BANKRUPTCY

AND

THE WINDING UP OF COMPANIES

IN

PRIVATE INTERNATIONAL LAW.
# SYNOPSIS

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>INTRODUCTION</td>
<td>1</td>
</tr>
<tr>
<td>II</td>
<td>JURISDICTION OF LOCAL COURTS</td>
<td>19</td>
</tr>
<tr>
<td>(1)</td>
<td>Jurisdiction of Australian Courts in Bankruptcy</td>
<td>19</td>
</tr>
<tr>
<td>(2)</td>
<td>Jurisdiction of South Australian Courts to wind up a company</td>
<td>447</td>
</tr>
<tr>
<td>III</td>
<td>EXTRA-TERITORIAL EFFECT OF LOCAL BANKRUPTCY OR WINDING UP</td>
<td>58</td>
</tr>
<tr>
<td>(1)</td>
<td>Of an Australian bankruptcy</td>
<td>58</td>
</tr>
<tr>
<td>(2)</td>
<td>Of a South Australian winding up</td>
<td>60</td>
</tr>
<tr>
<td>IV</td>
<td>JURISDICTION OF FOREIGN COURTS AND EXTRA-TERITORIAL EFFECT OF FOREIGN BANKRUPTCY AND WINDING UP</td>
<td>68</td>
</tr>
<tr>
<td>(1)</td>
<td>Bankruptcy</td>
<td>68</td>
</tr>
<tr>
<td>(a)</td>
<td>Bankruptcy taking place under an Act of the Imperial Legislature</td>
<td>68</td>
</tr>
<tr>
<td>(b)</td>
<td>Any other bankruptcy</td>
<td>74</td>
</tr>
<tr>
<td>(i)</td>
<td>Movable</td>
<td>74</td>
</tr>
<tr>
<td>(ii)</td>
<td>Immoveable</td>
<td>170</td>
</tr>
<tr>
<td>(c)</td>
<td>Concurrent bankruptcies</td>
<td>127</td>
</tr>
<tr>
<td>(2)</td>
<td>Winding up</td>
<td>127</td>
</tr>
<tr>
<td>V</td>
<td>ADMINISTRATION IN LOCAL BANKRUPTCY OR WINDING UP</td>
<td>135</td>
</tr>
<tr>
<td>(1)</td>
<td>Effect on antecedent transactions</td>
<td>125</td>
</tr>
<tr>
<td>(2)</td>
<td>Power of local Courts to protect foreign property of bankrupt or company</td>
<td>145</td>
</tr>
<tr>
<td>(3)</td>
<td>Proof and effect of proof</td>
<td>147</td>
</tr>
<tr>
<td>(4)</td>
<td>Liability ofContributories</td>
<td>179</td>
</tr>
<tr>
<td>(5)</td>
<td>Priority of debts and administration generally</td>
<td>188</td>
</tr>
<tr>
<td>(6)</td>
<td>Principal and ancillary windings up</td>
<td>205</td>
</tr>
<tr>
<td>(7)</td>
<td>Administration of local assets of dissolved foreign company</td>
<td>221</td>
</tr>
<tr>
<td>VI</td>
<td>EFFECT OF BANKRUPTCY AND WINDING UP AS A DISCHARGE</td>
<td>255</td>
</tr>
<tr>
<td>(1)</td>
<td>Bankruptcy</td>
<td>255</td>
</tr>
<tr>
<td>(a)</td>
<td>Local bankruptcy</td>
<td>255</td>
</tr>
</tbody>
</table>
SYNOPSIS (continued).

(b) bankruptcy taking place under an Act of the Imperial legislature .. .. .. .. 257.
(c) any other bankruptcy .. .. 262.
(?) Winding up .. .. .. .. 270.

APPENDIX A.
Domicil and personal law of corporations and theoretical reasons for recognition of foreign corporations .. .. 278.

APPENDIX B.
The Statute of Westminster .. .. 303.

