PARLIAMENTARY COUNSEL

HOUSE OF COMMONS

CANADA.

BRIEF SUMMARY

OF STEPS TO BE TAKEN IN INCORPORATING AND ORGANIZING A COMPANY.

(Items marked "*" are not necessary in case of a private company.)

PREREQUISITES TO INCORPORATION:

File the following documents with the Registrar of Companies:

(a) Memorandum of Association. (Section 13.)

(b) Articles of Association (unless Table A is adopted without modification). (Section 20.)

(c) Statutory Declaration as required by Section 27.

(d) Notice of Situation of registered office. (Section 70.)

(e) Cheque for Fees (Table A).

*(f) Consent and agreement where any person is appointed a director by the Articles. (Section 80.)

*(g) List of persons who have consented to be directors. (Section 80.)

HOLD MEETING of Subscribers to Memorandum of Association if they have power to appoint first directors. See Table A, Clause 68.

HOLD MEETING of First, or Provisional, Directors.

*FILE PROSPECTUS (if any). Sections 80, 89 and 90.

*TO OBTAIN CERTIFICATE authorizing Company to commence business:

(h) Make Allotment of Shares as required by Section 94.

(i) File with Registrar Statutory Declaration required by Section 96.

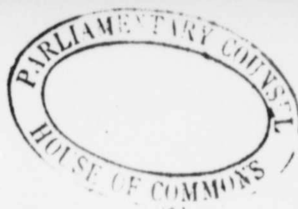
(j) If no Prospectus issued, a Statement in Lieu of Prospectus must be filed. (Section 91.)

STATUTORY MEETING:

*(k) Forward Statutory Report to shareholders, and file copy with Registrar. (Section 73.)

(l) Hold meeting. (Section 73.)

(For fuller summary of steps, see Pages 115 to 117 of this book.)



SUMMARY

OF RETURNS TO BE MADE TO REGISTRAR AND OTHER STATUTORY DUTIES OF DIRECTORS AND OTHER OFFICERS.

Section 18.—Notify Registrar of Change of Name.

Section 19.—Notify Registrar of Alteration of Objects.

Section 33.—Keep Register of Members.

Section 34.—Make Annual Returns to Registrar.

Section 41.—Allow Register of Members to be Inspected.

Section 51.—Notify Registrar of Increase of Capital.

Section 52.—Notify Registrar of Reorganization of Capital.

Section 58.—Notify Registrar of Reduction of Capital.

Section 64.—Notify Registrar of Reduction of Capital by Land Companies.

Section 70 —Notify Registrar of Registered Office.

Section 71.—Publish the Name of Company.

Section 72.—Hold Annual General Meeting in each year.

Section 78.—File with Registrar Copies of Special and Extraordinary Resolutions.

Section 79.—Keep Minutes of Meetings of Directors and Shareholders.

Section 83.—Keep Register of Directors and notify Registrar.

Section 97.—Make Return of Allotments.

Section 101.—Issue Share Certificates.

Section 102.—File Mortgages, etc., with Registrar.

Section 108.—Keep a Register of Mortgages.

Section 109.—Allow Inspection of Same.

Section 119.—Appoint Auditor Annually.

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A MANUAL

OF

BRITISH COLUMBIA COMPANY LAW

BEING

A Practical Handbook for the Legal Profession, Directors, Secretaries and Shareholders

ON

Formation, Management and Winding Up of Companies

BY

ALEXANDER HAROLD DOUGLAS, LL.B.

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PREFACE.

IT IS hoped that this book will fill a long felt want in Western Canada, and especially in British Columbia. A few treatises on Company Law have been published in Eastern Canada, but their service to the lawyer, and especially to the business man in Western Canada is very limited. Few words are required as a preface to the present work, as much of what might have been said in a preface will be found in the first chapter. It is pointed out there that the Companies' Act of British Columbia is, to a large degree, identical with the Companies' Act in force in England. This manual has accordingly been based on a standard English work known as "A Handbook on Joint Stock Companies," published by Jordan & Sons, Limited, of London, England, and that book (with the consent of the publishers) has been drawn upon to a large extent. It has a wide circulation in England amongst business men, as well as lawyers, and the authors hope that this manual will have a similar success in Western Canada.

Every effort has been made to make this book useful to directors, secretaries and others connected with joint stock companies. To make it a handy book of reference to lawyers, over 2,000 English cases and 150 Canadian cases have been quoted in the footnotes, and it has been brought up to date as far as possible. The Amendments contained in the Companies' Act Amendment Act, 1913, are included in the text. The principal Act was already in print before these amendments were passed, and it was not possible to interlineate the 1913 amendments with the principal Act as has been done in the case of the 1912 Amendments. The Amending Act is therefore set out in full after the principal Act, and the sections thereof affected by the 1913 Act have been noted in the margin of the principal Act.

VANCOUVER, B.C., April, 1913.

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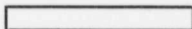

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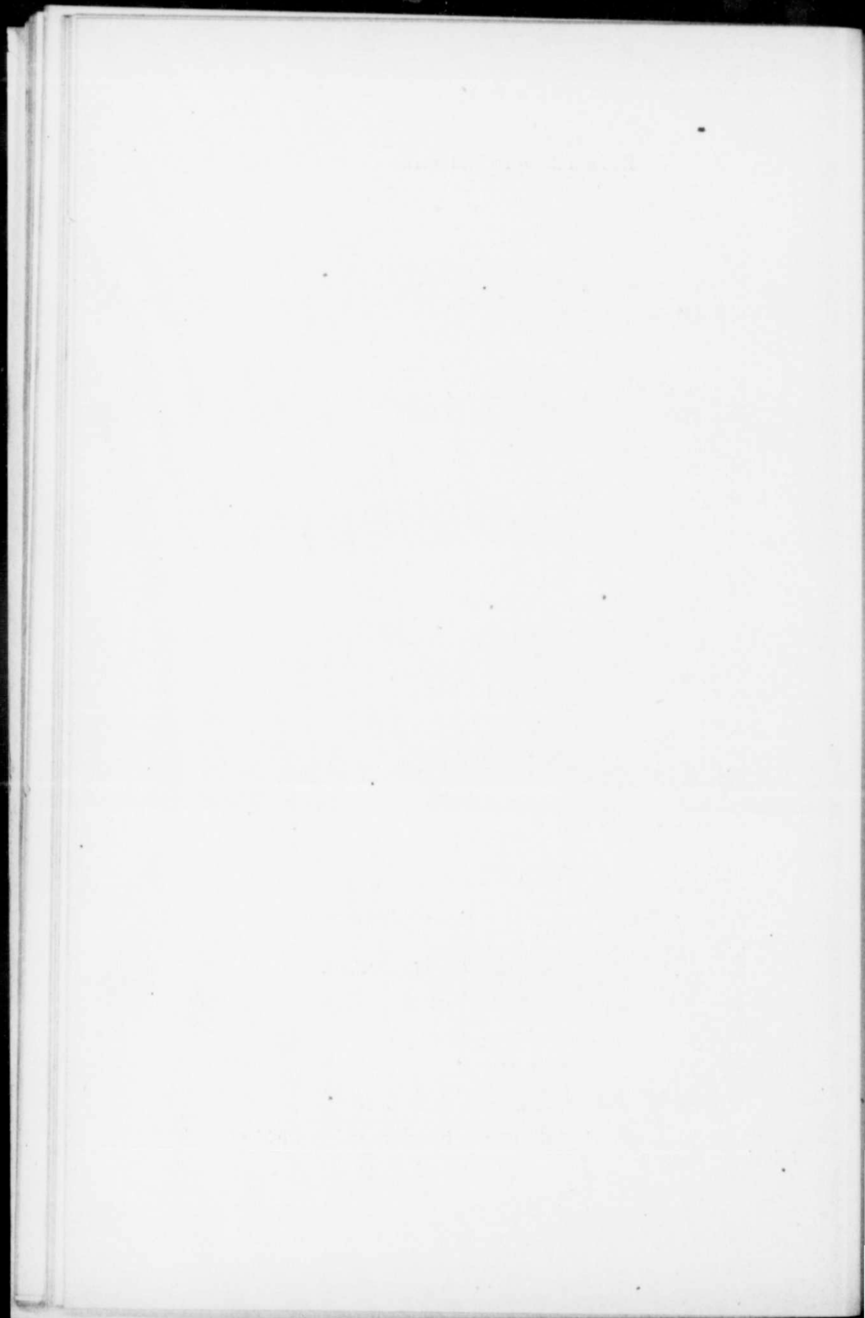

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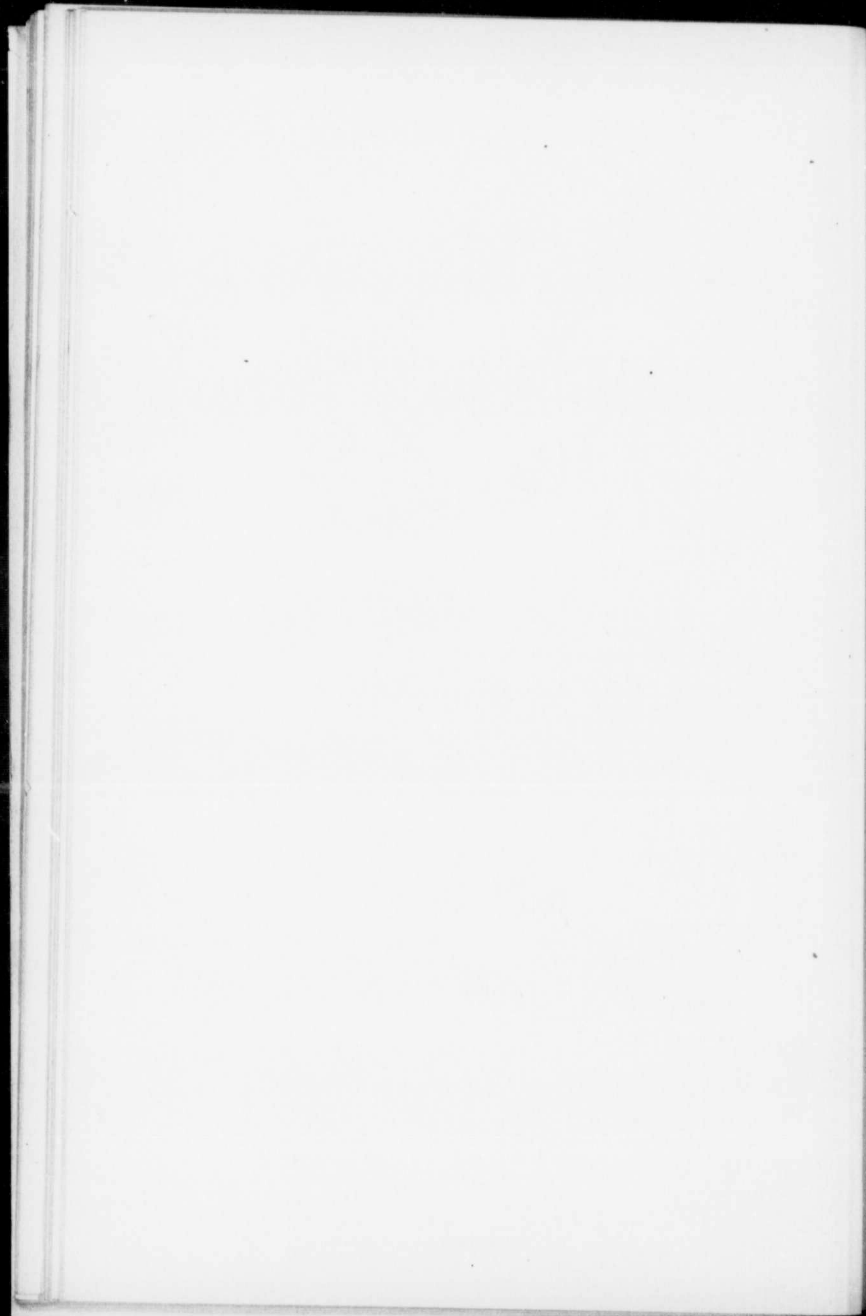

PART I.

THE FORMATION AND CONSTITUTION OF A COMPANY

CHAPTER I.

INTRODUCTION.

The operation of businesses for trading and other purposes on Joint Stock principles can be traced back for several centuries. The Hudson's Bay Company, for instance, was founded in 1670; the Bank of England in 1694, and the well known East India Company as far back as 1600, eight years before Champlain laid the foundations of Quebec. In those days such Companies were incorporated either by special Act of Parliament or by Royal Charter, but there also existed large and important businesses (*e.g.* Banking and Insurance Companies) which were merely private partnerships. In 1855 the principle of Limited Liability was established, and since that date the benefits and advantages which accrue therefrom have become so universally acknowledged, that in the Statute Book of almost every civilized country there will now be found enactments having Limited Liability as a fundamental principle for the operation of Joint Stock Companies.

The Imperial Parliament in 1844 and in subsequent years passed various general Acts of Parliament enabling Joint Stock Companies to be incorporated without the necessity of obtaining a special Act of Parliament, and in 1908 that Parliament consolidated all the general acts re-

lating to Joint Stock Companies into one Act known as the Companies (Consolidation) Act, 1908.

The British North America Act, an Act of the Imperial Parliament, is the written constitution of the Dominion of Canada. Sub-section 11 of Section 92 of this act gives to the Legislature of each Province in the Dominion the right to legislate exclusively as to, amongst other things, the incorporation of companies with Provincial objects. Section 91 of the British North America Act gives exclusive jurisdiction to the Parliament of Canada to legislate on all matters not expressly assigned to the Legislatures of the Provinces.

Mr. Lefroy, in his work on the Legislative Power in Canada, in Sections 55, 56 and 57, summarizes the powers of the Dominion Parliament and the Provincial Legislatures as follows:

55. The Dominion Parliament can alone incorporate companies with powers to carry on business throughout the Dominion and the business of companies so incorporated may have to do with property and civil rights, yet it cannot empower them to carry on business in any Province otherwise than subject to and consistently with the laws of that Province (unless the business is such that power to make laws in relation to it is exclusively in the Dominion Parliament, under one of the enumerated heads of Section 91 of the British North America Act).

56. The fact that Provincial Legislatures may have passed acts relating to companies of a particular description, such, for example, as building societies, and defining and limiting their operations, does not interfere with the power of the Dominion Parliament to incorporate such companies, with power to operate throughout the Dominion.

57. The fact that a company incorporated under an Act of the Dominion Parliament, with power to carry on its business throughout the Dominion, chooses to confine the exercise of its powers to one Province cannot affect its status or capacity as a corporation, if the act incorporating the company was originally within the legislative power of the Dominion Parliament.

Companies may, therefore, be incorporated either under Dominion or Provincial charter. Important questions of law have arisen as to the respective legislative powers under the British North America Act of the Dominion of Canada and of the Provinces of Canada in relation to the incorporation of companies. It was suggested that the true construction of Sub-section 2 of Section 92 of the British North America Act limited the exercise by a provincial company of its corporate powers to the territory of the particular province by which such company was incorporated. The opposite view, however, was taken by a majority of the Judges of the Supreme Court of Canada in Canadian Pacific Railway Company *v.* Ottawa Fire Insurance Company (39 S.C.R. 405), where it was held that a company incorporated under the authority of the Provincial Legislature to carry on the business of fire insurance is not inherently incapable of entering outside the boundaries of its province of origin into a valid contract of insurance relating to property also outside of those limits.[1] Notwithstanding this decision it is felt that the questions of law regarding the respective legislative powers of the Dominion and of the Provinces in relation to the incorporation of companies have not been finally or completely settled. With a view to this being done a series of questions, drawn up by the Minsiter

[1]See also Citizens *v.* Parsons, 7 A.C. 96; Colonial Building *v.* Atty. Gen. Quebec, 9 A.C. 57.

of Justice of Canada will be referred by the Governor-General in Council to the Supreme Court of Canada for hearing and consideration. Whatever may be the decision of the Supreme Court it will, without doubt, be taken to the Privy Council in England. Until the decision of the Privy Council is handed down these questions of law must remain in doubt.

HISTORY OF JOINT STOCK LEGISLATION IN BRITISH COLUMBIA.

On the 10th day of December, 1859, Sir James Douglas, the Governor of British Columbia, by Proclamation enacted that the then existing statutes in force in England relating to Joint Stock Companies should be taken and construed to extend to the Colony of British Columbia.

In 1866, the Companies Ordinance was passed by the Legislative Council of the Colony of British Columbia repealing all previous legislation dealing with Joint Stock Companies. This Ordinance, however, from 1866 to 1869 was in force only on the mainland of British Columbia. In 1869, after the colonies of British Columbia and Vancouver Island had been united, an amending act was passed extending the Companies Ordinance to Vancouver Island and its dependencies. The Companies Ordinance, 1866, provided that the Companies Act, 1862, of the Imperial Parliament should have the force of law in the Province with the exception of certain modifications set forth in the said Ordinance. From 1866 to 1878 this Ordinance remained the only general act dealing with Joint Stock Companies on the Statute book of this Province. In 1878 an act was passed enabling companies to be incorporated under that act independently of the Companies Ordinance, and in 1890 a further act, known as the Companies Act, 1890, was passed, which authorised a third distinct form of incorporation, and from

1878 until the year 1897 there were thus three distinct general acts dealing with the incorporation of companies and regulating companies formed thereunder. In the year 1897 an act was passed, and the preamble to this act states concisely the purpose of the Legislature in passing it:

> Whereas there are now several systems under which Joint Stock Companies and Trading Corporations may be incorporated and formed and it is expedient to amend and consolidate the law in this respect and to enact an exclusive and comprehensive law governing the formation of Joint Stock Companies and Trading Corporations.

