolvency of any company, the deposits of such company held by the Minister, and the assets held by the trustees under the Insurance Act, shall be applied *pro rata* towards the discharge of all claims of policy-holders in Canada duly authenticated against such company.

Origins. — R.S., (1886), c. 129, s. 101; 45 Viet., c. 23, s. 107; 40 Viet., c. 42, s. 15, in part.

JURISPRUDENCE.

1. Canadian policy-holders petitioned for distribution of the deposit made by a foreign Company with the Minister of Finance as required by the Insurance Act, the Company being insolvent.

Held:—That they were entitled to the relief asked, notwithstanding that proceedings to wind-up the Company were pending before the English Courts.

(Briton Medical and General Life Ass., 12 O. R., 141.)

163. Upon the insolvency of any company and the making of a winding-up order under this Act, the policy-holders in Canada shall be entitled to claim for the full net values, including bonus additions and profits accrued, of their several policies at the time of the winding-up order, less any amount previously advanced by the company on the security of the policies.

2. Such claims shall rank with judgments obtained and claims matured on Canadian policies, in the distribution of the assets.

Origins. — R.S., (1886), c. 129, s. 108 § 1; 45 Viet., c. 23, s. 108, in part; 40 Viet., c. 42, s. 16, in part.

JURISPRUDENCE.

1. The amount, for which the holder of an unmatured policy payable, at the death of the insured, is to rank against an insolvent life insurance Com-

pany in liquidation, under the Ontario Insurance Act, R.S.O., 1897, c. 203, is the difference, if any at the date of the commencement of the winding-up, between and in favour of the present value of the reversion in the sum assured, at the decease of the life and the present value of a life annuity of an amount equal to the future premiums, which would become payable during the estimated duration of the life assured.

(*Merchants Life Association Vernon Cases*, 1 O. L.R., 256.)

164. The liquidator may require the Superintendent of Insurance to value, or procure to be valued under his supervision, the policies of the policy-holders in Canada, on the basis prescribed in the Insurance Act.

2. The expenses of such valuation, at a rate of three cents for each policy or bonus addition so valued, shall be retained by the Minister from the securities held by him.

Origins. — 62-63 Vict., c. 43, s. 6.

165. Upon the completion of the liquidator of the statement to be prepared by him, judgments against the company upon policies in force and of all claims upon policies matured or about to mature, the court shall cause the securities held by the Minister for such company, and the assets held by the trustees provided in the Insurance Act, or any part of them it deems fit, to be sold or realized in such manner and after such notice and formalities as the court appoints.

Origins. — R.S., (1886), c. 129, s. 108 § 3; 40 Vict., c. 42, s. 16, in part.

166. The proceeds so realized, after paying expenses incurred, shall, except in so far as they have been applied under this Act to effect a re-insurance of policies, be distributed *pro rata* amongst the claimants according to such statement.

2. If the proceeds are not sufficient to cover in full all claims recorded in the statement, such policy-holders shall not be barred from any recourse they have, either in law or equity, against the company issuing the policy or against any shareholder or director thereof, other than for a share in the distribution of the proceeds aforesaid, or in respect to any distribution of the general property and assets of the company, other than the deposit and the assets vested in trustees.

Origins. — R.S., (1886), c. 129, s. 108 § 4; 40 Vict., c. 42, s. 16, in part.

167. Whenever the company or the liquidator, or the holder of the policy or contract of insurance exercises any right which it or he has to cancel any policy or contract, the holder shall be entitled to claim as a creditor for the sum which, under the terms of the policy or contract, is due to him upon such cancellation.

Origins. — R.S., (1886), c. 129, s. 109; 45 Vict., c. 23, s. 108, in part.

168. The liquidator shall, without the filing of any claim, notice or evidence, or the taking of any action by any person, make a statement of all the persons appearing by the books and records of the officers of the company to be creditors or claimants on any matured, valued or cancelled policy or contract of insurance, and of the amount due to each such person in respect of such claims, and every such person shall be collocated and ranked as, and shall be entitled to the right of, a creditor or claimant for such amount, without filing any claim, notice or evidence, or taking any action: **Provided** that any such collocation may be contested by any person interested, and any person who is not collocated, or who is dissatisfied with the amount for which he is collocated, may file his own claim.

Origins. — R.S., (1886), c. 129, s. 110; 45 Vict., c. 23, s. 109.

Theory. — S. 180.

169. A copy of such statement, certified by the liquidator, shall, forthwith after the making of such statement, be filed in the office of the Superintendent of Insurance at Ottawa.

2. Notice of such filing shall forthwith be given by the liquidator by notice in the *Canada Gazette* and in **the official gazette of each province, and in two newspapers** issued at or nearest to the place where the head office in Canada of the company is situate.