APPENDIX C.
The effect of the constitution on the principles of private international law as between the States .. .. .. 305.

---000---
CHAPTER I.

INTRODUCTION.

There are occasions in which a person's property has to be administered as a whole for the purpose of satisfying all just claims upon it. The property must be collected and administered by some person having authority to do so and he must satisfy all claims upon it to the extent and in the order prescribed by law. Some such process is known to all systems of law, for justice, both to the person concerned and to the persons having claims against him, demands on occasions when it is obvious or likely that not all those claims can be satisfied in full, that his estate shall be so administered, that they shall be dealt with equally and rateably and in some settled order, rather than that it should be left to each claimant to establish his right separately by the ordinary process of law, and to satisfy it by execution, thus leaving it to chance, caprice or oppression to decide who shall be paid in full and who not paid at all. And the usual, though not inevitable, corollary of such a process is that when the property of the person concerned has been so taken and administered he shall be discharged from his former liabilities. This process is generally brought about by operation of law but a similar result can be obtained by voluntary agreement between such a person and his creditors, whereby he either hands over his property to a representative appointed by them to be administered as described above, or agrees to pay them a rateable proportion of their claims receiving in return a discharge from his liabilities, or, under some systems, personal immunity only. It is the concursus of claimants against the property whereby their claims are dealt with and adjusted as a whole that
forms the essence of the processes with which I propose to
deal. These processes, in countries whose systems of law
are founded on English law, are bankruptcy - including in that
term the various voluntary processes not involving
sequestration described in the Bankruptcy Act - in the case of
a natural human being, and winding-up in the case of a company.

In many cases, our propositus the man or company
concerned has property situated in more than one country, or
the rights of the claimants upon his or its property may
arise under different systems of law. In such instances,
many questions of private international law may arise for
solution. Thus, what persons are to be subjected to this
process in the Courts of any given country? Are the Courts
of each country to administer separately the property within
their respective jurisdictions, and if so what account are
they to take of concurrent administrations in other countries,
or are the Courts of some country, and if so, of what country,
to be recognized as having the sole or at any rate the pre-
eminent right to administer the estate of our propositus as
a whole? If a person is appointed by the Courts or under
the law of one country to administer the estate of our propositus,
will the Courts of other countries recognize his title to
property situated in such other countries? Or, if there are
persons having claims upon the property arising under different
systems of law, by what law are the validity of such claims
and their priorities inter se to be decided? Will the Courts
of one country allow claimants from all over the world to share
in the property, or will the administration in each country
be only for the benefit of claimants belonging in some way to
the particular country concerned? Or, if our propositus is
discharged from his liabilities as a result of some bankruptcy
or liquidation proceedings in one country, in what cases, if a
all, will that discharge be a good answer to an action brought against him by one of his former creditors in the Courts of another country? It is the object of this thesis to endeavour to discover the principles which guide the solution of these and similar questions.

There are two methods of considering any question of private international law. (See Dicey - Conflict of Laws 4th Ed. p.15-19). One is to extract from the writings of jurists and other sources and from the application of logic and deduction a code of rules which should decide what jurisdiction is to belong to each State in any matter, or what law is to be applied to the solution of any question. Those writers who adopt this method are in effect attempting to propound a common private international law for the world, regardless of the fact that the actual rules of private international law adopted and enforced by the Courts of various States profoundly differ from each other. Such writers, while they do not pretend that their principles are those which are necessarily applied in the Courts of any particular State, rather hold those principles up as a test of the expediency or justice of the rules actually adopted. They are expounding law as it ought to be, not as it is. The second method is to endeavour to ascertain the actual rules in relation to the particular topic adopted by the law of some particular State. The first method is philosophical and ideal and has the advantage of logic and consistency. The second is more practical and less subjective, and only attempts to discover part of the actual law of some State. In accordance with the traditional methods of English law, I have adopted the second method and all that this thesis attempts to do is to discover the rules relating to the topic under discussion which are or would be applied in the
Courts of South Australia. This path can only be followed at the cost of a certain sacrifice of logic and consistency. The decisions are not all reconcilable and the principles underlying them are still less so. Nevertheless, I have endeavoured to adhere to principle as much as possible, and to this end, I have ventured to question several of the decisions, not considering the law to be finally settled in the absence of a statute or of a decision of the House of Lords or of the Privy Council.