This act repealed all general statutes then existing relating to companies, but provided that such repeal should not be held or taken to in any way alter, limit or affect the corporate existence, rights, privileges, powers and liabilities of any company incorporated under the said Repeal Acts or any or either of them.

This act remained the general act dealing with the incorporation of companies in this Province until the 1st day of July, 1910, when the Companies Act, 1910, came into force and repealed the Companies Act, 1897. The Companies Act, 1910, was introduced into the Legislature following the passing by the Imperial Parliament of the Companies (Consolidation) Act, 1908, referred to above. The British Columbia Act follows very closely the provisions of the British Act of 1908, with the addition of certain special sections applicable to Mining Companies and Extra Provincial Companies.

The whole of the statute law in this Province was consolidated in the year 1911 and the Companies Act, 1910, was accordingly repealed and replaced by the Companies Act, R.S.B.C., 1911, Chap. 39. The differences between

the Companies Act, 1910, and the Companies Act, R.S.B.C., 1911, Chap. 39, are only of a minor character. The Companies Act, R.S.B.C., 1911, Chap. 39, as amended by amending Statutes passed in the years 1912 and 1913, is the present general law relating to Joint Stock Companies in force in this Province, and all references to the Act or to the Companies Act in this book are to be taken to refer to the Companies Act, R.S.B.C., 1911, Chap. 39, as amended by the Companies Act Amendment Acts of 1912 and 1913. The Companies Act, R.S.B.C., 1911, Chap. 39, as amended by these two Acts, is set forth in full with all the schedules in the appendix hereto.

This act applies to all companies formed and registered thereunder, or formed and registered under any former public ordinance or act of the province dealing with companies, except the "Companies Act, 1878," and the "Companies Act, 1890" (Section 2). Companies formed under these two acts are subject to the provisions of the Companies Act, under which they were respectively formed and registered, and notwithstanding the repeal of these acts by the Companies Act of 1897 as above mentioned, these two acts must be deemed to remain on the statute book for the purpose of determining the rights, privileges, powers and liabilities of such companies.

Section 310 of the present act, however, expressly provides that Sections 34, 74, 83, 119 and 120 of the present act shall apply to such companies.

The existence of companies formed under the Companies Act, 1878, or the Companies Act, 1890, is limited to a period not exceeding 50 years. Such companies may apply under the "Companies Revival and Continuation Act, R.S.B.C., 1911, Chap. 42, to the Registrar of Joint Stock Companies for a certificate granting them perpetual existence.

Most of the companies operating in this Province are incorporated under the Companies Act, that is to say, either under the Companies Act, 1897, or previous General Acts repealed by the Act of 1897, or under the Companies Act, R.S.B.C., 1911, Chap. 39. Chapters 2 to 19 and 22 to 26 of this book relate exclusively to companies limited by shares formed under the Companies Act. This Act not only provides for the incorporation of such companies, but also provides for the incorporation of companies limited by guarantee and also of unlimited companies; but use is seldom made of these provisions of the Act and consequently little reference is made in this book to such companies.

The incorporation of companies in this Province, however, is not limited to the incorporation of companies under the Companies Act. Companies are formed at each session of the Legislature of British Columbia by Private Act. But incorporation in this way is much more expensive than incorporation under the Companies Act, and such incorporation is therefore limited to certain classes of companies which either cannot be formed under the Companies Act, as for example, Railway and Insurance Companies, or where special powers are desired direct from the Legislature. Companies thus incorporated by special Act do not come under the Companies Act in any way but are subject to another Provincial act called the "Companies Clauses Act."

Another form of incorporated association to which reference must be made are bodies formed under a number of Acts of the Legislature of this Province enabling the incorporation of various types of associations and societies for special purposes, as for example, benevolent and friendly societies, industrial and provident societies and other like institutions. These, however, are outside the scope of this work and no further reference is made thereto.

Companies may be incorporated with a Dominion charter either by letters patent issued under Part 1 of Companies Act, R.S.C., 1906, Chap. 79 (which corresponds to the certificate of incorporation under the Companies Act of British Columbia), or by special act of Parliament of Canada, in which latter case they are governed by Part 2 of said act. This Part 2, entitled "Companies Clauses," corresponds to the Companies Clauses Act of this province. Many Dominion companies incorporated by letters patent under Part 1 of the above-mentioned act, carry on business and have their head office in British Columbia. Chapter 21 deals with this type of company.

CHAPTER II.

HOW TO FORM A JOINT STOCK COMPANY.

Lord Justice Lindley gives this definition of a company having a capital divided into shares: "I understand by a company—an *unincorporated* company—some association of members, the shares of which are transferable. As distinguished from a partnership, I know of nothing else except the transferability of shares."[1] But with regard to an *incorporated* company there are other important distinctions: *e.g.* that, while in an ordinary partnership each partner is personally responsible for all the debts contracted by the firm, in an incorporated company the members have no individual liability to its creditors for debts owing by the company, and their personal liability is satisfied if they pay the calls properly made upon them by the company or its liquidator. The amount of these calls may be limited in amount or unlimited, according as the company is limited or unlimited, but they are enforceable only by the company or its liquidator. The company, moreover, is a distinct legal personality,[2] and can own and deal with property, sue and be sued, in its own name, and contract on its own behalf, and the members are not personally entitled to the benefits or liable for the burdens arising thereby: their rights are confined to receiving from the company their share of the profits, or, after a winding up, of the surplus assets. The creditors of a limited company accordingly

[1] Reg. *v*. Registrar of Joint Stock Companies, [1891] 2 Q. B. 610.

[2] Where a partnership of eight persons transferred their property to a company in exchange for shares in the same proportions as their interests in the partnership this was held ta be a sale to a distinct person. "We have two parties, one party consisting of several individuals, and the other party consisting of a corporation." *Per* Lindley, L. J. (John Foster & Sons *v* Commissioners of Inland Revenue, [1894] 1 Q. B. at p. 528).

know that they cannot, as in the case of an ordinary partnership, look to the whole property of the individual members to pay them, but are restricted to the property of the company, including such further amounts (if any) as the members are liable to pay in respect of shares held by them in the capital, and in the case of Companies Limited by Guarantee the sums payable in accordance with the guarantee contained in the Memorandum of Association.

Section 9 of the Companies Act provides that no company, association or partnership consisting of more than twenty persons may be formed for the purpose of carrying on any business[1] that has for its object the acquisition of gain, unless it is registered under the Companies Acts or is formed in pursuance of some other Act or of Letters Patent.

Companies are divided into "Public Companies" and "Private Companies." The latter are defined in Section 130, and are described at page 375 *infra*. Any five or more persons in the case of a Public Company, and any two or more persons, in the case of a Private Company, whether British subjects or foreigners,[2] may for any lawful purpose form an incorporated company. The Act provides, however, that no company shall be incorporated under the act for the construction and working of railways, or for the purpose of carrying on the business of banking or insurance, and any company that carries on the business of fire, life, marine or other insurance, in common with any other business, is deemed to be an Insurance Company.

Companies, both public and private, must be one of five kinds, *viz.*: (1) A Company with its liability limited by shares; (2) A Company with its liability limited by Guar-

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[1]As to what is "carrying on business" see Smith *v.* Anderson, [1880] 15 Ch. D. 247.

[2]General Company for the Promotion of Land Credit, [1870] 5 Ch. 363.

antee and not having a Share Capital; (3) A Company with its Liability limited by Guarantee and having a Share Capital; (4) A Company with Unlimited Liability and having a Share Capital; or (5) A Company with Unlimited Liability and not having a Share Capital. The form in most general use is with the liability limited by shares; the other forms are hardly, if ever, met with in practice, although it may be conceived that such forms might be appropriate to certain Syndicates, Associations or Societies where working Capital was not required.

Every company formed under the Act must have a Memorandum of Association (which may be described as the Charter of the Company), giving the particulars mentioned below. The registration of this Memorandum, after having been duly subscribed by at least five persons in the case of a "Public Company" or two persons in the case of a "Private Company," is the formal creation of the company, and from that time its corporate existence is recognized by law.

The Memorandum and Articles when registered bind the company and its members to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member to observe all the provisions of the Memorandum and Articles, and all money payable by any member under them becomes a debt due from him to the company of the nature of a specialty debt (Section 24).

The following are the particulars which the Memorandum of Association of a company limited by shares must state:

1. The Name of the Company, with "Limited" as the last word in its name.
2. The city, town or county in the Province in which the registered office of the Company will be situate.

3. The Objects for which the Company is established.
4. That the Liability of the Members is Limited.
5. The Amount of Share Capital with which the Company proposes to be registered, and the division thereof into Shares of a fixed amount.

Each of the persons who subscribe the Memorandum of Association of a Company having a Share Capital must write opposite his name in the Memorandum the number of shares he agrees to take in the first instance;[1] but he may subsequently increase his holding to any extent. No subscriber may take less than one share.

The Memorandum, and if there are special Articles also the Articles of Association, must then be lodged at the office of the Registrar of Companies in Victoria, accompanied by a statutory declaration by a solicitor engaged in the formation of the company, or by a person named in the Articles as a director or secretary, that the requirements of the Act have been complied with (Section 27, Sub-section 2), and also by a marked cheque for the necessary registration fees and Gazette advertising charges. If everything is in order, a Certificate to the effect that the company has been incorporated under The Companies Act, is issued forthwith by the Registrar.[2]

A Certificate of Incorporation given by the Registrar in respect of any association shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been

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[1]It is not uncommon for the subscribers to a Memorandum of Association to sign their names only to the document, and to allow a clerk, or the witness, to write in their addresses and occupations and the number of shares subscribed for. As writing the number of shares by any other person is not a compliance with the Act, it should be borne in mind that each subscriber *must write with his own hand* the number of shares he agrees to take (Section 13).

[2]For Table of Fees to be paid on registering a Company see Table B. page 690.

complied with, and that the association is a company authorised to be registered and duly registered under this Act (Section 27, Sub-section 1). The Registrar may refuse to issue a certificate of incorporation to a company which by its memorandum takes all or any of the powers of a Trust Company as defined by "Trust Companies Regulation Act." The Lieutenant-Governor-in-Council may, on application being made, direct the issue of the certificate. (Section 5, Amendment Act, 1913.)

From the date of incorporation mentioned in the Certificate of Incorporation the subscribers of the Memorandum, together with such other persons as may from time to time become members of the company, become a body corporate by the name contained in the Memorandum, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, with power to hold lands, but with such liability on the part of the members to contribute to the assets of the company in the event of the same being wound up as is mentioned in the Act (Section 26, Sub-section 2).

Section 269, Sub-section 3, enacts that any person may inspect the documents kept by the Registrar on payment of 25 cents for each inspection, and may require a copy or extract of any other document or part thereof, on payment for the copy or extract of the prescribed fees not exceeding ten cents for each folio, and a further fee not exceeding one dollar if such copy is required to be certified; and Sub-section 4 provides that a copy of or extract from any document kept and registered at any of the offices for registration, certified to be a true copy under the hand of the Registrar or an Assistant Registrar, shall in all legal proceedings be admissible in evidence as of equal validity with the original document. Emergencies frequently occur when an additional Certificate is required in legal proceedings or for use outside of the Province.

CHAPTER III.

THE MEMORANDUM OF ASSOCIATION.

THE registration of the Memorandum of Association (after having been duly subscribed) being the formal creation of the company, the contents of that document are now dealt with more fully.

1. THE NAME OF THE COMPANY.

The word "Limited" must be the last word in the company's name. Any person or persons not duly incorporated with limited liability who trade or carry on business under any name or title of which "Limited" is the last word are liable to a penalty not exceeding twenty-five dollars a day (Section 294). An abbreviation of the word (such, for instance, as "Ld." or "Ltd.") should not be used, as it is not a compliance with the Act; and the word must therefore be given in full in the Memorandum of Association: *e.g.* "The Name of the Company is THE EASTERN STEAM PACKET COMPANY, LIMITED."

In selecting a name for a company, care must be taken that it is not identical with that by which a company or society or firm in existence is carrying on business or has been incorporated, licensed or registered, or so nearly resembling that name as, in the opinion of the Registrar,[1] is calculated to deceive, or by a name of which the Registrar shall for any reason disapprove, except where such company or society or firm in existence is in the course of being dissolved and certified its consent by resolution duly passed and filed with the Registrar, or except where an extra Provincial Company licensed or registered has ceased or is deemed to have ceased to carry on business in the Province (Section 18, Sub-section 1).

[1]As to Registrar's discretion, see King v. Registrar of Companies. 1912, 3 K. B. 23.

If by inadvertence a company is incorporated, licensed or registered by a name identical with or too closely resembling that of an existing company, the first mentioned company shall change its name in the manner provided by Section 18 (see page 34).

The two names Canada Permanent Loan & Savings Company and the British Columbia Permanent Loan & Savings Company have been held by the Supreme Court of British Columbia not to so resemble each other as to cause confusion.[1]

Where a company has obtained incorporation under the Dominion Companies Act under a certain name, although it is not licensed to do business in the Province of British Columbia, it may nevertheless prevent another company being formed in the Province under the Provincial Companies Act with the same name.[2]

A company cannot be registered with a name identical with that of an existing one, although the purposes for which it is formed may be totally different, and the scene of its operations in a different part of the world.[3] Further, a company formed for the purpose of carrying on a business similar to that of an existing firm has no right of registration under a name closely resembling that of the firm, even if the proposed name is that of a person identified with the company. For example, Madame Tussaud & Sons, Limited, obtained an injunction restraining Louis J. K. Tussaud from registering a waxworks exhibition under the name of "Louis Tussaud, Limited,"[4] for although a man may trade in his own name, notwithstanding the fact that it closely resembles

[1]Canada Permanent *v.* B.C. Permanent 6 B.C.R. 377.

[2]Semi-Ready Limited *v.* Semi-Ready Limited 15 B.C.R. 301

[3]But if the name is distinct and the business different it is no objection that one of the principal names is identical (Dunlop Pneumatic Tyre Co. *v.* Dunlop Motor Co., [1907] App. Ca. 430).

[4]Madame Tussaud & Sons *v.* Tussaud, [1890] 44 Ch. D. 678.

the name of another trader or company, he may not register a company in such name, so as to obtain the benefit of the goodwill attaching to the name already in use.[1]

A company must not take such a name as will lead to the belief that it is carrying on the business of an existing firm, British or Foreign;[2] for, even after the name has been placed upon the Register, the company and its members may be restrained from allowing the company to remain registered under the offending name,[2] and the Court may also grant other injunctions in such form as to make the use of the name nearly impossible. · Thus, Messrs. Huntley & Palmer procured an injunction restraining the Reading Biscuit Company, Limited, from using the word "Reading" as descriptive of or in connection with its biscuits without clearly distinguishing them from the plaintiffs' biscuits.[3] Where, however, one company carried on only Marine Insurance business, and another General but not Marine Insurance, an injunction was refused in Scotland on the ground that no confusion was likely to arise.[4]

But a company cannot appropriate a descriptive word or title so as to obtain a monopoly of it,[5] even when the word

[1]Fine Cotton Spinners' Association v. Harwood, Cash & Co., [1907] 2 Ch. 184.

[2]Societe Anonyme des Anciens Etablissements Panhard et Levassor *v.* Panhard Levassor Motor Co., [1901] 2 Ch. 513; Daimler Motor Co. *v.* London Daimler Co., *Times*, 16th April, 1907; Mercantile Investment and General Trust *v.* Mercantile and General Trust, *Times*, 27th Feb., 1909; Standard Bank of South Africa *v.* Standard Bank, [1909] 25 T. L. R. 420. Lamontagne, Limited, *v* Girard [1910] 39 Que. S. C. 179.

[3][1892] 9 T. L. R. 462; compare Montgomery *v.* Thomson, [1891] App. Ca. 217. John Brinsmead & Sons obtained an injunction restraining Thomas Edward Brinsmead & Sons, Limited, from selling pianos without a statement that they were not those of the plaintiff firm (Court of Appeal, 26th October, 1896).

[4]Scottish Union and National Insurance Co. v. Scottish National Insurance Co., [1909] S. C. 318 Court of Sess.

[5]Aerators, Limited v. Tollit, [1902] 2 Ch. 319, where it was held that the plaintiff company could not prevent the registration of Automatic Aerators Patent Co. The Electromobile Co. also failed to restrain the British Electromobile Co. from trading in that name (1908, 98 L. T. 258), and the Trade Extension Co. failed against the Expansion of Trade, Limited, [1909] 54 S. T. 101.

is a fancy word, whose use is brought in by the complaining company.[1]

The Registrar will, on request being made to him, reserve any name which is available for an intended company or for a company which is changing its name, for a period of fourteen days, or for any extended period he may allow, not exceeding in the whole thirty days.