3. The liquidator shall also, forthwith, send by mail, prepaid, a notice of such creditor named in the statement, a notice of such filing to each creditor named in the statement, addressed to the addresses in Canada of such creditors, as far as the same are known, and, in the case of foreign creditors, addressed to the addresses of their representatives or agents in Canada, as far as the same are known.

Origins. — R.S., (1886), c. 129, s. 110; § 2; 45 Vict., c. 23, s. 109.

Theory. — Ss. 182, 183.

170. The holder of a policy or contract of life insurance, upon which a claim accrues after the date of the winding-up order and before the expiration of thirty days after the filing, **in the office of the Superintendent of Insurance**, of the statement referred to in the last preceding section, shall be entitled to claim as a creditor for the full net amount of such claim less any amount previously advanced by the company on the security of the policy or contract, and the said statement and the dividend sheet shall, if necessary, be amended accordingly: Provided that no claim which accrues after the expiration of the thirty days aforesaid shall rank upon the estate unless nor until there is sufficient to pay all creditors in full.

Origins. — R.S., (1886), c. 129, s. 111; 45 Vict., c. 23, s. 110.

Theory. — S. 184.

171. If, before the expiration of the thirty days hereinafore mentioned, the holder of a policy or contract of life insurance, on which a claim has not accrued, signifies in writing to the liquidator his willingness to accept an insurance in some other company for the amount which can be secured by the dividend on his claim to which such holder is or may become entitled, the liquidator may, with the sanction of the court, effect for such holder an insurance to the amount aforesaid in another company or companies, approved of by the Superintendent of Insurance, and may apply to that purpose the dividend on his claim to which such holder is or may become entitled: Provided that such insurance shall be effected only as part of a general scheme for the assumption, by some other company or companies, of the whole or part of the outstanding risks and liabilities of the insolvent company.

Origins. — R.S., (1886), c. 129, s. 112; 45 Vict., c. 23, s. 111.

172. If the company is licensed under the Insurance Act, the liquidator shall report to the Superintendent of Insurance once in every six months, or oftener as the Superintendent requires, on the condition of the affairs of the company, with such particulars as the Superintendent requires.

Origins. — R.S., (1886), c. 129, s. 113; 45 Vict., c. 23, s. 112.

Theory. — S. 187.

173. Publication in the *Canada Gazette*, and in the official gazette of each province, and in two newspapers published at or nearest to the place where the head office in Canada of an insurance company is situate, of notice of any proceeding of which, under this Act, creditors should be notified, shall be sufficient notice to holders of policies or contracts of insurance in respect of which no notice of claim has been received.

Origins. — R.S., (1886), c. 129, s. 114; 45 Vict., c. 23, s. 106.

Theory. — S. 188.

PART IV

OTHER THAN LIFE INSURANCE COMPANIES

174. The provisions of this Part apply only to insurance companies other than life insurance companies, and to insurance companies doing life and other insurance, in so far as relates to the insurance business of such companies which is not life insurance business.

Origins. — R.S., (1886). c. 129, s. 115; 45 Vict., c. 23, subtitle.

175. Any company shall be deemed insolvent upon its failure to pay any undisputed claim arising, or loss insured against in Canada, upon any policy held in Canada for the space of sixty days after becoming due, or, if disputed, after final judgment and tender of a legal valid discharge, and, in either case, after notice thereof to the Minister.

2. In any case when a claim for loss is, by the terms of the policy, payable on proof of such loss, without any stipulated delay, the notice of the Minister under this section shall not be given until after the lapse of sixty days from the time when the claim becomes due.

Origins. — R.S., (1886). c. 129, s. 116; 45 Vict., c. 20, s. 16, in part.

Theory. — S. 3.

176. Any deposit held by the Minister for policy-holders, shall be applied *pro-rata* towards the payment of all claims duly authenticated against such company, upon or in respect of policies issued to policy-holders in Canada.

Origins. — R.S., (1886), c. 129, s. 111; 45 Vict., c. 23, s. 114, in part.

177. Holders of policies or contracts of insurance on which no claim has accrued at the time the winding-up order is made, shall be entitled to claim as creditors, for such part of the premium paid, as is proportionate to the period of their policies or contracts respectively unexpired at the date of the winding-up order.

2. Such return or unearned premium shall rank with judgments obtained and claims accrued in the distribution of assets.

Origins. — R.S., (1886), c. 129, s. 118; 45 Vict., c. 23, s. 115, in part.

178. Upon the completion of the statement to be prepared by the liquidator under this Act, the court shall cause the securities held by the Minister for the company, or any part of them it deems fit, to be sold in such manner and after such notice and formalities as the court appoints.

2. The proceeds thereof, after paying expenses incurred, shall, except in so far as they have been applied under this Act to effect a re-insurance of the policies, be distributed *pro rata* among the claimants according to such statement.

3. If the proceeds are not sufficient to cover in full all claims recorded in the statement, such policy-holders shall not be barred from any recourse they have, either at law or in equity, against the company issuing the policy, other than for a share in the distribution of the proceeds of the securities held for such company by the Minister.