Though, therefore, my purpose is to discuss part of the law of South Australia, yet I do not propose to enter into a detailed discussion of the provisions of Federal or State Statutes, where no question of principle is involved. For where the legislature lays down a particular rule, provided that it is within its legislative competence, the Courts subject to that legislature have no option but to obey it. It may or it may not conform to the Court's idea in abstract of the proper limits of its own jurisdiction, or of the proper system of law to be applied to the particular case. It may be in flagrant contradiction of some generally accepted principle of international law. But these considerations become irrelevant. For example, the Federal Bankruptcy Act lays down certain rules as to the persons against whom and the conditions in which a sequestration order may be made. These rules are purely arbitrary, and no principle of private international law can be deduced therefrom. They, indeed, answer the question: What is the jurisdiction of an Australian Court to make a sequestration order? And they are, therefore, in outline necessary to be understood for the purposes of our subject. But, if we desire to know what, according to the principles of private international law in force in South Australia, is the proper Court to exercise this jurisdiction, we must look at the cases
in which the effect of foreign bankruptcies is discussed. It is certain that an Australian Bankruptcy Court would not concede to a foreign Court a jurisdiction co-extensive with its own.

The principles of private international law applied in Australia are mainly those which have been developed in the English Courts, except in so far as these have been varied by statute. Private international law, however, is still, to a very large extent, case law. It is, moreover, case law for the most part of recent development. It has been said that it is the last province still remaining for the Courts to develop and settle. It is here, more than in most branches of law, that the opinions of text writers of foreign jurists and the influence of legal theory can still play a large part in the guidance of the Courts. I have, therefore, frequently referred to the opinions of text writers, particularly to those of Dicey (Conflict of Laws 4th Ed.) and Westlake (Private International Law 7th Ed.) and any expression of disagreement with their conclusions is given with diffidence and hesitation.

I might add that I have not thought it necessary to define the fundamental conceptions of private international law, such as the nature of the subject itself or the meaning of the term "domicil", or the difference between movable and immovable property. I have used the word "country" to mean what Dicey (p.57) defines it to mean, namely, the whole of a territory subject under one sovereign to one system of law. This presents some complication in a Federal system of Government, but this is avoided if we bear in mind the relation of the term to the particular subject matter under discussion. When considering a subject matter regulated by Federal law, Australia is one country for the purposes of
private international law; when considering one regulated by State law, the various States are separate countries for that purpose. The terms "local" and "foreign" are used in a similar way. Thus, since the Constitution gives the Commonwealth Parliament power to make laws with regard to bankruptcy, and that power has been used, for the purposes of bankruptcy Australia is one country (for the purposes of an Australian bankruptcy at least; the effect of a bankruptcy occurring in a country outside Australia might conceivably be different in the various States); whether or not the Commonwealth Parliament has power to make laws with regard to the winding up of companies, that power has not been used, and the matter is in fact regulated by the different States, so that in that regard South Australia and Victoria are separate countries for our purpose. The application of the ordinary principles of private international law as between the States of the Commonwealth, however, is, to some extent, affected by the Constitution. I have discussed this subject briefly, and with hesitation, in an Appendix. For the purposes of the body of the thesis, I assume, unless otherwise stated, that with respect to any matter the subject of State legislative power, the States are separate countries from the standpoint of private international law.

Before I discuss the questions which I raised at the beginning of this Chapter, it might be as well to take a general view.