Every company must have its name painted or affixed, "in letters easily legible," in a conspicuous position on the *outside* of every office or place wherein it carries on business. Its name must also be "engraven in legible characters" on its seal, and appear "in all notices, advertisements and other official publications of the company, and in all bills of exchange, promissory notes, endorsements, cheques and orders for money or goods purporting to be signed by or on behalf of the company, and in all bills of parcels, invoices, receipts and letters of credit of the company" (Section 71, Sub-section 1). The penalty for not publishing the name of a company as required is twenty-five dollars per day for every day during which its name is not so kept painted or affixed, and every director or manager knowingly and wilfully permitting the default is liable to the same penalty (Section 71, Sub-section 2).

Any director, manager or officer of a company using or authorizing the use of a seal purporting to be the seal of the company whereon its name is not so engraven, or issuing or authorizing the issue of any document of the company wherein its name is not mentioned in manner aforesaid, is liable to a penalty of two hundred and fifty dollars, and is also personally liable to the holder of any such bill of ex-

[1]British Vacuum Cleaner Co. *v.* New Vacuum Cleaner Co., [1907] 2 Ch. 312. In this case the plaintiff company was forming subsidiary companies using the words "Vacuum Cleaner," which was another ground for refusing relief. See also Electromobile Co. *v.* British Electromobile Co., [1907] 23 Times L. R. 631.

change, promissory note, cheque or order for money or goods for the amount thereof, unless the same is duly paid by the company (Section 71, Sub-section 3).

2. THE REGISTERED OFFICE.

This clause must be stated thus: "The Registered Office of the Company will be situate in the City of Vancouver, B.C."

Every company must have a registered office, "to which all communications and notices may be addressed" (Section 70, Sub-section 1), and any writ, notice, summons or order is well served if left at or sent by post to such registered office (Section 123). Any company which carries on business without having registered the situation of its office, or any change thereof, is liable to a penalty of twenty-five dollars for every day during which business is so carried on (Section 70, Sub-section 3).

Notice of the situation of the registered office must be delivered to the Registrar with the Memorandum of Association, and notice of any change therein must be given to the Registrar, who will record the same. The recording fee is one dollar in each case. Forms of such notices will be found in Part IV., page 541.

3. THE OBJECTS OF THE COMPANY.

The Objects clause being the most important part of the Memorandum, great care should be taken that the objects of the company (*i.e.* the trade or business which it is formed to carry on) are stated in the fullest and clearest manner possible, as the company cannot legally undertake any business not authorized by its Memorandum, and even the fullest sanction given by the shareholders will not make valid any act which is outside the powers of the company.[1] Directors

[1]See Ashbury Railway Carriage Co.*v* . Riche, [1875] L. R. 7 H. L. 653; Attorney-General *v*. Great Eastern Railway Co., [1880] 5 Ap. Cap. 473.

undertaking any such business may become personally liable for loss, and the greatest inconvenience follows from companies having too limited powers. It is, indeed, customary to insert some general words, such as "To do all such other things as may be deemed incidental or conducive to the attainment of the above objects or any of them." It must, however, be understood that in the Courts such words will only be held to cover operations of a nature similar to the businesses previously mentioned, and will not include any wholly fresh business,[1] and, moreover, wide powers given in general words will be construed as merely ancillary to the specific objects mentioned in the early paragraphs,[2] even if there is a provision that each clause is to be read separately and not limited by other paragraphs.[3] The limits of the powers of a company and the effect of acts done outside such powers are considered in Part II., Chapter XV., page 321, *infra*.

It was at one time not uncommon to insert such words as "To do any other business which the company may from time to time determine;" but this form is objectionable, and, even if passed by the Registrar of Joint Stock Companies, would probably be held of no effect, not being a statement of what the objects of the company are. Accordingly it is desirable that the Memorandum should specifically enumerate all the businesses that the company is likely to undertake. For instance, a mining company should take power to construct tramways and canals, and not only to use them itself, but to let them out to others; and almost every company may with advantage take powers to acquire lands and build offices or works, and to dispose of them. Similarly, a company which lends money on mortgage should

[1]London Financial Association *v.* Kelk, [1884] 26 Ch. D. 107.
[2]German Date Coffee Co., [1882] 20 Ch. D. 169.
[3]Stephens *v.* Mysore Reefs (Kangundy) Mining Co., [1902] 1 Ch. 745.

have power to develop and turn to account or improve any lands that may come into its possession.

Under Section 19 the Memorandum can, with the sanction of the Court, be altered as regards its objects; but this right is subject to many limitations, causing much trouble and expense, and the necessity of making use of it should be avoided if possible. These alterations and the extent to which they can be made are considered at page 35, *infra*.

4. The Liability of the Members.

In Companies Limited by Shares the fourth clause must simply state that "The Liability of the Members is Limited." Those are the words contained in the forms given in the Second Schedule to the Act, and they should not be departed from. It is wrong to insert, as has been done, "The Liability of the *Company* is Limited." Such a variation, if passed by the Registrar, might produce results disastrous to the members.

The most usual course is to frame the Memorandum of Association so as to limit the liability of each member or shareholder to the amount of the shares held by him; the meaning of which is that at no time can he be called upon to pay, either for the purpose of carrying on the company's business or of satisfying the claims of its creditors, a larger sum than remains unpaid on the shares which at the time of the call, or within a year before the commencement of the winding up of the company, were registered in his name. For example, if a member holds five shares of ten dollars each, his utmost liability is fifty dollars. When he has paid a part, the balance only can be recovered from him. Should he transfer his shares before the full amount is called up, his unsatisfied liability passes to the person who acquires them; but a contingent liability still attaches to the original

holder to the limited extent that, if the company should go into liquidation within one year from the time of his parting with his shares, he may be called upon to contribute towards the payment of any debts contracted before he ceased to be a member, in the event of the existing members being unable to meet the liabilities of the company, and the person who has acquired his shares failing to pay up the amount of the shares in full.

Under the provisions of Sections 68 and 69, however, the directors or managers may take upon themselves an unlimited liability, although the liability of the other members is limited.

Section 182 of the Act defines the extent to which members and directors of limited companies are liable in the event of liquidation.

In the event of a company going into liquidation, existing members are placed upon the "A List" of Contributories. Past members who remain liable are placed on a separate list, commonly referred to as the "B List."

The limitation of liability protects members from actions brought in British Columbia by foreigners in respect of business done in countries where limited liability is not recognized.[1]

5. THE NOMINAL CAPITAL.

In Companies Limited by Shares the capital must be divided into shares of a certain fixed amount, and a statement to that effect included in the Memorandum: *e.g.* "The Capital of the Company is Ten Thousand Dollars, divided into Ten Thousand Shares of One Dollar each."

If it is intended that part of the shares in the original capital should have certain privileges or conditions attached

[1]Risdon Iron and Locomotive Works *v.* Furness, [1906] 1 K. B. 49.

to them, the particulars may either be given in the clause of the Memorandum specifying the amount of the capital, or the Articles of Association may define the rights of the various classes of shareholders.

It is convenient to take powers in the Memorandum to issue shares with preferred or deferred rights. It was formerly held that unless such powers were taken at the inception of the company they could not be subsequently acquired. It has now been decided that a company can at any time take these powers[1] unless the Memorandum of Association expressly stipulates otherwise[2]; but it is as well to show on the face of the Memorandum that it is intended that the powers may be exercised.

If the Memorandum defines the respective rights, they cannot subsequently be varied[2] without the sanction of the Court, in a proceeding under Section 52 or Section 129, unless the Memorandum also confers powers to alter such rights[3]; and if it refers to contemporaneous Articles as declaring the rights, it seems that this makes the Articles for the purpose part of the Memorandum and therefore unalterable, but not if it refers to such rights as the Articles of Association may from time to time confer.[4] As companies often desire to vary the respective rights given to different classes of shareholders, it is wise only to take power in the Memorandum to issue preferred, ordinary, and deferred shares, and to leave the declaration of the rights to be attached to such shares to the Articles or subsequent special resolutions.

It is not infrequent to take power in the Memorandum or Articles to modify the rights of the respective classes of

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.*v* [1]Andre Gas Meter Co., [1897] 1 Ch. 361.

[2]Ashbury *v.* Watson, [1885] 30 Ch. D. 376.

[3]Underwood *v.* London Music Halls, [1901] 2 Ch. 309; Welsbach Incandescent Gas Co., [1904] 1 Ch. 87.

[4]Collins *v.* Birmingham Breweries [1899] 15 Times L.R. 180.

shareholders with the sanction of an extraordinary resolution of the holders of shares of the class affected, and this power has very frequently been acted upon.[1] But a power to "modify" rights cannot be used to extinguish rights without giving anything in place of them.[2] Where the rights are conferred by the Articles only it is not necessary to have recourse to the procedure required by Section 52 in cases where the rights are conferred by the Memorandum.[3]

There are further provisions contained in Section 52 that a Company Limited by Shares may by special resolution, confirmed by an Order of the Court, modify the conditions contained in its Memorandum of Association so as to reorganize its capital, whether by the consolidation of shares of different classes or by the division of its shares into shares of different classes, provided that no preference or special privilege attached to or belonging to any class shall be interfered with except by a resolution passed by a majority in number of shareholders holding three-fourths of the capital of that class,[4] and confirmed at a meeting of shareholders of that class in the same manner as a special resolution is required to be confirmed (*i.e.* by a bare majority of those present or represented at a properly convened meeting); and it is declared that every resolution so passed shall bind all shareholders of such class. This section presents some difficulties. The earlier part is confined to "the consolidation of shares of different classes," or "the division of shares into shares of different classes," the former of which is hard to understand, but the latter is a compar-

[1]Collins *v.* Birmingham Breweries, [1899] 15 Times L. R. 180.
[2]Gill *v.* Arizona Copper Co., [1901] Court of Sess., 2 F. 843.
[3]Australian Estates Co., [1910] 1 Ch. 414.
[4]This requires a bare majority in number of the shareholders, but th majority must represent three fourths of the total capital of the class not three fourths of those present or represented at the meeting as in the case of a special resolution. This provision does not apply to cases where the preferential rights are conferred by the Articles and not by the Memorandum (Australian Estates Co., [1910] 1 Ch. 414).

atively simple matter. The proviso, moreover, clearly contemplates that such consolidation or division may vary the preferential or other rights attached to existing shares, and enables the specified majority to bind the whole class, subject to confirmation by the Court. It is easy to understand dividing 100,000 ordinary shares of $10 each into 50,000 preference and 50,000 ordinary shares of $10 each, or into 200,000 shares of $5 each, to 100,000 of which certain preferences are attached; but to consolidate 50,000 preference and 50,000 ordinary shares into 100,000 ordinary shares would simply be to deprive the preference shares of their priority. Possibly this is intended, the safeguards being considerable, for on the occasion of a reduction of capital it has been not uncommon, after reducing the amount of the ordinary shares from, say $10 to $3, to make them rank equally with the preference shares (or, as it is called, to "unify" the stock), acting under powers to modify contained in the Articles. It may be that the intention of the Act is to make such a proceeding possible in all cases where the specified majority approves and the Court sanctions the arrangement.

When any such consolidation or division is sanctioned by order of the Court, an office copy of the Order must be filed with the Registrar within seven days after the making of the Order, and the resolution will not take effect until the copy is filed (Section 52, Sub-section 2).

If the Memorandum or Articles allow, a company may at any time increase its capital to any extent, as explained in Part II., Chapter XVIII. (see page 354, *infra*). The increased capital may be divided into shares of a greater or less value than those with which the company was originally registered.

It has always been very common for companies to have two or more classes of capital, such as Ordinary, Preference,

Deferred, and Founders' Shares; while railway and some other companies have also Guaranteed Shares or Stock, and sometimes divide Preference into First, Second, and Third Preference. All these differences are matters of arrangement, and a company can attach whatever rights and privileges it pleases to one class of shares, and postpone another class. In the absence, however, of express provisions to the contrary, the law treats all shares as conferring equal rights.

Money raised upon debentures is not part of the "capital" of the company, but is a debt due from the company, and the amount should not be set out in the Memorandum as part of the capital. Such money is often called "loan capital," and payments made out of moneys raised on debentures must be treated as paid on capital account.

The capital of the company can be increased by the company itself; but it can only be reduced by an Order of the Supreme Court of British Columbia confirming a special resolution of the company—a matter involving delay and expense.

The shares of a company formed under the Companies Acts cannot be issued at a discount[1]; nor may they be issued by way of a bonus or gift; but they may be issued at a premium. A commission may, however, be paid on the issue of shares in the cases governed by Section 98 (see page 106, *infra*).

The manner of the issue of shares will be dealt with in Chapter VII. of this Part (page 120, *infra*), and alterations of capital by increase or reduction in Chapter XVIII. of Part II. (page 354, *infra*).

Preference Shares.

Preference shares may either (A) give a preferential right only as to dividend, or (B) give a preferential right

[1]North West Electric Co. *v.* Walsh. 29 S.C.R. 33.

both as to dividend and to the return of capital. In either case the preferential dividend may be cumulative, or it may be payable only out of the profits of each year.

It will be obvious that preference shares bear the same relation to ordinary that ordinary shares do to deferred, and that an identically similar arrangement may be expressed by saying either that one set of shares receives a dividend in preference to the others, or that the latter shares have their dividend deferred to that of the first named.

Whatever preferences or postponements are intended to be created should be clearly expressed in the Memorandum or Articles (if the original capital is divided into different classes), or in the special resolution authorising the issue of preferred or deferred shares, and also in the prospectus inviting subscriptions for the shares. It is also important to express clearly what are the rights of the various holders in case of a winding up. If the ordinary or deferred shares are not to receive the whole profits after the preferred shares have received their dividend, it is necessary to specify how the reserve fund, which is an accumulation of undivided profits, is to be dealt with. It is also desirable to deal expressly with the premiums receivable upon shares issued above par.

Provisions in the Memorandum and Articles or in the terms of issue of preference shares which give the holders a preference in regard to dividend do not give a preference in regard to the division of capital unless it is expressly mentioned.[1] Persons subscribing for or purchasing preference shares should protect themselves by inquiring what their rights will be in the case of a winding up; otherwise, upon a reconstruction of the company, they may be reduced to the position of holders of ordinary shares.[2]

[1]See Driffield Gas Light Co., [1898] 1 Ch. 451, and next note.
[2]Griffiths *v.* Paget, [1877] 6 Ch. D. 511; Birch *v.* Cropper, [1880] 14 App. Ca. 528.

If the Memorandum or Articles declare that the preference shares confer a preference in the winding up, but do not further deal with the capital, the preference capital must first be repaid, then the ordinary capital, and the surplus divided among both classes in proportion to the nominal amount of the shares; if the preference capital is repayable "with interest," this means with interest from the date of winding up, and any surplus from the sale of assets will be treated as capital.[1]

A declaration that the profits are to be applied first in paying a dividend on the preference shares, and secondly on the ordinary shares, gives the preference shareholders a cumulative dividend,[2] unless any other Article shows that the profits of each year are to be distributed among the preference and ordinary shareholders on the basis named.[3] The Articles will on this as on other points be construed as they stand, and the fact that the company is a reconstructed one and that the word "cumulative" found in the earlier Articles has been struck out will not affect the decision of the Court in a clear case[4]; but a declaration that a preferential dividend is to be paid "out of the net profits *of each year*," and after such payment a dividend on the ordinary shares, does not give a cumulative dividend.[5]

Sometimes, by the provisions of the Articles, the holders of preference shares are precluded from voting in respect of such shares, being treated as if they were holders of debentures; but many questions must arise in which their interests are involved, and it seems improper to exclude them

[1]Espuela Land and Cattle Co., No. 2 [1900] Ch. 187.
[2]Webb *v.* Earle, [1875] 20 Eq. 556; Foster *v.* Coles and M. B. Foster & Sons, [1906] W. N. 107; Henry *v.* Great Northern Railway, [1857] 1 De G. & J. 606.
[3]Adair *v.* Old Bushmills Distillery, [1908] W. N. 24.
[4]Foster *v.* Coles and M. B. Foster & Sons, [1906] W. N. 107.
[5]Staples *v.* Eastman Co., [1896] 2 Ch. 303; Adair *v.* Old Bushmills Distillery, [1908] W. N. 24.

from voting. Occasionally the Articles contain a provision that preference shareholders shall not be entitled to be present at general meetings in respect of their preference shares; but it is difficult to imagine how a meeting can be a "general" meeting in compliance with the Statutes if any class of shareholders be excluded. It is to be observed that Section 121 confers on the holders of preference shares (and debentures) of public companies registered after the 30th June, 1910, the same right to receive and inspect balance sheets and the reports of the auditors and other reports as are possessed by the holders of ordinary shares.

When preference shares have been issued it is sometimes desired to issue new shares taking priority over the preference shares already issued. Whether this can be done against the wishes of the holders of the original preference shares will depend upon the bargain that was made with them at the time their shares were issued, and to determine the question careful attention must be paid to the provisions of the Memorandum and Articles of Association, to the prospectus inviting subscriptions for the preference shares, and to the form of the share certificate. If it appear that a promise was made to the holders of preference shares that their rights should come first, they cannot be postponed[1]; but if the preference shares were issued subject to the right of the company to issue fresh capital having "such preferences and priorities as shall be agreed upon" or "on such terms as the company may determine," then the original preference shares may be postponed.[2]

If shares are issued as preference shares when there is no power to do so, or in an irregular manner, the subscribers

[1]James *v.* Buena Ventura Syndicate, [1896] 1 Ch. at page 466; Welton *v.* Saffery, [1897] App. Ca. at page 309.