Origins. — R.S., (1886), c. 129, s. 118, § 2; 45 Vict., c. 23, s. 115, in part; 38 Vict., c. 20, s. 17, in part.

179. Whenever the company or the liquidator, or the holder of the policy or contract of insurance, exercises any right which it or he has to cancel the policy or con-

tract, the holder shall be entitled to claim as a creditor for the sum which, under the terms of the policy or contract, is due to him upon such cancellation.

Origins. — R.S., (1886), c. 129, s. 118 § 3; 45 Vict., c. 23, s. 115, in part.

180. The liquidator shall, without the filing of any claim, notice or evidence, or the taking of any action by any person, make a statement of all the persons appearing, by the books and records of the officers of the company, to be creditors or claimants under the three last preceding sections, and of the amounts due to each such person thereunder.

Origins. — R.S., (1886), c. 129, s. 119; 45 Vict., c. 23, s. 116, in part.

Theory. — Ss. 83, 168.

181. Every such person shall be collocated and ranked as, and shall be entitled to the rights of, a creditor or claimant for such amount, without filing any claim, notice or evidence, or taking any action: Provided that any such collocation may be contested by any person interested, and any person not collocated, or dissatisfied with the amount for which he is collocated, may file his own claim.

Origins. — R.S., (1886), c. 129, s. 119; 45 Vict., c. 23, s. 116, in part.

Theory. — S. 72.

182. A copy of such statement, certified by the liquidator, forthwith after the making of such statement, be filed in the office of the Superintendent of Insurance, at Ottawa, and notice of such filing shall be forthwith given by the liquidator by notice in the *Canada Gazette*, and in the official gazette of each province, and in two newspapers published at or nearest to the place where the head office in Canada of the company is situate.

Origins. — R.S., (1886), c. 129, s. 119, § 2; 45 c. 23, s. 116, in part.

Theory. — S. 169.

183. The liquidator shall also forthwith send by mail, prepaid, a notice of such filing to each creditor named in the statement, addressed to the addresses in Canada of such creditors, as far as the same are known, and, in the case of foreign creditors, addressed to the addresses of their representatives or agents in Canada, as far as the same are known.

Origins. — R.S., (1886), c. 129, s. 119, § 2; 45 Vict., c. 23, s. 116, in part.

Theory. — S. 169

184. The holder of a policy or contract of insurance, upon which a claim accrues, after the date of the winding-up order, and before the expiration of thirty days after the filing, in the office of the Superintendent of Insurance, of the statement aforesaid, shall be entitled to claim, as a creditor, for the full net amount of such claim; and the said statement and the dividend sheet shall, if necessary, be amended accordingly: Provided that no claim which accrues after the expiration of the thirty days hereinbefore mentioned, shall rank upon the estate, unless nor until there is sufficient to pay all creditors in full.

Origins. — R.S., (1886), c. 129, s. 120; 45 Vict., c. 23, s. 117.

Theory. — S. 170.

185. Before the expiration of the thirty days aforesaid, the liquidator may, with the sanction of the court, arrange with any incorporated insurance company, approved of for such purpose by the Superintendent of Insurance, for the re-insurance by such company of the outstanding risks of the insolvent company, and for the assumption by such company of the whole or any part of the other liabilities of the insolvent company.

Origins. — R.S., (1886), c. 129, s. 121; 45 Vict., c. 23, s. 118, in part.

Theory. — S. 171.

186. In case of such arrangement the liquidator may pay or transfer to such company, such of the assets of the insolvent company as may be agreed on as the consideration for such re-insurance or assumption, and in such case the arrangement for re-insurance shall be in lieu of the claim for unearned premium.

2. Any remaining assets of the insolvent company shall be retained by the liquidator as a security to the creditors for the payment of their claims, and shall, if necessary, be so applied, and shall not be returned to the company, except on the order of the court after the satisfaction of such claims.

Origins. — R.S., (1886), c. 129, s. 121, in part; 45 Vict., c. 23, s. 118, in part.

187. If the company is licensed under the Insurance Act, the liquidator shall report to the Superintendent of Insurance once in every six months, or oftener, as the Superintendent requires, on the condition of the affairs of the company, with such particulars as the Superintendent requires.

Origins. — R.S., (1886), c. 119, s. 122; 45 Vict., c. 23, s.

Theory. — S. 172.

188. Publication in the *Canada Gazette*, and in the official gazette of each province, and in two newspapers published at or nearest to the place where the head office of an insurance company is situate, of notice of any proceeding of which, under this Act, creditors are to be notified, shall be sufficient notice to holders of policies or contracts of insurance, in respect of which no notice of claim has been received.

Origins. — R.S., (1886), c. 129, s. 123; 45 Vict., c. 23, s. 113.

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