In the first place, in English law, both bankruptcy and winding-up are entirely the creatures of statute. They are unknown to the common law. I will explain the history of the two proceedings in more detail at a later stage. Their development has been very largely the work of the
Courts of Equity in comparatively recent times, mostly during the last two centuries in the case of bankruptcy, the last century in the case of winding-up, work upon which the legislature has from time to time set the seal of its approval. Their roots are not embedded in the common law: they make their appearance in the English legal system at a comparatively late stage. Here, they differ from the other great example of the administration of a person's property as a whole, and the satisfaction of claims upon it, namely the administration of a deceased person's estate. In this case, too, the property of the deceased has to be collected and administered by some person having authority to do so, and all just claims upon it satisfied before the question of the right to the clear surplus is considered. Questions very like the ones set out at the beginning of this chapter have to be answered in this case also. But we will derive no satisfactory assistance in our efforts to discover the answers to most of the questions there set out from a study of the cases dealing with executors and administrators. The reasons for this are historical.

From a very early date, the right to decide who was to represent the estate of a deceased person, the right to appoint the executor or administrator, became the sole prerogative of the ecclesiastical Courts. The rights and liabilities of the executor or administrator as the representative of the deceased when so appointed, on the other hand, fell within the province of the common law, and formed a large part of the learning of the common lawyers in the Middle Ages. Into this field of law, Courts of equity came late, and when they did come, they could only appropriate what was left or what they were obviously fitter to undertake than their rivals. The superiority of their machinery gave them an advantage over the ecclesiastical Courts; and it also enabled them to view the estate
as a whole, whereas the common law Courts could only consider individual claims by or against the estate. The administration action enabled the Court of Chancery to take over the administration of the estate itself, to settle and adjust the claims of creditors upon it and the order in which those claims were to rank, besides distributing the surplus if there was any, an event of some improbability in the later stages of the Court's career. The Court's jurisdiction in this respect bears an obvious analogy to the cases of bankruptcy and winding-up; hence, we shall derive assistance from some of the cases on the administration of a deceased person's estate, and I have used some of these as authorities, although it must be remembered that the Court of Chancery in administering this branch of the law, was administering something which bore the marks of two other systems of law. These historical factors make it impossible to form a coherent and homogeneous set of principles with regard to the administration of assets; and this is one of the penalties which must be paid by a legal system which derives its contents from the principles enunciated by three different and hotly competing sets of Courts administering three different systems of law.

Secondly, our topic shares a difficulty with all the other branches of private international law. The subject was originally developed on the Continent by countries which derived most of their fundamental principles of jurisprudence from a common source - the Roman law. As questions of private international law were raised in England, the Judges, in view of the silence of English law, were forced to borrow the theories and maxims of the Continental jurists, and to attempt to apply principles derived from an alien system of jurisprudence to the legal conceptions of their own law.
It is obvious that this is likely to cause confusion and in no case more than in the present one. The Continental countries inherited a system of bankruptcy of a sort from Roman law, the procedures of cession bonorum and venditic bonorum. I do not profess to be able to describe accurately the nature of the bankruptcy law of any Continental country, but it appears that in general the same principles guide the bankruptcy of a natural and of an artificial person and that the adjudication of bankruptcy acts as a judgment in favor of the creditors, giving the curator or syndic, the representative of the creditors, the administration of the bankrupt's property for their benefit and preventing executions or attachments by individual creditors, but not always operating as a transfer of property from the debtor to the curator. It is, viewed in one way, simply a method of execution. (See Savigny Private International Law (translated by Guthrie) p. 209). (1)

Two views have been taken by foreign jurists as to the proper rule of private international law to be applied to bankruptcy. According to one which upholds what is called "the unity of bankruptcy", there should be only one bankruptcy in the country of the bankrupt's domicile, or perhaps the country of his principal trading establishment.