[2]Pulbrook *v.* New Civil Service Co-operation, [1878] 26 W. R. 11; Underwood *v.* London Music Halls, [1901 2 Ch. 309; compare Allen *v.* Gold Reefs of West Africa, [1900] 1 Ch. 656.

are entitled to have the money they have paid for the shares returned and are creditors of the company.[1]

Profits may be applied, after the sanction of the Court has been obtained (this being a reduction of capital), in paying off preference shares.[2]

Founders', Management, and Deferred Shares.

Founders' or management shares are occasionally created and issued. They are not, however, now held in much favor except among companies of a speculative character, such as mining and development companies. They are, in fact, only deferred shares, receiving no dividend until the preference and ordinary shares have been paid a fair dividend, the amount varying according to agreement. The founders', management, or deferred shares are usually few in number, and when the surplus profits are large the shares become very valuable.

The practice is to use them to remunerate the promoters or founders of the company, or the underwriters of the share capital, who are allotted founders' or deferred shares of a small nominal amount, but entitled to take (say) half the net profits after a specified dividend has been paid on the ordinary shares. If, *e.g.,* there are only 500 founders' or deferred shares of $1 each, and there are several thousand dollars surplus profits, to half of which the founders are entitled, it will be seen that for each dollar subscribed the founders receive some hundreds per cent., and to this they look as part of their compensation for founding and floating the company. Sometimes, as an inducement to the public to subscribe, one founders' or deferred share is offered for every hundred ordinary shares taken, the larger share-

[1]London and New York Investment Co., [1895] 2 Ch. 860; Waverley Co. *v.* Bannerman, 23 Court Sess. Ca., 4th Series, 136.

[2]Dicido Pier Co.'s Case, [1891] 2 Ch. 354.

holders thus getting a second and contingent interest in the profits of the company.

The existence of founders' or deferred shares of course diminishes the value of the ordinary shares, as in the case of large profits a considerable proportion is taken by the holders of founders' or deferred shares. It is also an objection that they often create difficulties in the case of a reconstruction of the company. Another objection to such shares is that in years of great prosperity they absorb all the surplus profit which prudent traders would carry to reserve, so that in bad years the company has no accumulation of profit to fall back upon.

Under Section 90 every prospectus must state the number of founders', management, or deferred shares (if any) and the nature and extent of the interest of the holders in the property and profits of the company, and also the voting rights of each class.

The Declaration of Association.

The Memorandum must end with the Declaration of Association, which is in the following form:

We the several persons whose names and addresses are subscribed are desirous of being formed into a Company in pursuance of this Memorandum of Association, and we respectively agree to take the number of shares in the capital of the Company set opposite our respective names.

NAMES, ADDRESSES, AND DESCRIPTIONS OF SUBSCRIBERS.	NUMBER OF SHARES TAKEN BY EACH SUBSCRIBER.
[Here follow the names, addresses, and descriptions of not less than five persons in the case of a Public Company, or two in the case of a Private Company, each of whom must subscribe for one share at least. Each subscriber *must write with his own hand* his name and the number of shares he agrees to take. His address and occupation may be written by any other person.]	

Subscribers usually sign for only one share each; but there is no reason why they should not sign for as many

shares as they intend to take up and pay for. The fact that they have subscribed makes them members of the company from the date of registration (page 44, *infra*). Directors named in Articles filed contemporaneously with the Memorandum are required by Section 80, in the case of all companies not being private companies, to subscribe the Memorandum for their qualification shares (if any), or sign and file with the Registrar a Contract to take them from the company and pay for them.[1]

The name, address, and occupation of each subscriber should be stated fully, giving the number, street, town and county. The trade or profession (if any) of each subscriber must also be stated, and it is best to avoid indefinite descriptions, such as "Gentleman" and "Esquire," when possible. Persons who have retired may describe themselves as "Retired Merchant," etc. A clerk should state the nature of his clerkship, whether "Solicitor's Clerk," "Merchant's Clerk," or otherwise. So an agent should state whether he is a "Financial Agent," "Patent Agent," "Commission Agent," or otherwise.

Females may subscribe as well as males. An unmarried woman should describe herself as "Spinster" or by her occupation if she has one, such as "Stenographer"; a married woman as "Married Woman" or "Wife of So-and-So," preferably the latter. All or any of the signatories may be foreigners.[2] Neither corporations nor firms are recognized by the Registrar as subscribers; but, of course, the directors or partners, as the case may be, are at liberty to sign in their individual capacity.

[1]The Registrar accepts as a compliance with this requirement a document containing the words "We the undersigned, having consented to act as Directors of the A Company, Limited, do hereby severally agree to take from the said company and to pay for shares of each, being the prescribed number of qualification shares for the office of director of the company."

[2]General Company for Promotion of Land Credit, [1870] 5 Ch. 363.

Minors (*i.e.* persons under age) should not subscribe; for, although the Registrar's certificate is conclusive evidence that the company is duly registered, the Registrar would refuse to accept the Memorandum or grant the Certificate of Incorporation if he had reason to believe the Memorandum was not signed by adults.

An agent may sign the Memorandum on behalf of his principal, and the authority to sign may be given orally. The execution will be good, whether the agent simply writes his principal's name or adds words showing that it is signed by an attorney.[1]

The signatures must be attested by at least one witness, who should be a disinterested person, and not a subscriber. He should give his address and occupation in the same manner as the subscribers.

The document may be signed at different times and different places, and be witnessed by different persons; but it is advisable to obtain all the signatures as near the same date as possible.

All the above directions with respect to the signatures, etc., apply to the Articles (if any), with the exception that the number of shares taken need not be stated.

The Memorandum should be in correct form when presented for registration, and any alterations and interlineations in it should be initialled by each subscriber, or the witness should certify that the alterations were made before the document was executed.

For the purpose of registration, the Memorandum may be either entirely written upon a sheet or sheets of foolscap; or it may be partly written and partly printed; or it may be entirely printed. As, however, every member is entitled to be supplied with a copy on payment of one dollar, printing is advisable. Printing the document has the further advantage

[1] Whitley Partners, Limited, [1886] 32 Ch. D. 337.

that every copy is an exact reproduction of the registered original.

If the company is to be registered without special Articles, the regulations contained in Table A in the First Schedule to the Act will govern the company (Section 21). In the case of companies registered before the 1st July, 1910, without special Articles, the original Table A in the Schedule to the Act of 1897 applies.

Under Section 80 the applicant must, in the case of companies not being private companies, at the time of the application for registration of the Memorandum and Articles, deliver to the Registrar a list of the persons who have consented to be directors, and if any person's name is wrongly included the applicant is liable to a penalty of two hundred and fifty dollars. If the directors are appointed by the Articles they must either sign the Memorandum for their qualification shares or sign a Contract to take from the company and pay for such shares, which Contract, together with a Consent to Act, signed by each director, must be filed with the Registrar.

There must also be a Statutory Declaration by a solicitor engaged in the formation of the company, or by a person named in the Articles as director or secretary, that all the requirements of the Act have been complied with (Section 27, Sub-section 2). The Registrar accepts a Declaration by either of those persons as sufficient evidence, and, if the other documents are in order, registers the company and issues his Certificate of Incorporation.

ALTERATION OF THE MEMORANDUM OF ASSOCIATION.

The Memorandum of Association can be altered in the following respects:

1. By changing the name of the company (Section 18).

2. By varying the amount of its capital (Sections 48 and 53).
3. By altering the division of its capital, consolidating or subdividing the existing shares, converting paid-up shares into stock, or reconverting stock into paid-up shares (Section 48).
4. By creating reserve liability (Sections 66 and 67).
5. By making the liability of the directors unlimited (Section 69).
6. By altering to a limited extent the objects for which the company was formed (Section 19).

With regard to these, Nos. 2, 3, and 4 will be dealt with in Part II., Chapter XVIII. (page 354, *infra*), and No. 5 on page 269. It only remains to deal here with the Change of Name and Alteration of the Objects of a Company.

Change of Name of Company.

To change its name a company must (Section 18):

1. Pass, confirm, and register a special resolution;
2. Give at least one month's previous continuous notice in the Gazette and in some newspaper or newspapers published or circulated in the locality in which the registered office of the Company is situated, and in the locality in which the operations of the Company are carried on, of the intention to apply for the change of name, and such notice must state the name proposed to be adopted;
3. Obtain from the Registrar his approval in writing of the proposed change;
4. Obtain from the Registrar a certificate that the Company has changed its name.

No alteration of name will affect a company in any of its rights or obligations, or in any legal proceedings in which it may be interested (Section 18, Sub-section 6).

Alteration of Objects Clause.

A company may, under Section 19, alter the provisions of its Memorandum of Association with respect to the objects of the company, by special resolution, for any of the following purposes: (A) To enable it to carry on its business more economically or more effectually; (B) To attain its main purpose by new or improved means; (C) To enlarge or change the local area of its operations; (D) To carry on some business or businesses which under existing circumstances may conveniently or advantageously be combined with the business of the company; (E) To restrict or abandon any of the objects specified in its Memorandum.

No alteration is permissible which would enable the Company to exercise all or any of the powers of a Trust Company as defined by the "Trust Companies Regulation Act" (Section 4, Amendments Act, 1913).

No alteration of the Memorandum will take effect until and except in so far as it is confirmed by the Court. The confirmation must be sought by petition,and the Court will have regard to the following rules:—(1) It must be satisfied that the holders of debentures and any persons whose interests are affected have had sufficient notice, and that all creditors who in the Court's opinion have any right to object, or have objected, have consented, or have had their debts provided for either by payment or security. (2) The Court may attach terms and conditions to the Order confirming the alteration, and has the costs in its discretion. (3) The Court must have regard to the rights of members or classes of members, or, in other words, must protect a dissentient minority of shareholders, and may adjourn the proceedings to allow of arrangements being made with them for the purchase of their interests. But no part of the capital may be spent in buying them out: *i.e.* if their interests are to be purchased, it must be with money provided either by share-

holders or strangers, and not out of the capital of the company. (4) The Court may confirm the alteration either wholly or in part, or may add words limiting the generality of the proposed alteration.[1]

All the Court has to do is to decide whether the alteration is fair and equitable as between the members of the company. It is not concerned with the wisdom or desirability of the proposed alteration, which is a question for the members, but will refuse its sanction if the wishes of the majority cannot be fairly ascertained.[2]

The Court will not, as a rule, allow large general additional powers to be taken, but will require evidence that the specific objects mentioned are required for some of the purposes stated above.[3]

The sanction of the Court is sought by petition, on the presentation of which a summons must be taken out to have a day fixed for the hearing and for directions as to the advertisement of the petition.

When the alteration has been made and confirmed by the Court, an office copy of the Order confirming it, with a copy of the Memorandum as altered, must (under a penalty of fifty dollars a day) be delivered to the Registrar of Companies within fifteen days of the date of the Order of the Court; and upon his registering the altered Memorandum, and issuing his certificate of the fact, it becomes thenceforth the Memorandum of the Company. If the altered Memorandum and Order are not registered within the prescribed time, the Court has power to enlarge the time for registration (Section 19, Sub-section 6).

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[1] *Re* Spiers & Pond, [1895] W. N. 135 (2); *re* Fleetwood Estate Co., [1897] W. N. 20.

[2] Jewish Colonial Trust, [1908] 2 Ch. 287.

[3] D. & D. H. Fraser, [1903] W. N. 73, where in very special circumstances wide powers were allowed to be taken.

CHAPTER IV.

THE ARTICLES OF ASSOCIATION.

THE Memorandum being the Charter of the company, it is necessary to have Articles of Association to govern its internal affairs, and these may be termed the By-Laws of the company. Unlike the Memorandum, the Articles of Association may from time to time be altered by the members without the intervention of the Court, and to an almost unlimited extent.

The Memorandum and Articles of Association when registered bind the company and its members to the same extent as if each member had signed and sealed them, and they contained a covenant by him to observe all the provisions contained in them. It appears now that the Articles establish a contract between the shareholders and the company as well as between each individual shareholder and every other[1]; but this contract is not for the benefit of strangers, or even of members in other relations than those of membership.[2]

Every person dealing with a company is bound to ascertain and will be deemed to have notice of any limitations contained in the Articles of Association, and contracts made must be construed accordingly.[3] On the other hand, any person dealing with a company is entitled to assume that the

[1]Wood *v.* Odessa Waterworks Co., [1889] 42 Ch. D. 636; Salmon *v.* Quin & Axtens, [1909] 1 Ch. 311. The cases have not been uniform on this point.

[2]Eley *v.* Positive Assurance Co., [1876] 1 Ex. D. 88; Browne *v.* La Trinidad, [1888] 37 Ch. D. 1.

[3]Royal British Bank *v.* Turquand, [1856] 6 E. & B. 327; Ernest *v.* Nicholls, [1858] L. R. 6 H. L. 401 to 419; Fountaine *v.* Carmarthen Railway Co., [1868] L. R. 5 Eq. 322; Peirce *v.* Jersey Waterworks Co., [1870] L. R. 5 Ex. 209; Irvine *v.* Union Bank of Australia, [1877] 2 App. Ca. 366; Chapleo *v.* Brunswick Building Society, [1881] 6 Q. B. D. 696; Mahony *v.* East Holyford Co., [1875] L. R. 7 H. L. 869.

Articles registered have been duly adopted if they are such as the company could lawfully adopt.[1]

A Company Limited by Shares may either be registered with special Articles of Association, or may, without registering Articles, rely upon the regulations in "Table A," which is a code of "Regulations for Management of a Company Limited by Shares."

There are, however, certain provisions which a Private Company must include in its Articles, and others which it must not (see page 375).

The following rules apply where Table A is excluded and no other regulations are provided regarding the matters in question: (1) Meetings may be held on seven days' notice being served on every member in the manner mentioned in Table A; (2) Any five members may summon a meeting; (3) Any person elected by the members present at a meeting may be the chairman thereof; and (4) Every member has one vote in respect of each share held by him (Section 75).

Large companies almost always adopt their own special regulations, when the Articles begin with a statement to the effect that "The following shall be the Articles of Association of the Company, to the exclusion of Table A, in the First Schedule to Companies Act, 1911."

Other companies, instead of wholly excluding Table A, may adopt the suitable parts of that Table, with a few special Articles containing the desired modifications. In such cases the Articles commence with a statement to the effect that "The regulations contained in Table A, in the First Schedule to The Companies Act, 1911, shall be the Articles of Association of the Company, except in so far as they are modified by the following provisions." The special Articles are then set out, and the clauses of Table A which are not to apply are indicated by their numbers: *e.g.*

[1]Muirhead *v.* Forth and North Sea Association, [1894] App. Ca. at page 7

"Clauses — of Table A shall not apply." In cases of this kind it is a good plan to attach copies of Table A to the Articles, so that each member who obtains a copy may have the whole of the regulations before him. It may be observed that Table A, or such portions of it as are adopted, need not be registered.

The Articles must be printed or typewritten and divided into paragraphs numbered consecutively (Section 22). They must be signed by each subscriber to the Memorandum and attested by a witness.

The registered Articles of a company, or any portion thereof, or the regulations contained in Table A, may, subject to the conditions in the Memorandum, at any time be altered or set aside by special resolution, others being substituted as circumstances render necessary (Section 23). This is a power of which the company cannot deprive itself, either by a statement in the Articles of Association[1] or by a contract[2] that they shall not be altered. No majority of shareholders, however, can even by altering the Articles retrospectively affect, to the prejudice of non-consenting owners of shares, the rights already existing under a contract,[3] nor take away a right already accrued: *e.g.* after a transfer of shares is lodged the company cannot create a right of lien so as to defeat the transfer.[4] But every shareholder is presumed to know that rights conferred by the Articles alone are subject to alteration by special resolution of the company, and he cannot restrain such an alteration, even though to his own prejudice,[5] unless the alteration

[1]Walker *v.* London Tramways Co., [1879] 12 Ch. D. 705.

[2]Malleson *v.* National Insurance Co., [1894] 1 Ch. 200; Punt *v.* Symonds & Co., [1903] 2 Ch. 506, following an unreported case in the Court of Appeal.

[3]*Per* Rigby, L. J., in James *v.* Buena Ventura Syndicate, [1896] 1 Ch. at page 466; *per* Lord Watson in Welton *v.* Saffery, [1897] App. Ca. at page 309.

[4]McArthur, Limited *v.* Gulf Line, [1909] S. C. 732, Court of Sess.

[5]Allen *v.* Gold Reefs of West Africa, [1900] 1 Ch. 656.

would amount to a breach of contract; but it is far from easy to say in what cases there is a contract, for in the case last cited Lindley, M. R., says (at page 673): "A company cannot break its contracts by altering its Articles of Association; but when dealing with contracts referring to revocable Articles, and especially with contracts between a member of the company and the company respecting his shares, care must be taken not to assume that the contract involves as one of its terms an Article which is not to be altered"; while Romer, L. J. (at page 679), shows that the Articles alone *may* confer on classes of shareholders rights which are unalterable without their consent. In the case of the issue of preference shares and the like there will almost always be outside the Articles a contract conferring the special rights to be found in the prospectus or in the terms of the offer and acceptance of the shares.[1]

Even when Articles have not been formally altered, the Court may have regard to a long course of practice, and recognise as valid Articles which have been used for many years, although not regularly adopted,[2] and may also act upon a distribution of assets not in strict accordance with the Articles if there has been a general adoption of the method of distributing.[3] Moreover, where an Article is one which the company has power to adopt, the fact that there has been a defect in the procedure of its adoption will not prevent a person dealing with the company on the faith of the Article from insisting that it shall be treated as binding on the company, and the company can equally insist upon

[1]See also Bailey *v.* British Equitable Assurance Co., [1904] 1 Ch. 374, where the position of a stranger claiming rights defined by the Articles is considered. The case was, however, reversed in the House of Lords, [1906] App. Ca. 35.

[2]Ho Tung *v.* Man On Insurance Co., [1902] App. Ca. 232.

[3]Somes *v.* Currie, [1855] 1 K. & J. 605; Beeston Pneumatic Tyre Co., [1898] W. N. 34, 14 Times L. R. 338, cases which were recognised in North-West Argentine Railway Co., [1900] 2 Ch. 882.

such Article where it has been made the basis of a contract with a stranger.[1]

It has been pointed out that companies registered without Articles of Association before the 1st July, 1910, were governed by the Table A, as contained in the First Schedule to the Companies Act, R.S.B.C., 1897, and there is still a large number of companies regulated by that Table, in some cases with and in others without modification. Those companies can now obtain the benefit of a modern set of Articles by passing a special resolution to the following effect:—"The existing regulations of the company are hereby rescinded, and in lieu thereof the regulations contained in Table A, in the First Schedule to The Companies Act, R.S.B.C., 1911, shall be the regulations for the management of thecompany." If it be desired to vary any of these regulations, there should be added to the resolution the words "subject to the modifications hereinafter set forth," after which the special Articles to give effect to the variations required will follow as part of the resolution.

The adoption of the new Table A where possible is very advisable, as there is great convenience in having identical Articles for various companies, so that they may become well known and understood.

Every company is bound to supply any of its members, on request, with a copy of its Memorandum of Association, having annexed thereto its Articles of Association (if any), upon payment of a sum not exceeding one dollar. The penalty in case of default is five dollars for each offence (Section 28).

Table A is part of the Act, and accordingly companies may safely adopt any operative regulations contained therein, or analogous thereto, without fear of such regulations proving invalid. The Lieutenant-Governor in Council may, however,

[1]Muirhead *v.* Forth Insurance Co., [1904] App. Ca. 78.

under Section 126, alter any of the Tables or Forms in the First Schedule.

The following form of Articles will suffice for a company desiring not to incur the expense of registering a complete set of special regulations:

Articles of Association of The Company, Limited.

1. The regulations of the company shall be those contained in Table A in the First Schedule to The Companies Act, R.S.B.C., 1911 (hereinafter called "Table A"), subject to the additions and modifications hereinafter set forth.
2. The minimum subscription upon which the directors may proceed to allotment in the case of the first allotment of any shares payable in cash shall be shares to the nominal value of $.
3. It shall be lawful for the company to pay to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, a commission of per share [*or* a commission at the rate of per cent. on the nominal amount of the shares so subscribed or agreed to be subscribed, or the subscription whereof is so procured or agreed to be procured].
4. The first directors of the company shall be A. B., C. D., and E. F., who shall hold office until the ordinary general meeting in the year 19 , unless disqualified as provided by Clause 77 of Table A. At the said general meeting, and at the ordinary general meeting in every subsequent year, one third of the directors, or if their number is not

three or a multiple of three then the number nearest to one third, shall retire from office in the manner provided in Table A.

[*Or* 4. Until the first directors are appointed the subscribers of the Memorandum of Association shall have all the powers of directors of the company, but shall act without remuneration.]

5. The directors' remuneration shall be at the rate of $ per annum, and shall be divisible among the directors in such proportions as they shall determine, or in default of determination equally. A resolution of the board to forego or reduce or postpone the payment of their remuneration, or any part thereof, shall bind all the directors.

6. The qualification of a director shall be the holding, in his own right, of shares to the nominal value of not less than $. A first director may act before acquiring his qualification, but shall acquire the same within two months [*or* one month] after his appointment.

If the company is a Private Company it must include in its Articles clauses restricting the transfer of shares, limiting the number of members (exclusive of employees) to fifty and prohibiting any invitation to the public to subscribe for shares or debentures (see page 375). It must also rescind the Clauses of Table A (35 to 40) authorising the issue of share warrants.

CHAPTER V.

THE BOOKS AND SEAL OF THE COMPANY.

THE MEMBERS OF A COMPANY.

MEMBERSHIP is defined by Section 32 of the Companies Act as follows: "The subscribers of the Memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in its Register of Members. Every other person who agrees to become a member of a company, and whose name is entered in its Register of Members, shall be a member of the company."

A subscriber of the Memorandum is therefore a member whether he has otherwise agreed to become so or not, and whether or not his name is entered on the Register, and he is bound to take and pay for the number of shares written opposite his name.[1] He is not relieved from liability unless the whole of the shares are allotted to other persons, so that none is left in respect of which he can be registered.[2] When the liability is thus extinguished, it does not revive on an increase of capital or a forfeiture of shares putting further shares at the disposal of the directors.[3]

The same consideration, as to what is good payment (*e.g.* the set-off of a debt) apply to shares thus taken as to shares taken in the ordinary way. They can pay for shares for which they have subscribed the Memorandum by a transfer

[1]Tyddyn Sheffrey Slate Co., [1869] 20 L. T. 105; Drummond's Case. [1869] 4 Ch. 772; Pell's Case, [1870] 5 Ch. 11; Patterson *v.* Turner, 3 O. L, R. 373. In *re* London Speaker Printing Co., 16 A. R. 508. In *re* Haggert Mfg. Co., 19 A. R. 582. In *re* Nepissing Planing Mills, 18 O. L. R. 80.

[2]Tufnell's Case, [1885] 29 Ch. D. 421; Evans's Case, [1867] 2 Ch. 427; London Coal Co., [1877] 5 Ch. D. 525; Levick's Case, [1870] 40 L. J. Ch. 180, 23 L. T. 838.

[3]Mackley's Case, [1876] 1 Ch. D. 247.

of property or by services in any manner agreed with the company.

The other persons who are members are those who have agreed to take shares and whose names are entered in the Register. These persons are not members until their names are entered in the Register; but if there is a complete agreement between them and the company they will not escape liability, for the Register can be amended under Section 43 while the company is a going concern, or under Section 209 when the company is in liquidation.[1] On the other hand, to have his name entered in the Register does not make a man a member if he never agreed to become one, for the name may in like manner be removed, and if retained in the Register after his name should have been removed the Court may make its order for removing his name retrospective, so as to free him from liability as a contributory.[2]

A corporation may be a member if authorised by its constitution to hold shares[3]; but a partnership should not be entered in the firm name, as the firm is not "a person," and the names of the individual holders of the shares must be entered in the Register (Section 33). If a transfer purports to be made to a firm in its firm name the company may reject it.[4] If, however, the firm name is in fact entered with the consent of the partners, they become liable as members.[5]

The simplest and most usual form of agreement to become a member is an application for and an allotment of shares. This is dealt with in Chapter VII. (*infra,* page 119, *et seq.*). But an agreement may be made in other ways. For instance, it may be part of the preliminary contract with

[1]Winstone's Case, [1879] 12 Ch. D. 239; compare Portal *v.* Emmens, [1877] 1 C. P. D. 201, 664.
[2]Nation's Case, [1866] 3 Eq. 77; compare Sussex Brick Co., [1904] 1 Ch. 598.
[3]Bath's Case, [1878] 8 Ch. D. 334; Barned's Banking Co., *ex parte* Contract Corporation, [1868] 3 Ch. 105.
[4]Vagliano Anthracite Collieries, [1910] W. N. 187.
[5]Weikersheim's Case, [1873] 8 Ch. 831.

the vendor that he shall take shares; persons may by underwriting letters bind themselves to take any shares not subscribed for by the public; or there may be contracts to take shares which are not in writing, for a man may agree with the company by word of mouth, or even by conduct, to become a member. Thus, if a man who has not previously agreed to take shares knows that they have been allotted to him, and afterwards acts as a member of the company (for instance, by attending meetings, giving proxies, or selling or attempting to sell some of the shares), he will be held to have accepted the allotment and to be a member in respect of the shares. Or a person accepting the office of director when the Articles make it a condition of his office that he shall take shares from the company will be held to have agreed to become a member[1] (see *"Directors' Qualification Shares,"* Part II., Chapter XIII., page 247, infra).

An agreement to take shares may be made through an agent.[2] The authority of the agent must be considered under the ordinary doctrines of principal and agent. An application by a person not having authority of course does not make the supposed principal a member[3]; but it must be noted that the act of a person purporting to be an agent may be ratified by the intended principal, and such ratification may be by acquiescence if there is full knowledge of the facts; and, further, that where a person has given a written authority, which is acted upon by a third party in good faith (*e.g.* by a company in making an allotment), he may be estopped from alleging that the authority was limited by private instructions, or was not complete, if upon the face of the document all was in order.[4] As an authority coupled

[1]Rose *v.* Machar 8 O. R. 417: Norden Woollen Mills Co. *v.* Heckel 17 Man. L. R. 557.

[2]Levita's Case, [1870] 5 Ch. 489; Fraser's Case, [1871] 24 L. T. 746; Barrett's Case, [1865] 4 De G. & Sm. 416.

[3]*Ex parte* White, [1867] 16 L. T. 276; Coventry's Case, [1891] 1 Ch. 202.

[4]*Re* Henry Bentley & Co., [1893] 69 L. T. 204.

with an interest (*e.g.* given for valuable consideration) is irrevocable, an underwriting letter containing authority for some person to apply in the name of the underwriter, when duly accepted, cannot be revoked.[1]

A person who purports to contract as agent for another, not having authority, does not himself become a member, but is liable to the company in damages for breach of warranty of his authority—the measure of damages being the loss sustained by the company, which may in some cases be the whole nominal amount of the shares.[2]

To accept a transfer of shares involves an agreement to become a member, and, if the shares are not fully paid, renders the transferee liable for the unpaid balance.

An exception, however, is made in the case of a person taking a transfer of shares as collateral security for a loan. Section 40 provides that no liability shall attach to such mortgagee or pledgee of shares but that the person mortgaging or pledging same shall be liable as a shareholder in respect thereof.

If an agreement to take shares (not arising merely by subscription to the Memorandum) is brought about by misrepresentation, made either by the company or its agents, the member can, before a winding up, obtain rescission of the contract, repayment of what he has paid, and removal of his name from the Register. But, a contract procured by misrepresentation being only voidable and not void, if the company has gone into liquidation and other interests have come into existence, it is too late to set the contract aside, and the person remains a member (see under head of "EFFECT OF MISREPRESENTATION IN THE PROSPECTUS," page 88, *infra*).

[1]Carmichael's Case, [1896] 2 Ch. 643; Hindley's Case, [1896] 2 Ch. 121.
[2]*Ex parte* Panmure, [1883] 24 Ch. D. 367; Coventry's Case, [1891] 1 Ch. 202.

If, however, there was in fact no contract to take shares, the supposed member can at any time have his name removed from the Register; for he was never really a member.[1]

A man ceases to be a member of a company upon a complete transfer of his shares being made, but he remains liable to a limited extent in the event of a liquidation occurring within one year after the transfer. On the death of a shareholder the membership of course ceases, but his estate remains entitled to the benefits and subject to the burdens arising from his membership until some other person is entered in the Register in respect of his shares. A man may also cease to be a member by a surrender or forfeiture of his shares properly made.

The representatives of a deceased member are entitled to receive on behalf of the estate any dividends, bonuses, or benefits attaching to the shares, and are liable to contribute in respect of the estate in their hands and to be put on the list as representative contributories. (See Section 185.)

Section 39 of the act expressly provides that no person holding shares in the capacity of executor, administrator, guardian, or trustee shall be personally subject to liability as a shareholder; but that the estates and funds in the hands of such person shall be liable in like manner and to the same extent as the testator or intestate, or the minor, ward, or person interested in the trust fund would be if living and competent to act and holding such shares.

The company cannot refuse to enter executors in the Register or insist on inserting a notice that they hold in a representative capacity, unless the Articles contain some authority to do so, and must enter the names in the order desired by the executors, a matter which often affects the right to vote and receive notices.[2]

[1]Oakes *v.* Turquand [1867] L. R. 2 H. L. 325: Alabaster's Case [1869] 7 Eq. 273.
[2]T. H. Saunders & Co., [1908] 1 Ch. 415.

Infant Members.

An infant may become a member of a company[1] and hold shares either by subscribing the Memorandum of Association[2] or by taking a transfer of shares,[3] but the company has power to refuse to accept a minor as a shareholder or transferee of shares,[4] and should always do so, at any rate, in any case where a liability attaches to the shares, for the infant can on attaining his majority repudiate the shares if they are then burdensome.[5]

The company or its liquidator can set the transfer aside on learning that the transferee is an infant,[6] unless it has allowed him to transfer his shares and accepted his transferee,[7] or has retained him on the Register or list of contributories after knowing of his infancy.[8] If a transfer to an infant is repudiated either by the infant or the company, the person who transferred the shares to the infant is restored to the Register of Members or list of contributories as the holder of the shares[9]; and even if the infant has transferred some of the shares, the transferor to the infant remains liable in respect of the balance untransferred[10]; but the transferor will escape liability if neither the infant on attaining twenty-one nor the company has repudiated the

[1]An infant cannot, however, become a member of a statutory corporation where the provisions of the Statute are such as to contemplate the acts of an adult, *e.g.* where every member is eligible for the council (Seymour *v.* Royal Naval College, [1910] 1 Ch. 806).

[2]*Re* Laxon & Co., [1892] 3 Ch. 555; Nassau Phosphate Co., [1876] 2 Ch. 610.

[3]Lumsden's Case, [1868] 4 Ch. 31.

[4]Symon's Case, [1870] 5 Ch. 298; Costello's Case, [1869] 8 Eq. 504.

[5]Dublin and Wicklow Railway Co. *v.* Black, [1852] 8 Ex. 181; Ebbett's Case, [1870] 5 Ch. 302; *re* Laxon & Co., [1892] 3 Ch. 555.

[6]Symon's Case, [1870] 5 Ch. 298; Costello's Case, [1869] 8 Eq. 504; Massey & Griffin's Case, [1907] 1 Ch. 582.

[7]Gooch's Case, [1872] 8 Ch. 266.

[8]Parson's Case, [1869] 8 Eq. 656 (three years); Massey & Griffin's Case, [1907] 1 Ch. 582 (nine years).

[9]Capper's Case, [1868] 3 Ch. 458; Symon's Case, [1870] 5 Ch. 298; Weston's Case, [1870] 5 Ch. 614; Costello's Case, [1869] 8 Eq. 504.

[10]Mann's Case, [1867] 3 Ch. 459, note; Curtis's Case, [1868] 6 Eq. 455.

transfer of the shares to the infant, so that he has himself become a duly constituted member.[1] Nor can such transferor be put on the B List of contributories if his transfer was more than a year before the winding up, and the infant has re-transferred the shares to another person, even though the latter cannot pay the calls.[2]

A person who has purchased shares and procured them to be transferred into the name of on infant cannot be put on the Register as the true owner of the shares[3] unless there can be shown to be some contractual relation between him and the company, or the circumstances are such as to show that the infant's name was used as a mere alias for the adult.[4]

If the infant repudiates his shares on attaining his majority he can, provided he has derived no benefit from the shares, recover back any sums he has paid the company in respect of them[5]; but he cannot, even while an infant, retain the shares without accepting the burdens attaching to them, *e.g.* the liability for calls.[6] Until he repudiates the shares he is for the purpose of both benefits and burdens a member and shareholder.[7]

The infant's repudiation may be at any time during his minority or within a reasonable time after attaining his majority. What is a reasonable time for repudiation varies with the circumstances. The receipt of benefits would determine the right of repudiation. In the case of shares in a

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1Parson's Case, [1869] 8 Eq. 656; Lumsden's Case, [1868] 4 Ch. 31; Ebbett's Case, [1870] 5 Ch. 302; Mitchell's Case, [1869] 8 Eq. 363; Massey & Griffin's Case, [1907] 1 Ch. 582.

2Gooch's Case, [1872] 8 Ch. 266.

3Massey & Griffin's Case, [1907] 1 Ch. 582; King's Case, [1872] 8 Ch. 266.

4Pugh & Sharman's Case, [1872] 13 Eq. 566; Richardson's Case, [18 75] 19 Eq. 588; Nickalls *v.* Furneaux, [1869] W. N. 118.

5Hamilton *v.* Vaughan Sherrin Co., [1894] 3 Ch. 598; Cope *v.* Overton, [1833] 10 Bing. 252.

6Cork and Bandon Railway Co. *v.* Cazenove, [1847] 10 Q. B. 935; Leeds and Thirsk Railway Co., [1849] 4 Ex. 26; North-West Railway Co. *v.* McMichael, [1850] 5 Ex. 114.