(1) See for example Giraud French Code of Commerce p. 353: "The effect of an adjudication of bankruptcy is to deprive the bankrupt of the right to administer his property from the day on which the bankruptcy is therein declared to have commenced. This measure does not divest the bankrupt of the ownership of his property but it deprives him of all power to manage sell or transfer it and thus renders it impossible for him to deal in any way with his estate.

The right to administer the estate having passed from the bankrupt to the syndic, it follows that the syndic is the proper party to appear, whether as plaintiff or defendant in all cases which involve the bankrupt's interests. The syndic is the representative of the bankrupt as well as of the general body of creditors. See at p. 375."
No Court of any other country should entertain any bankruptcy proceedings against him and the curator appointed by the Court of the domicile should be assisted by being allowed to obtain possession of all the bankrupt's property in other countries. Separate executions against that property should be prevented and all the creditors referred to the Court of the domicile to have their claims ranked according to that law, with the exception of rights in rem against the bankrupt's property which must be governed by the lex situs and satisfied either in the country of the situs, the surplus then being remitted to the Court of the bankruptcy, or in the court of the bankruptcy itself, the whole proceeds of the foreign property being remitted there. (See for an exposition of this view Savigny, Private International Law above referred to, p.209). According to the other view, separate bankruptcies should be instituted in each country where the debtor has property and each bankruptcy should proceed entirely separately according to its own law, some authorities apparently going so far as to advocate distribution in each country only among creditors subjects of or domiciled in such country or at least the giving of a preference to such creditors. These views are both extreme and probably the law of no country would go so far as to adopt either of them in its entirety. (See Westlake Chap. VI. for a discussion of these matters. See also Aghion French Law as applied to British subjects. Chap. VII

Attempts have been made by writers to discover whether English law adopts or rejects the unity of bankruptcy. In my opinion, it cannot be said in strictness to do either, because its fundamental conceptions in these matters are utterly different. I will explain my opinions of what these principles are and my reasons for that opinion.
in due course. I am assuming here the theories which I shall endeavour to prove elsewhere. In the first place, the principles which govern the bankruptcy of a human being and the winding-up of a company are not the same. There is no logical reason why this should be so; but the law with regard to winding up has always been a part of the company legislation in force at any particular time and no attempt has been made in England or Australia to include the matter in a bankruptcy statute. Now bankruptcy effects an assignment of property from the bankrupt to the trustee in bankruptcy. (Sec. 60 of the Federal Bankruptcy Act 1924-1933). On the other hand, the winding up of a company does not effect an assignment of property from the company to the liquidator, but merely gives him the custody, control and administration of the company's property. (Sec. 211 of the Companies Act 1934.) (See also Primary Producers Bank v. Hughes 32 S.R. (N.S.W.) 14.) The liquidator then is more nearly analogous to the Roman law curator than a trustee in bankruptcy.

When the Courts begin to consider the effect of foreign bankruptcies, they, assuming that in these cases too there was an assignment of property, placed an assignment on bankruptcy in the same category as an assignment on death (i.e. of the beneficial surplus after payment of debts not of the legal title to the property as a whole) or on marriage, and therefore to be regulated on the maxima which we shall frequently meet hereafter, mobilia sequuntur personam. Since, in English law, the law of the person is the law of the domicile, this means that a bankruptcy occurring under the law of the bankrupt's domicile would act as an assignment of the bankrupt's movables all over the world and at any rate in England to the representative of his creditors appointed under the foreign
bankruptcy law. (See for an example of this mode of reasoning: Sill v. Worswick 1 H. Bl. 665). But bankruptcy not occurring under the law of the domicile would have no such effect and therefore could not affect the English movables. The result of this would be that the trustee (to use a convenient term) of the country of domicile would be able to take the English movables: they would be his property, not the property of the bankrupt and therefore no separate execution could be had against them in England. But the trustee in a country not the country of domicile could not take the English movables for they would not be his property, but the property of the bankrupt still, and therefore they could be attached in England. It is possible that under certain conditions such a bankruptcy might be enforced in England as a judgment in personam against the debtor, not as an assignment: in this case, the foreign trustee could sue in England on the judgment and possibly recover property there, but the property would not until then be protected against execution. The English immovables would not be affected by the assignment as they would be governed by the lex situs, not by the lex domicilii but they might be recovered as a result of an action in England on the foreign bankruptcy as a foreign judgment: in the latter event, they would not be protected against individual creditors until the order of the English Court. On the other hand, the existence of a foreign bankruptcy was never a bar to bankruptcy proceedings in England though it might be a matter to be considered in the exercise of the Court's discretion, and it might well be that there would be no property in England for the English bankruptcy to operate upon except assets which had not passed to or been recovered by the foreign trustee.