7Lumsden's Case, [1868] 4 Ch. 31; *re* Laxon & Co., [1892] 3 Ch. 555.

company one[1] or two years'[2] delay has sufficied to put an end to the right; but in another case nearly three years' delay was held not to preclude relief.[3] If there is no repudiation within a reasonable time the infant, as above stated, remains a contributory or member, subject, however, to the liquidator's or company's right (if not precluded by the acquiescence or delay of the company or liquidator) to remove the infant's name and substitute that of the transferor.[4]

There is no authority as to how far an infant member while on the Register of Members can act as a director or exercise rights of voting, signing requisitions, and giving proxies; but there seems no reason why, while remaining a member, he should not exercise these functions.

THE REGISTER OF MEMBERS.

Every company is required to keep a Register of its Members in one or more books, and Section 33 of the Companies Act prescribes that the following particulars shall be entered therein:

1. The names and addresses, and the occupations, if any, of the members, and in the case of a company having a share capital a statement of the shares held by each member, distinguishing each share by its number, and of the amount paid or agreed to be considered as paid on the shares of each member;
2. The date at which each person was entered in the Register as a member;
3. The date at which any person ceased to be a member.

[1]Ebbett's Case, [1870] 5 Ch. 302.
[2]Mitchell's Case, [1870] 9 Eq. 363.
[3]Hart's Case, [1868] 6 Eq. 312. also Central Bank *v.* Hogg 19 O. R. 7.
[4]See above and Massey and Griffin's Case, [1907] 1 Ch. 582.

It is not uncommon for secretaries to enter in the Register, not the date when the name of a person was entered in the Register as a member, but the date when he agreed to become a member. This is not in accordance with the Act, and may be material. Except in the case of a subscriber to the Memorandum, a person is not a member until his name is entered in the Register, and the secretary must make a true record to show when he became a member.

The penalty for not keeping such a Register is twenty-five dollars per day, and every director or manager knowingly and wilfully permitting default is liable. The Register of Members is *prima facie* (but not conclusive) evidence of any matters directed or authorised to be inserted therein (Section 44).

By Section 35 it is provided that no notice of any trust shall be entered on the Register or be receivable by the Registrar, and the company may not enter particulars of a lien it may claim to have on the shares.[1]

The Register of Members gives particulars of the shares as they were originally issued, with the changes from time to time made; the Register of Transfers (as its name implies) gives particulars of the changes which take place in the ownership of shares; and the Annual List and Summary shows the names, addresses, and occupations of the members in each year, and the aggregate number of shares held on the fourteenth day after the ordinary general meeting, with other particulars, which will be found later on under the head "ANNUAL RETURNS OF CAPITAL AND MEMBERS (page 372, *infra*). In the case of small companies these may all be bound together in one volume.

The Register of Members is not an easy book to keep in proper order, especially where there are different classes of shares, the calls of various amounts, and the transfers

[1]W. Key & Son, [1902] 1 Ch. 467.

numerous. The Act does not prescribe any particular system of keeping the Register, but only requires that it shall contain the particulars above noted, and more than one book may be used.[1].

A company not entering in the Register the name of a person entitled to be put thereon is liable to pay him damages for any loss he may have sustained by its neglect or refusal to do its duty (Section 43, Sub-section 2).[2]

Inspection and Copies of the Register.

The Register of Members "commencing from the date of the registration of the company," must be kept at the company's registered office, and be open, for a period of at least two hours a day, to the inspection of any member gratis, and to the inspection of any other person on payment of a sum not exceeding twenty-five cents for each inspection (Section 41). Any member or other person may demand to be supplied with a copy of the Register or of the Annual List and Summary, or any part thereof, on payment of twenty-five cents for every hundred words required to be copied (Section 41, Sub-section 2), but is not entitled himself to take extracts and make copies.[3] Any company refusing to supply such copy or to submit its Register for inspection is liable to a penalty of ten dollars for the refusal, and a further penalty of ten dollars per day for every day during which such refusal continues, and every director or manager is alike liable (Section 41, Sub-section 3). Even if it be known that the object of inspecting the Register, or of requiring a copy thereof, is antagonistic to the company, it is illegal to refuse such inspection or

[1]Weikersheim's Case, [1873] 8 Ch. 831, 836.

[2]See Ottos Kopje Diamond Mines, [1893] 1 Ch. 618; Tomkinson *v.* Balkis Consolidated Co., [1891] 2 Q. B. 614.

[3]Balaghat Gold Mining Co., [1901] 2 K. B. 665, overruling Boord *v.* African Consolidated Land and Trading Co., [1898] 1 Ch. 596.

copy.[1] But the right to inspect ceases upon the commencement of a winding up,[2] and if inspection is required after liquidation an Order of Court must be obtained under Section 258. Such an Order entitles the party to inspect and take copies himself. He need not pay the liquidator a fee for having them made.[3]

Period when the Register may be Closed.

A company may close its Register for a period not exceeding thirty days in each year, upon giving notice thereof by advertisement in some newspaper circulating in the district in which the registered office is situate (Section 42). The usual course is to close the Register for fourteen days before the ordinary general meeting, and to state the fact in the notice convening the meeting. The main objects of closing the Register are that entries of transfer may be deferred until after dividends have been declared and paid, and that lists of members may be made out in the event of polls being demanded, and the like. But closing the Register is sometimes resorted to with the object of preventing inspection for a hostile purpose.

Rectification of the Register.

It is of the greatest importance that the Register of Members should be promptly and accurately entered up, as delay or inaccuracy frequently leads to expensive lawsuits. Section 43 prescribes that if the name of any person is without sufficient cause entered in or omitted from the Register of Members of any company, or if default is made or unnecessary delay takes place in entering in the Register the fact of any person having ceased to be a member of the com-

[1]Reg. *v.* Wilts and Berks Canal Navigation Co., [1873] 29 L. T. 922, 3 A. & E. 477; Mutter *v.* Eastern and Midlands Railway, [1888] 38 Ch. D. 92; Davies *v.* Gas Light and Coke Co., [1909] 1 Ch. 708.

[2]Kent Coalfields Syndicate, [1898] 1 Q. B. 754.

[3]*Re* Arauco Co., [1899] W. N. 134.

pany, the person or member aggrieved, or any member of the company, or the company itself, may apply for an Order of the Court that the Register may be rectified; and the Court may "either refuse the application or order Rectification of the Register, and payment by the company of any damages sustained by any party aggrieved."[1] Such an Order must be notified to the Registrar of Companies (Sub-section 4). But if the Order for Rectification is refused, the Court cannot give damages upon a motion made under Section 43, the proper course being for the person aggrieved to bring an action.[2] The Court has power to determine any question relating to the title of any party to the application (Sub-section 3).

The Court will interfere and rectify the Register, upon a motion made under Section 43, where the error is due to the neglect or default of the company, and generally when the question arises between the company and a member or alleged member whether his name is properly included or excluded.[3] The power of the Court is discretionary, and regard must be had to the "justice of the case."[4] In a dispute between two individuals as to which ought to be registered as a member of the company, if the matter is a simple one the Court will decide it upon a motion under this section, and will make the necessary Order for rectifying the Register. But if the question is complicated, or if the rights of third parties intervene, the Court will not

[1]As to the measure of damages see Ottos Kopje Diamond Mines, [1893] 1 Ch. 618.

[2]See Ottos Kopje Diamond Mines, [1893] 1 Ch. 618.

[3]Ward and Henry's Case, [1867] 2 Ch. 431; Reese River Silver Mining Co. *v.* Smith, [1870] L. R. 4 H. L. 64, 79.

[4]Sichell's Case, [1868] L. R. 3 Ch. at page 122; *re* Dronfield Silkstone Co., [1881] 17 Ch. D. at page 97; Trevor *v.* Whitworth, [1888] 12 App. Ca., *per* Lord Macnaghten, at page 440. If the removal of a member's name was in consequence of an invalid surrender, it will be replaced even after seven years (Bellerby *v.* Rowland and Marwood's Steamship Co., [1902] 2 Ch. 14).

interfere, but will allow the party aggrieved to seek his remedy by an action.[1]

A member can procure his name to be removed from the Register on the ground that he was induced to subscribe for his shares by fraud or misrepresentation in the prospectus,[2] if the shares are not fully paid,[3] and if the application is made within a reasonable time, and before proceedings have been taken to wind up the company.[4] In an application of this nature the same general principles will apply as if the applicant were seeking rescission of any ordinary contract on the ground of fraud or misrepresentation. But a shareholder cannot retain his shares and ask for damages (see page 89, *infra*).

If the contract under which the alleged shareholder is supposed to have taken his shares is void from the beginning, and not merely voidable, his name may be removed from the Register even after a winding up has commenced; for he never agreed to take the shares.[5]

If where a transfer is complete and in order, and left for registration, it is not registered owing to any unnecessary delay on the part of the company, the name of the transferor will be removed and that of the transferee placed on the Register, although a winding up has commenced in the interval, and the order may be retrospective in effect, so as to render valid notices of dissent given by the transferee to a scheme of reconstruction,[6] or to relieve the transferor from

[1]Ward and Henry's Case, [1867] 2 Ch. 431; *ex parte* Shaw, [1877] 2 Q. B. D. 463; *ex parte* Sargent, [1874] 17 Eq. 273.

[2]*Ex parte* Ward, [1867] L. R. 3 Ex. 180; *ex parte* Kintrea, [1870] 5 Ch. 95; London and Staffordshire Co., [1883] 24 Ch. D. 149.

[3]Alison's Case, [1874] 9 Ch. 1.

[4]Muir *v*. Glasgow Bank, [1879] 4 App. Ca. 337; Tennent *v*. Glasgow Bank, [1879] 4 App. Ca. 615. See also page 87, *infra*.

[5]Oakes *v*. Turquand, [1867] L. R. 2 H. L. 325· Alabaster's Case, [1869] 7 Eq. 273.

[6]Sussex Brick Co., [1904] 1 Ch. 598.

liability as a contributory.[1] But no alteration will be made if the transfer is not registered owing to a decision of the directors, *bona fide* come to and within their powers, that the transfer ought not to be registered,[2] or if something remains to be done to complete the transfer,[3] or if the Articles require the directors to exercise their discretion and they have not done so[4]; and if there is a pending dispute whether the company is in liquidation the Order will not be made, although the Judge has in an interlocutory proceeding decided that there is no winding up in operation.[5]

The importance of these rules is great, because until a new member is entered in the Register the former holder of the shares remains liable in respect of any calls which may be made on the shares.

The Court has power to rectify the Register after as well as before a Winding-up Order has been made (Section 209),[6] and by an application to the Court the liquidators can enforce the liability of persons who are not, but ought to have been, entered in the Register of Members.

Where a company is being wound up by the Court or subject to its supervision, transfers of shares are, unless the Court otherwise orders, void (Section 248, Sub-section 2); and where the company is being wound up voluntarily any transfers of shares, unless made to or with the sanction of the liquidator of the company, are void (Section 248, Sub-section 1). In the former case the exercise of the power of

[1]Nation's Case, [1866] 3 Eq. 77; Hill's Case, [1869] 4 Ch. 769 n.

[2]Alex. Mitchell's Case, [1879] 4 App. Ca. 548; Nelson Mitchell's Case, [1879] 4 App. Ca. 624.

[3]Marino's Case, [1867] 2 Ch. 596.

[4]Walker's Case, [1866] 2 Eq. 554; Union Debenture Corporation *v.* Fletcher, 59 J. P. 708.

[5]Violet Consolidated Gold Mining Co., [1899] W. N. 66, 68 L. J. Ch 535, 80 L. T. 684.

[6]See Sussex Brick Co., [1904] 1 Ch. 598.

the Court is discretionary, and an Order will not be made except on strong grounds.[1]

The Register of Mortgages.

In addition to registering with the Registrar certain mortgages and charges as required by Section 102 (see page 204), every limited company must keep a Register of all Mortgages and Charges specifically affecting the property of the company, in which must be entered a short description of the property mortgaged or charged, with the amount of charge created, and, except in the case of securities to bearer, the names of the mortgagees or persons entitled to such charge. If any property of the company is mortgaged or charged without such entry being made, every director, manager, or other officer of the company who knowingly and wilfully authorises or permits the omission is liable to a penalty of two hundred and fifty dollars (Section 108).

However, a mortgagee, even though a director of the company, does not lose his security by an omission to see that it is entered in the Register of Mortgages,[2] although he does so if the mortgage is one that requires registration under Section 102 and is not registered with the Registrar (see page 206, *infra*). The priority of mortgages is not affected by any imperfection of the Register kept by the company.[3]

Debentures containing a specific charge on the property of the company clearly must be included in this Register, but not those only containing a floating charge. Where such debentures are payable to bearer the names of the persons entitled need not be specified.

Under Section 109 the Register of Mortgages, and copies of all mortgages and charges which are required to be

[1] Onward Building Society, [1891] 2 Q. B. 46.
[2] Wright *v.* Horton, [1887] 12 App. Ca. 371.
[3] General South American Co., [1876] 2 Ch. D. 337.

registered with the Registrar, must be open at all reasonable times to the inspection of any creditor or member of the company without fee, and the Register of Mortgages must be open to inspection by any other person on payment of a fee not exceeding twenty-five cents; but on a winding up the Register cannot be inspected without an Order of Court.[1] The right to inspect the Register of Mortgages involves a right to take copies of it.[2] Any officer refusing to allow such inspection is liable to a penalty of twenty-five dollars, and a further penalty of ten dollars per day for every day during which such refusal continues, and every director or manager permitting such refusal is liable to the same penalties. In addition to the above penalties, any Judge of the Supreme Court sitting in Chambers, may by an Order compel an immediate inspection of the Register (Section 109, Sub-section 2).

There is no provision in the Act for keeping a Register of Debenture Holders as distinct from the Register of Mortgages; but the debentures or trust deed usually provide for such a Register being kept, and Section 110 requires that every Register of Holders of Debentures of a company shall (except when closed, in accordance with the Articles, for any specified period or periods not exceeding thirty days in any year) be open to inspection by the registered holder of any such debentures and by any shareholder, subject to any reasonable restrictions which the company may in general meeting impose, so that at least two hours a day are appointed for inspection, and every such debenture or shareholder is entitled to a copy of all or part of the Register on payment of ten cents for every hundred words. The pen-

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[1] Somerset *v.* Land Securities Co., [1897] W. N. 29.

[2] Nelson *v.* Anglo-American Land Co., [1897] 1 Ch. 130. Note that, as the sections do not give the persons inspecting a right to have a copy supplied on payment, the case is different from that of the Register of Members (see page 53, *supra*).

alties for default are twenty-five dollars, and ten dollars for every day during which the default continues, and are imposed on the company and every officer knowingly authorising the default.

The same section gives every debenture holder a right to a copy of the trust deed securing his debentures, if printed on payment of twenty-five cents, and if not printed on payment of ten cents for every hundred words, under the same penalties for default (see page 202).

THE REGISTER OF DIRECTORS OR MANAGERS.

Under Section 83 the company is required to keep a Register of its Directors or Managers, and to file copies thereof or of any changes therein. The penalty for default in keeping the Register or neglecting to file a copy of it with the Registrar of Companies is twenty-five dollars a day.

The Annual Return of Members and Summary of Capital and Shares required by Section 34 must also state the names and addresses of the persons who are the directors of the company at the date of the Return.

THE COMMON SEAL.

Every company must be provided with a Common Seal, on which it "shall have its name engraven in legible characters" (Section 71, Sub-section 1[*b*]). If any director, manager, or officer of a company "uses or authorises the use of any seal purporting to be a seal of the company whereon its name is not so engraven," he shall be liable to a penalty of two hundred and fifty dollars (Section 71, Sub-section 3). As has been remarked on page 17, the name of a company should be correctly given in every detail. Especially is this necessary in the case of the Common Seal, the use of which is the official signature of the company.

The seal is impressed upon share and stock certificates (Section 31), trust deeds, debentures, contracts, mortgages,

and other important documents, usually in the presence and with the authority of two directors, who sign the document, which is then countersigned by the secretary. Any contract which if made between private persons would be required to be in writing, and if made according to the law of the Province or of the Dominion to be under seal, may be made on behalf of a company in writing and under its common seal; but a contract which if made between private persons would not require a seal may be made on behalf of the company in the same manner by any person having express or implied authority from the company (Section 84).

The mere affixing of the seal of a corporation is sufficient without witnesses, and, unless the Articles provide that the directors shall attest, it is not necessary, although it is customary, for them to do so.

If the seal of a corporation is found to be attached to a deed it will be presumed to be regularly affixed, and those who assert to the contrary must strictly prove their case.[1]

A person having power to manage the affairs of a trading company has implied power to affix the seal.[2] But negligence of the company in leaving the seal in the custody of a dishonest person will not preclude the company from setting up that the seal was wrongfully affixed, and a forgery gives no title.[3] Thus where a secretary, to aid his own frauds, wrongfully affixed the seal of the company to share certificates, and, having forged the signatures of two directors, issued the certificates apparently in the ordinary course

[1]Clarke *v.* Imperial Gas Co., [1833] 4 B. & Ad. 315, Woodhill *v.* Sullivan 14 C. P. 265; Fell *v.* South 24 U. C. R. 196; Sheppard *v.* Bonanza Nickel Co., 25 O. R. 305. National Malleable Castings Co., *v.* Smiths Falls 14 O. L. R. 22; South of Ireland Colliery *v.* Waddle L. R., 3 C. P. 463: 4 C. P. 617.

[2]*Re* Contract Corporation, [1868] 3 Ch. 105, 116; Biggerstaff *v.* Rowatt's Wharf, [1896] 2 Ch. 93.

[3]Merchants of the Staple *v.* Bank of England, [1888] 21 Q. B. D. 160.

of business, the company came under no liability to the honest holders of the share certificates.[1]

In Articles of Association provision is frequently made as to the occasions on which the seal shall be used. The seal is often secured by a bolt passed through part of the mechanism, and held in position by two padlocks. Sometimes it is enclosed in a case with two locks, different persons holding the keys.

A company may by writing under its common seal empower any person to act as its attorney to execute deeds on its behalf in any place situate within or without the limits of the Province (Section 87); or it may, if authorised by its Articles, have for use in any territory, district, or place out of the Province a separate official seal, and by writing authorise any person appointed for the purpose to affix the same. Such person when using the seal must certify the date and place of affixing it (Section 88). This local seal must be a facsimile of the original seal, except that it must show on its face the name of the locality where it is to be used.

[1]Ruben *v.* Great Fingall Consolidated Co., [1904] 2 K. B. 712; affirmed in the House of Lords, [1906] App. Ca. 439.

CHAPTER VI.

MATTERS PRELIMINARY TO COMMENCEMENT OF BUSINESS.

PROMOTION AND PROMOTERS.

THE functions of Promoters and their duties and liabilities are very important matters in connection with the formation and early existence of a company, and it is important to form clear ideas upon these points. Yet the Courts have always refused to define exactly what constitutes a "Promoter"—and rightly; for if a rigid definition were given, those who desire to avoid the liabilities of the position would be careful to come very close to the line without crossing it. The best description is that of Bowen, L. J.:—"The term 'Promoter' is a term not of law but of business, usefully summing up in a single word a number of business operations, familiar to the commercial world, by which a company is generally brought into existence."[1] But probably there should be added "and by which its capital is provided." The promotion does not necessarily cease with the registration of the company, for "a person not a director may be a Promoter of a company which is already incorporated, but the capital of which has not been taken up."[2]

In seeking to ascertain who are the Promoters of a company it is useful to ask:—(1) "Who started the idea of forming a company for the purpose in question?" (2) "Who settled what was to be included in the Memorandum and Articles of Association and in the Prospectus, or gave the lawyers instructions to prepare them and information upon which they might be prepared?" (3) "Who undertook the liability for the costs of preparing those documents, reg-

[1]Whaley Bridge Co. *v.* Green, [1880] 5 Q. B. D. 109.
[2]Emma Silver Mining Co. *v.* Lewis, [1879] 4 C. P. D. at page 407.

istering the company, and making the preliminary agreements?" (4) "Who sought out the persons who ultimately became the first directors, and induced them to undertake the office?" (5) "Who procured the subscription of the capital?" And, lastly the famous question *"Cui bono?"*—"Who benefited by the formation of the company?"

It must be remembered, however, that none of these questions is decisive. A man may have done one or more of these things, and yet not be a Promoter; or a man may have kept in the background and have appeared to do none of these things, and yet be a Promoter. Usually, however, persons who have busied themselves in procuring subscriptions or underwriting will find it very hard to escape from being held to be Promoters. Further, a man may be a Promoter who is only acting as agent for others, or as director of a promoting syndicate, if he has personally taken an active part in the promotion.[1]

Very frequently the vendors of property to a company are the Promoters.[2] But, on the other hand, the owners of property may have been asked, "If a company is formed to acquire your property, will you sell it? and, if so, at what price?" If they have done no more than agree to sell they will not be Promoters; nor will the solicitors who as part of their professional duty prepared the contracts.[3] But it is to be noted that the Courts will look at the substance of a transaction, and vendors or others who are in reality the Promoters will not escape liability by the interposition of a nominal vendor or a nominal Promoter, who professes to purchase and resell the property or to undertake the financial operations incident to forming and floating a company.

[1]Lydney and Wigpool Co. *v.* Bird, [1886] 33 Ch. D. at page 94.

[2]Twycross *v.* Grant, [1877] 2 C. P. D. 469; Beck *v.* Kantorowicz, [1857] 6 K. & J. 230; Gluckstein *v.* Barnes, [1900] App. Ca. at page 249.

[3]*Re* Turner, [1884] 53 L. J. Ch. 42, 49 L. T. 20.

The relation of a Promoter to the company he is about to form, although not strictly that of a trustee to his *cestui que trust,* or beneficiary, or of an agent to his principal, is of the same nature; and it follows that he may not secretly make a profit for himself, nor otherwise benefit at the expense of the company. Thus Lindley, L. J., in delivering the judgment of himself and Cotton and Lopes, L. JJ., said, "Although not an agent of the company nor a trustee for it before its formation, the old familiar principles of the law of agency and of trusteeship have been extended, and very properly extended, to meet such cases. It is perfectly well settled that a Promoter of a company is accountable to it for all moneys secretly obtained by him from it, just as if the relationship of principal and agent or of trustee and *cestui que trust,* had really existed between him and the company when the money was so obtained."[1] It was further held in the same case that the fact that the Promoter was an agent for others did not exonerate him from liability. Again, Lord Cairns and Lord Blackburn decided that Promoters undoubtedly stand "in a fiduciary position towards the company."[2] The fiduciary relationship extends, moreover, not only to the company as constituted at the time, but also to future allottees of shares; so that disclosure of profits made by the Promoters must be made not only to the subscribers to the Memorandum, but also either to an independent Board or to all the subscribers for shares.[3]

A convenient summary of some of the main principles in relation to contracts with Promoters and persons in a fiduciary position is to be found in the judgment of Lord

[1]Lydney and Wigpool Co. *v.* Bird, [1886] 33 Ch. D. at page 94.
[2]Erlanger *v.* New Sombrero Phosphate Co., [1879] 3 App. Ca. 1236.
[3]British Seamless Paper Box Co., [1881] 17 Ch. D. 467; Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392. Bennet *v.* Havelock, 1 O. W. N. 352, 751, 21 O. L. R. 375.

Lindley (then Master of the Rolls) in Lagunas Nitrate Co. *v.* Lagunas Syndicate (1899, 2 Ch. at page 422):

"The first principle is that in equity the Promoters of a company stand in a fiduciary relation to it, and to those persons whom they induce to become shareholders in it, and cannot in equity bind the company by any contract with themselves without fully and fairly disclosing to the company all material facts which the company ought to know. Erlanger *v.* New Sombrero Phosphate Co. (1879, 5 Ch. D. 73, 3 App. Ca. 1218) is the leading authority in support of this general proposition.

"The second principle is that a company when registered is a corporation capable by its directors of binding itself by a contract with themselves if all material facts are disclosed.[1] Salomon *v.* Salomon & Co. (1897, App. Ca. 22) is the leading authority for this principle.

"The third principle is that the directors of a company, acting within their powers and with reasonable care, and honestly in the interest of the company, are not personally liable for losses which the company may suffer by reason of their mistakes or errors in judgment. Overend, Gurney & Co. *v.* Gibb (1865, L. R. 5 H. L. 483) is the leading authority on this head.

"A fourth principle, not confined to companies, but extending to them, is that a contract can be set aside in equity on proof that one party induced the other to enter into it by misrepresentations of material facts, although such misrepresentations may not have been fraudulent.

"A fifth principle is that a voidable contract cannot be rescinded or set aside after the position of the parties has

[1]It should be noted that this disclosure must be to independent persons. not to themselves as directors or their nominees. This appears from the case here being quoted. See [1899] 2 Ch., page 431 *et seq.*; Erlanger *v.* New Sombrero Phosphate Co., [1879] 3 App. Ca. 1218; and Gluckstein *v.* Barnes, [1900] App. Ca. 240, affirming *re* Olympia, Limited, [1898] 2 Ch. 153. Ruethal Mining Co. *v.* Thorpe, 9 O. W. R. 942. O'Sullivan *v.* Clarkson, 9 O. W. R. 46, Stratford Fuel Co., *v.* Mooneys' 1910; 21 O. L. R. 426

been changed, so that they cannot be restored to their former position. Fraud may exclude the application of this principle, but I know of no other exception."

In the case in question it was held by a majority of the Court of Appeal (Lindley, M. R., and Collins, L. J.) that on the facts the company had notice that the directors were also vendors, and therefore the fact that they did not constitute an independent board was not a sufficient ground for setting aside the contract, as there was no material misrepresentation made to the persons who were members of the company at the date of the contract, these being the directors themselves; and, further, that although the prospectus was in some respects misleading, the subsequent alteration in the position of the company rendered rescission impossible. But Rigby, L. J., thought that the facts were such as to render the directors liable.

The fiduciary position commences as soon as the Promoter begins to act for or promote the company, but not earlier. The fact of acquiring a property with the intention of ultimately forming a company which shall acquire and develop it does not render the purchaser accountable for the profit he makes on the resale, so long as the company, on coming into existence, is informed that the person selling to the company and the Promoter are identical.[1] But any profit which the Promoter makes after he has begun to promote the company, and the benefit of any contracts into which he enters during that period, belong to the company;[2] for the rule is that where an agent sells what is already his own property to his principal he is only liable if the principal is ignorant that the agent is himself the vendor; but

[1]Bentinck *v.* Fenn, [1888] 12 App. Ca. 652; Gover's Case, [1876] 1 Ch. D. 182; Erlanger *v.* New Sombrero Phosphate Co., [1879] 3 App. Ca. 1218; Ladywell Mining Co. *v.* Brookes, [1887] 35 Ch. D. 400; compare Burland *v.* Earle, [1902] App. Ca. 98—the case of a director purchasing privately and selling to his company.

[2]Ladywell Mining Co. *v.* Brookes, [1887] 35 Ch. D. 400; Cape Breton Co., [1885] 29 Ch. D. 795.

where an agent is purchasing on behalf of his principal the bargain is the bargain of the principal, who is entitled to the whole benefit, and the agent must not intercept any portion of the profit: (*e.g.* by taking commission from the vendors, or by making a resale to his principal at an enhanced price). It is also the duty of the agent to secure the purchase for his principal on the most favorable terms obtainable.

If the Promoter was not at the time he bought in a fiduciary position, though subsequently and at the time of his resale to the company he is in a fiduciary position and does not disclose his interest, the company is entitled to rescind. If in such a case rescission has become impossible, the company cannot recover from the Promoter, as money had and received, the profit he has made;[1] but there might possibly be a remedy in damages.[2]

How far a Promoter is agent or trustee for a company not yet formed is not clearly laid down; but it is decided that immediately upon the registration of the company he is under fiduciary obligations, not only to the company as originally constituted, but also as consisting of future allottees, and therefore Promoters and Directors will not be protected by disclosures made before the public have joined the company unless there is an independent board or body of shareholders to receive and act upon the information, and the directors who participate in the profits must not be counted as independent.[3] Thus mere communication to the subscribers to the Memorandum of Association who are clerks in the vendor's office is obviously a farce, even though

[1]Cape Breton Co., [1884] 26 Ch. D. 221, [1885] 29 Ch. D. 795; Ladywell Mining Co. *v.* Brookes, [1887] 34 Ch. D. 308, 35 Ch. D. 400; Lady Forrest (Murchison) Gold Mine, [1901] 1 Ch. 582.

[2]Bentinck *v.* Fenn, [1888] 12 App. Ca., *per* Lord Herschell, at page 664.

[3]Leeds and Hanley Theatres of Varieties, [1902] 2 Ch. 809; Fitzroy Bessemer Co., [1885] 33 W. R. 312; Erlanger *v.* New Sombrero Phosphate Co., [1879] 3 App. Ca. 1218; Olympia, Limited, [1898] 2 Ch. 149; Gluckstein *v.* Barnes, [1900] App. Ca. 240.

they hold a meeting and are the only members of the company; and, equally, disclosure to directors who are mere nominees of the vendors or Promoters will not be sufficient.[1] In such a case the information should be given in the prospectus;[2] and even if all the facts are known to all the members of the company at the time the contract is made, but a misleading prospectus is subsequently issued by the Promoters to the public inviting them to join the company, the Promoters will be liable.[3]

If, however, there is no intention of making a public issue of shares, and no such issue is in fact made, knowledge by all the directors and members of the company of the facts will exonerate the Promoters, even where the purchase price has been greatly inflated.[4]

"A Promoter whose duty it is to disclose what profits he has made does not perform that duty by making a statement not disclosing the facts, but containing something which, if followed up by further investigation, will enable the inquirer to ascertain that profits have been made and what they amounted to."[5] Therefore, a reference in the prospectus to contracts is not a sufficient disclosure of profits unless the terms of the contracts are fairly stated.

Where a Promoter has to account to the company for secret profits the measure of damage is the amount of profit made by the Promoter;[6] but he is allowed to deduct

[1]Olympia, Limited, [1898] 2 Ch. 149; Gluckstein *v.* Barnes, [1900] App. Ca. 240. Compare Kaye *v.* Croydon Tramways, [1898] 1 Ch. 358, and Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. at page 431.

[2]Leeds and Hanley Theatres of Varieties, [1902] 2 Ch. 809.

[3]Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. at page 428.

[4]*Re* Ambrose Lake Tin Co., [1880] 14 Ch. D. 390; British Seamless Paper Box Co., [1881] 17 Ch. D. 467; Innes & Co., [1903] 2 Ch. 254.

[5]Olympia, Limited, [1898] 2 Ch. 149; affirmed Gluckstein *v.* Barnes, [1900] App. Ca. 240. Compare Kaye *v.* Croydon Tramways, [1898] 1 Ch. 358. O'Sullivan *v.* Clarkson, 9 O. W. R. 46.

[6]Leeds and Hanley Theatres of Varieties, [1902] 2 Ch. 809.

from the amount all reasonable expenses he has been put to, and is liable only for the net profits made.[1]

Co-Promoters are not partners, nor is one Promoter necessarily the agent of the others, or the act or admission of one evidence against the others.[2]

When the company is in liquidation, a Promoter may be examined privately under Section 220; and where a public examination is ordered in a compulsory winding up under Section 221, the Promoters are among the persons who may be publicly examined. Promoters may also be rendered liable for misfeasance under the procedure provided by Section 254. All these matters are dealt with in their proper places.

Promoters have not infrequently arranged for the shares of the company being underwritten, and paid the necessary commission out of the purchase money or other consideration they receive from the company. Section 98, Sub-section 3, renders the payment of the commission by the Vendors or Promoters lawful if made in such circumstances as would have justified direct payment of the commission by the company.

The remuneration of the Promoter usually comes out of the purchase money for the property acquired. In any case the amount paid within the two preceding years or intended to be paid to any Promoter must be disclosed in the Prospectus (Section 90, Sub-section 1 (*j*)) or in the Statement in Lieu of Prospectus (Section 91 and Schedule II).

Preliminary Agreements.

Whether the company is formed to acquire a business, to work a mine, to develop a patent, to undertake financial business, or for any other purpose, it seldom issues its prospectus without having entered into preliminary agreements

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[1]Emma Silver Mining Co. *v.* Grant, [1879] 11 Ch. D. 918; Lydney and Wigpool Co. *v.* Bird, [1886] 33 Ch. D. 95.

[2]See "Lindley on Companies," Fifth Edition, pages 143 to 145. See also Wilson *v.* Hotchkiss, 2 O. L. R. 261. Sandusky Coal Co., *v.* Walker, 27 O R. 677. Sylvester *v.* McCuaig, 28 C. P. 443 Garvin *v.* Edmondson [1909] 15 O. W. R. 240.

for the purchase of the property or rights to be acquired, or for securing the services and connection of some manager or expert.

As the Promoters of the company will desire to offer the benefit of such agreements or contracts as an inducement to the public to take shares, it becomes necessary that they should be made before the formation of the company, or at least before the general allotment of shares, and accordingly an agreement or contract is usually prepared and executed before the issue of the prospectus, being expressed to be made between the vendor and either the company itself or a trustee for the intended company. In either event, however, the company is not bound by the contract until it has been adopted by the directors after the incorporation of the company.

It will be observed that a contract can be made with a trustee for the company before the company has any existence, in which case the trustee will be personally bound by the contract unless he expressly protects himself from liability by including a power to rescind it.[1] It is usual in such a case to make it one of the objects of the company mentioned in the Memorandum, and also to provide in the Articles of Association that the directors shall adopt the preliminary agreement; but this will not lay the company under obligation unless a distinctly new contract is made by which the company agrees to be bound by the terms of the preliminary agreement.[2] Nor will a resolution of the Board of the new company adopting the agreement create a contract between the new company and the vendor.[3] A new contract may, however, sometimes be inferred from

[1]Kelner *v.* Baxter, [1867] L. R. 2 C. P. 174.

[2]*Re* Olympia, Limited, [1898] 2 Ch. 168; Northumberland Avenue Hotel Co., [1886] 33 Ch. D. 16; Natal Land Co. *v.* Pauline Colliery, [1904] App. Ca. 120.

[3]Johannesburg Hotel Co., [1891] 1 Ch. 119; North Sydney Investment Co. *v.* Higgins, [1899] App. Ca. 263.

the circumstances and the conduct of the parties.[1] But the mere fact that the directors of the company think they are bound by the contract with the trustee, and act accordingly, is not enough, even though large sums of money are expended and work is done in that mistaken belief.[2]

Where the contract is expressed to be made with the company itself, it is sometimes prepared before the incorporation of the company, and then referred to in the Memorandum and Articles of Association as an "agreement already drawn up and intended to be executed," and, for identification, signed or initialled by some of the subscribers to the Memorandum of Association or by a solicitor. In this case the agreement requires to be executed by the company, and this must be done after proper consideration by the directors and not merely *pro forma*: in fact, they must exercise their judgment upon it, and if they are not an independent board the company may repudiate the contract.