Then, when the Courts came to consider the effect of a foreign winding up, they, assuming this time that there was no assignment from the company to the foreign liquidator,
decided that the bankruptcy rules were therefore not applicable and that the property within their jurisdiction did not vest in the foreign liquidator. Here again, in certain cases, the liquidator would be acknowledged as the agent of the company and that would give him a right to sue on the company's behalf and to get in its local property, but there would be no protection of that local property, against local executions. Thus, it would be necessary to have a separate winding up in each forum, just as a separate administration in each forum is necessary in the case of death, as a result, historically, of the technical rules about the necessity for a grant of probate or letters of administration from the proper ecclesiastical court before the goods of the deceased within the particular diocese or province could be collected.

In all cases, the English courts have treated foreign and domestic creditors of the same class on an equality, except that they have reserved to themselves the right to take measures of retorsion against creditors coming from a country which refuses to grant equality to English creditors.

The rules on this topic are sometimes stated as if the distinction was between bankruptcy and winding up. The true distinction, in my opinion, is between proceedings which involve assignment and those which do not. It is because bankruptcy under British systems of law involves assignment and winding up does not that the distinction is wrongly taken. But obviously, this need not be a rule of universal validity and there may be cases of bankruptcy which do not effect an assignment to the trustee and cases of winding up which do effect one to the liquidator. This warning must constantly be given whenever rules are laid down as to the effect of bankruptcy and winding up.

I have stated here baldly and roughly propositions which I shall endeavour later at length to discuss and explain.
and if possible, to justify by authority, in order to be able to answer the first question which the theoretical writers would put on this topic to the expounder of any system of law, namely: "Do you adopt or reject the unity of bankruptcy?"

The answer is that the law of South Australia does neither. It holds that in cases involving assignments of property to the representative of the creditors of the bankrupt or the company by the law of the domicile of the bankrupt or company, movable property situated here will have passed to that representative. To that extent, of course, the local creditors are deprived of their remedy against the local property and our law acknowledges the unity of bankruptcy. But that will not prevent a separate bankruptcy or winding up here and a separate administration here of what remains, the immovable property, and any species of movable property which does not pass under the foreign law. In other cases, the representative of the creditors under the foreign law may be assisted here to recover local property of the bankrupt or of the company, but since no assignment to him has been effected the property is still the property of the bankrupt or of the company, and is, therefore, not protected against local executions, and for this purpose a local bankruptcy or winding up is necessary. We therefore never carry the theory of the unity of bankruptcy so far as to allow the jurisdiction of our Courts necessarily to be ousted by the occurrence of a foreign bankruptcy. We so far adopt it, however, as to consider that in all bankruptcies or windings up, foreign and domestic creditors should be treated equally: on the other hand, in any bankruptcy or winding up here we will generally apply the local law of administration. It might be added that in the case of a competition between two systems of law which are founded upon English law, the theory of the unity of bankruptcy will be applied, so far as we ever apply it, to the case of the bankruptcy.
of a natural person, but separate administrations will be necessary in the case of the winding up of a company, and it is necessary to remember that the rules applied in cases of competition between two such systems may have to be materially altered when one of the competing systems is not of such a nature.

I propose to deal with the topic in the following way:

Firstly, I will deal with the jurisdiction of the local courts in bankruptcy and winding up. That is to say, I will endeavour to answer the questions—what persons, for what reasons, and subject to what conditions, are liable to have a sequestration order made against them by an Australian Court, and what companies can be wound up by a South Australian Court? Of course, I am only concerned with these questions from the point of view of private international law, with cases which involve some foreign element. I only deal with the question of jurisdiction as looked at territorially or in other words, in order to discover for example what connection with Australia is necessary to subject a man to the Australian bankruptcy law, either in relation to himself, his nationality, domicile, residence or mere presence in Australia or in relation to any acts he may commit.

Secondly, having ascertained when the Australian or South Australian Court can make an order for sequestration or winding up I next consider what the effect of that order is outside Australia so far as the question can arise for consideration in our Courts. I only consider what its effect is according to Australian or South Australian law: what effect the Courts of any other country will give to it is not, of course, a part of our law, but a part of the law of such other country.
Thirdly, having observed the jurisdiction of our Courts and the effect of their orders, I will next consider the jurisdiction that our law considers should be allowed to foreign Courts in matters of bankruptcy and winding up and the effect in Australia or South Australia of foreign bankruptcies and windings up. This effect will be different upon movable and immovable property here. Logically, the jurisdiction and the extra-territorial effect should, perhaps, be considered separately, but the first can generally only be discussed in our Courts when the second is under consideration.

Fourthly, I come to the actual administration during the bankruptcy or winding up. In this connection only an administration in our Courts concerns us: the rules adopted by foreign Courts during the course of a bankruptcy or winding up in foreign countries form no part of our topic except in so far as they affect the conduct of our own administration. Thus, we shall have to consider how far the provisions of our bankruptcy and winding up law affecting antecedent transactions relate to foreign persons property or transactions; how far the Court can prevent the diminution of the funds available for creditors by executions and attachments against the foreign property of the bankrupt or the company; what creditors will be allowed to prove their debts here and upon what terms; how far the Court can take into account payments received abroad in deciding what to pay here; by what law the Court is to decide whether a creditor is secured or unsecured; by what law the foreign property of the bankrupt or company in the hands of the local trustee or liquidator is to be administered, and by what law the priority of creditors inter se is to be decided.

There are some questions which fall to be answered in
the case of a company only. These arise mainly from the
differences between the bankruptcy of a human being, and
the winding up of a company. Thus, it is not only insolvent
companies which may be wound up and therefore it is possible
that there may be a surplus. This is possible in the case
of bankruptcy also; but in that case, the surplus can only
be restored to the bankrupt. But the winding up provisions
of the Companies Act contemplate the dissolution of the
company and the division of the surplus in a certain way.
(See Sec. 232 and 264 of the Companies Act,); so that we
have to ask — what law has power to dissolve the company?
what is the effect of the dissolution of the company in a
foreign country upon its existence and assets in South
Australia? by what law is the title to the surplus left in
the winding up after the debts are paid to be decided?
The rights and liabilities of the members also have to be
considered, so we must ask — what persons can be placed
upon the list of contributors? on what persons can calls
be made? by what law are the rights and liabilities of the
members to be decided? Moreover, since, under British
systems of law it is necessary for a separate winding up to
take place in each forum, we have to ask what account is to
be taken here, of a winding up elsewhere. This raises the
question of principal and ancillary windings up. Many of
these matters have not been as yet thoroughly investigated,
and owing, no doubt, to the existence of separate company
laws and winding up provisions in the six Australian States
the Australian Courts have taken a leading part in exploring
this legal terra incognita. Matters like this often occur
in Australia and the subject is of much practical importance.

Fifthly, I will deal with the question of discharge
and endeavour to answer the question: By a discharge
arising under what bankruptcy law will what obligations
be regarded as discharged in Australia?
Finally, I have relegated to an appendix certain subjects which incidentally arise to be considered and which cannot be conveniently dealt with elsewhere.