By Section 96, Sub-section 3, any contract made by a company before the date at which it is entitled to commence business is provisional only, and is not binding on the company until that date, but on that date it becomes binding. It is thought that if this event does not happen within a reasonable time the Court will have power, at the instance of the other party, to declare the contract at an end: it can hardly be that a vendor would be bound indefinitely. But a person contracting with the company will be wise to include in any contract made before the date in question a provision that if the company does not become entitled to commence business within a specified period, the contract shall be void or be liable to rescission by either party.

By Section 92 a company is forbidden, prior to the statutory meeting, to vary the terms of any contract referred

[1]Howard *v.* Patent Ivory Co., [1888] 38 Ch. D. 156; Natal Land Co• *v.* Pauline Colliery, [1904] App. Ca. at page 126.
[2]Northumberland Avenue Hotel Co. [1886] 33 Ch. D. 16.

to in the prospectus, except subject to the approval of the statutory meeting. Section 73, Sub-section 3 (*e*), also prescribes that the directors shall, in the report to be submitted seven days before the statutory meeting, give particulars of any contract the modification of which is to be submitted to the meeting for approval, and the details of the proposed modification.

It follows from Section 98 that nothing must be added to the purchase price of property or contract price for work to enable the vendor to the company or the contractor to pay commission for placing the share capital, unless the payment is authorised by the Articles, and stated in the prospectus or statement in lieu of prospectus.

Persons who are not part owners of the property must not be joined, to enable them to receive a part of the fully paid shares forming the consideration. Directors knowingly allowing Promoters to obtain remuneration by such an arrangement are guilty of misfeasance.[1]

The purchase consideration is usually first stated in a lump sum, thus:—"The vendor shall sell and the company shall purchase [the property] at the price of $100,000, which shall be satisfied by the payment of $50,000 in cash and the allotment to the vendor or his nominees of 50,000 shares of $1 each in the capital of the company credited as fully paid, numbered to ." It should be noted that if this form is not used, but it is simply stated that the vendor is to take "$50,000 worth of fully paid shares," this means fully paid shares of the market value of $50,000.[2]

If directors receive any benefit under the preliminary agreement, it should be fully disclosed. They will be liable to repay to the company any secret profits, and it is misfeasance for them to accept any gifts from the vendors with-

[1]Bland's Case, [1893] 2 Ch. 612.

[2]McIlquham *v.* Taylor, [1895] 1 Ch. 63.

out the full knowledge of the company. It is also wrong and improper for the directors to accept any gift whatever while the consideration or completion of the contract is still open.[1]

Questions relating to the contracts which require to be disclosed in the prospectus or statement in lieu of prospectus are considered on pages 79 to 83, *infra*.

Statement in Lieu of Prospectus.

Even when a company (not being a private company as defined by Section 130) does not issue a prospectus to the public it must (unless it has previously to the 15th day of March, 1912, made an allotment of shares or debentures) give publicity to its affairs by filing the Statement in Lieu of Prospectus referred to in Section 91, signed by every person named therein as a director or proposed director, or his agent authorised in writing, and until it has done so it is forbidden to allot any of its shares or debentures. The form of the Statement is set forth in the Second Schedule to the Act (see page 702).

It will be seen from the following pages that the information required to be given in this statement is substantially the same as that required to be given in a prospectus, with the omission of certain items (such as the contents of the Memorandum of Association and the names of the signatories thereto) which will already be found upon the file. In the pages which follow will be found a discussion of the principal matters involved.

Under Section 80 no person can be appointed a director of a Public Company by the Articles or named as a director in the Statement unless he has signed and filed a Consent in writing to act as a director, and has agreed to take and pay for his qualification shares. Under Section 94 a company must not proceed to allotment unless the minimum subscription, as named in

[1]See Eden *v.* Ridsdale's Railway Lamp Co., [1889] 23 Q. B. D. 368; Archer's Case, [1892] 1 Ch. 322; Hay's Case, [1875] 10 Ch. 593.

the Statement has been applied fòr (see page 121), and cannot (Section 96) commence business or exercise any borrowing powers until the minimum subscription (consisting of shares payable in cash, as named in the Statement) has been allotted, and there has been filed with the Registrar a Statement in Lieu of Prospectus. For other necessary preliminaries see page 113.

If no amount is named in the Statement as the minimum subscription, the company must not proceed to allotment unless "the whole amount of the share capital other than that issued or agreed to be issued as fully or partly paid up otherwise than in cash, has been subscribed, and an amount not less than five per cent. of the nominal amount of each share payable in cash has been paid to and received by the company" (Section 94, Sub-section 7). The effect of making an allotment in violation of these provisions is as stated on page 123.

A private company is excepted from the provisions of Sections 80, 94, and 96. Companies which have made an allotment of shares or debentures before the 1st July, 1910, are excepted from Section 94.

The object of the Statement in Lieu of Prospectus is to give publicity in the case of "prospectusless" companies to the essential matters of their constitution. But it allows the Statement to be filed at any time before allotment, and it is not improbable that promoters may adopt the practice of filing the Statement at the same time as or immediately after the Memorandum, in which case they can truthfully state in regard to many of the particulars required that nothing has been done, although before the issue of the shares or debentures many of the things referred to may happen. In cases of an early filing of the Statement a question will arise as to what is meant by the word "proposed." It seems that this must mean "proposed by the company," for the intentions of persons who are strangers to

the company can hardly be the subject of Section 96. It will therefore clearly include anything indicated in the Memorandum or Articles as one of the objects of the company: *e.g.* if it is stated that the company is formed to acquire the business of Messrs. A and B, that will be a property proposed to be acquired, and A and B will no doubt be the vendors; but if no contract has been made it is not clear that any amount can be said to be "payable to each separate vendor"; and if the Memorandum and Articles do not refer to any property, and the directors have not yet taken into consideration any proposed purchase, there is more difficulty in saying what property is proposed to be purchased or who are the vendors. Again, how is the amount "intended to be paid to any promoter" to be fixed before there is an agreement with him? The promoter may intend to get as much as he can, but that can hardly be what is to be stated. A true statement is not possible unless the company, acting through its directors sitting as a board, has formed an intention of paying the promoter some specific sum.

If false statements are found in a prospectus, the directors and persons responsible for the issue of the prospectus are liable in damages to the persons taking shares on the faith of the statements. How far any person who has taken shares can avail himself of misstatements contained in the document filed with the Registrar under this section is not clear. A person who had not seen the statements before he took the shares, or who did not rely on them in taking the shares, would have no remedy. But a man who had consulted the file before applying for shares might argue, "The directors had a statutory duty to make and file true statements, but they failed in that duty, whereby I suffered loss, and, being one of the class for whose benefit the enactment was made, I have an action on the case against the directors"; and this argument might prevail.

PROSPECTUSES.

The most important practical matter connected with the formation of a company is the obtaining of capital, and, except in the case of converting private businesses into companies, and in a few cases where money is privately subscribed, this is done by means of a "Prospectus."

Definition of "Prospectus" in the Act.—The Act defines a prospectus as "any prospectus, notice, circular, advertisement, or other invitation offering to the public for subscription or purchase any shares or debentures of a company." This definition applies "unless the context otherwise requires," and at first sight would seem to exclude the case of shares or debentures offered to a limited class of persons, such as only to the members of a particular company.[1] But this cannot be affirmed with certainty; for in Section 90, which contains the main provisions relating to the prospectus, there is this sub-section (7): "This section shall not apply to a circular or notice inviting existing members or debenture holders of a company to subscribe either for shares or for debentures of the company"—words which are wholly unnecessary unless the word "prospectus" applies to an offer of shares to the members of the company only. On the other hand, if the present members of the company issuing the prospectus are "the public," it is difficult to see what class of persons may not also be held to be "the public," and how any prospectus can be other than an invitation offering shares or debentures to the public.

It appears from a Scotch case that a circular placed in the hands of friends of the proposed directors, even to the number of forty, and intended to be shown to their friends, is not an invitation to the public.[2] It has also been held that the printing of two hundred and twenty copies of a

[1]See Booth *v.* New Afrikander Gold Mining Co., [1903] 1 Ch. 295.
[2]Sleigh *v.* Glasgow and Transvaal Options, [1904] Court of Sess., 6 F. 420.

prospectus, and the circulation of them by the directors and promoter among their friends, is not such an invitation; holding further that the offer of the shares, to fall within the section, must be by the company, and must be an offer to any person who chose to come in and take them.[1] It is not possible to say with confidence what number of persons will constitute a "public." All the circumstances must be considered in each case.[2]

In the case of a reconstruction, shares issued to the members of the old company are not in the same position as shares issued to the public, and the circular offering them would seem not to be a prospectus within the meaning of the Act.[3]

It will be observed that the definition includes a prospectus offering the public shares for *purchase,* so that even where the capital has been taken up, if the holders, being persons interested in the company, or intended company, offer the shares for sale to the public, they must comply with the requirements of the Act.

Prospectus to be Dated and Filed (Section 90).—Every prospectus which relates to any company or intended company and is issued by or on behalf of any such company or intended company or by or on behalf of any person interested in any such company or intended company must be dated, and such date, unless the contrary is proved, is to be taken as the date of publication of the prospectus. Before the date of publication a copy of the prospectus must be signed by every person named as a director or proposed director, or by his agent authorised in writing, and filed with the Registrar. Until so filed the prospectus must not be issued, and when issued it must bear on the face of it a statement that it has been filed with him. The Registrar

[1]Sherwell *v.* Combined Incandescent Mantles Syndicate, [1907] W. N. 110.

[2]As to advertisements being deemed prospectuses, see Rex *v.* Garvin 18 O. L. R. 49 and also Law Quarterly Review 1911 page 286.

[3]See Booth *v.* New Afrikander Gold Mining Co., [1903] 1 Ch. 295.

refuses to register any prospectus unless it is dated and signed as above mentioned. If a prospectus is issued before filing, the company and every person knowingly a party to the default will be liable to a fine of twenty-five dollars a day from the date of the issue to the date on which the filing is effected.

By Section 80, no person, except in the case of a private company, is capable of being appointed a director by the Articles, or may be named in any prospectus issued within a year from the date at which it is entitled to commence business, as a director or proposed director, unless he has first signed (by himself or his agent authorised in writing), and filed with the Registrar, a consent in writing to act, and has agreed to take his qualification shares from the company, either by subscribing the Memorandum for at least the prescribed number, or by signing and filing with the Registrar a contract in writing to that effect.

Contents of Prospectus.—Every prospectus (defined as above) which relates to any company or intended company and is issued by or on behalf of any such company or intended company or by or on behalf of any person interested in any such company or intended company must state the particulars required by Section 90.

Several of these particulars require consideration, which here follows.

Disclosure as to the Vendors and the Purchase Price (Section 90, Sub-section 1 (*f*)).—A common practice has been for the owners of a business or property to agree to sell it to a nominee of the promoters, who agrees to resell to the company at a profit, often very large, which the promoters receive and retain. In the case of mines, concessions, patents, and other property of uncertain value, sometimes several intermediaries are found. The prospector may agree to sell his mine to a speculator for a few hundred dollars

and a tenth of the capital of any company to be formed to purchase. The speculator agrees to sell it to financiers for a few thousand dollars and sufficient shares to make the price equal to one-third of the capital of the company. The financiers make the purchase in the name of a nominee, promote the company, and agree to sell the mine for sufficient cash to pay all their outgoings and as many shares as make up two-thirds of the capital of the company. The public are then invited to subscribe for the shares necessary to provide the cash before mentioned and more or less working capital.

The Act now requires the disclosure in the prospectus of the names and addresses of all the vendors and sub-vendors, and the amount *each* person is to receive, whether in cash, shares, or debentures. For the purposes of this requirement the word "vendor" includes, as well as the immediate vendor to the company, every person who has entered into a contract, absolute or conditional, for the sale or purchase or for any option of purchase of any property to be acquired by the company where either the purchase money is not fully paid before the publication of the prospectus, or the purchase money is to be paid wholly or in part out of the proceeds of the issue offered for subscription by the prospectus, or the contract depends for its validity or fulfilment on the result of the issue (Section 90, Sub-section 2). But if the vendors or any of them are a firm it is not necessary to distinguish the amounts receivable by the respective partners (Section 90, Sub-section 1 (*f*)). Where the company purchases the benefit of an existing contract, it will be necessary to state both the price paid for such benefit and the price payable under the contract.[1] In other words, the only way of escaping the obligation to disclose particulars of any purchase is to complete the purchase, and pay the

[1]Brookes *v.* Hansen, [1906] 2 Ch. 129.

whole purchase consideration, before the publication of the prospectus, in which case this particular portion of the Statute will not apply;[1] but, although the contents of the contract need not be stated in such a case, the obligation to disclose all material contracts will usually render it necessary to give the date of and parties to the contract, and provide a reasonable time and place where it may be seen.

"Where any of the property to be acquired by the company is to be taken on lease" the word "vendor" includes "lessor," and the words "purchase money" include the consideration for the lease (Section 90, Sub-section 3). It is not clear whether the words "is to be taken on lease" include the case of the company purchasing an existing lease. In common parlance certainly the words would not have that meaning; but if they have not, the object of the Act might be defeated by the original vendor granting a long lease of the property to the vendor to the company, who could sell the lease to the company without being subject to the obligation to make disclosure of the price paid by him for the lease.

Disclosure of Material Contracts (Section 90, Sub-section 1 (*k*)).—This sub-section is somewhat vague. It says "every material contract" without specifying between whom or for what purpose it must be material to fall within the scope of the Act. For instance, a contract between rivals in trade of the new company to prevent it from obtaining business would be very material, but can hardly be within the meaning of the Act. It is submitted that the contracts must be those to which the company or some persons having direct relations with the company (such as vendors, promoters, directors, or officers) are parties, and that a material contract is one "which, upon a reasonable construction of its purport and effect, would assist a person in

[1]Brookes *v.* Hansen, (1906) 2 Ch. 129.

determining whether he would become a shareholder in the company,"[1] or one which is "calculated to influence persons reading a company's prospectus in making up their minds whether or not they will apply for shares";[2] or that (to adopt the summary of the cases in Lord Justice Buckley's "Companies Acts," 8th edition, page 654) "the prospectus had to disclose, not only contracts which imposed an obligation on the company, but also all contracts . . . . which relate to the affairs of the company, or its promoters, vendors, directors, and officers, and which are material for an intending applicant to know."

It is necessary to state a reasonable time and place where the contracts or copies may be inspected; but it is not stated that the company or the promoters must produce the contracts or copies to any applicant. If production is refused, the remedy of the applicant for production is therefore not to subscribe for shares.

The contracts which are excepted from the provisions of the Act are—

1. Contracts entered into in the ordinary course of the business carried on or intended to be carried on by the company. Presumably the words "intended to be carried on" refer to the case where the company is formed to purchase an existing business, when contracts made in the ordinary course of that business need not be disclosed.
2. Contracts made more than two years before the date of issue of the prospectus.

Disclosure of the Interest of Directors (Section 90, Subsection 1 (*m*)).—At Common Law a director could not take

[1]This was the test applied by Baggallay, L. J., in Sullivan *v.* Mitcalfe, [1880] 5 C. P. D. 465.

[2]*Per* Coleridge, L. C. J., Grove and Lindley, JJ., in Twycross *v.* Grant, [1877] 2 C. P. D. 485.

a secret profit from his company; but if there were independent directors, disclosure to them was a sufficient disclosure to the company. Under the Act there must be an express statement in the prospectus, not only of the nature but of the extent of every director's interest in the promotion and in the property proposed to be acquired by the company,[1] and a statement must also be made of all sums paid or agreed to be paid to him in cash or shares or otherwise, either to induce him to become a director or to qualify him or otherwise, for services rendered by him in connection with the formation of the company. All Common Law liabilities remain unaffected by the Act, and directors will be liable for secret profits made by them out of their office, whether such profits fall within the words of the Act or not.

Restrictions on the Generality of Section 90.—These are as follows:—

1. The section does not apply to a circular or notice inviting existing members or debenture holders of a company to subscribe for shares or debentures of the company (Section 90, Sub-section 7).
2. If the prospectus is published more than one year after the date at which the company is entitled to commence business, the requirements as to Memorandum of Association, qualification of directors, remuneration of directors, names, addresses, etc., of directors, amount of preliminary expenses, and interest of directors, do not apply (Section 90, Sub-section 8).
3. If the prospectus is published as a newspaper advertisement, it is not necessary to specify the

[1]The Act does not require in terms disclosure of the director's interest in any property which *has been* acquired by the company.

contents of the Memorandum of Association or the signatories thereto, or the number of shares subscribed for by them (Section 90, Sub-section 5).

Except as above, the section applies to all prospectuses, whether issued on or with reference to the formation of a company or subsequently.

No "Waiver" of the Obligations of Section 90.—"Any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirement of this section, or purporting to affect him with notice of any contract, document, or matter not specifically referred to in the prospectus, shall be void" (Section 90, Sub-section 4).

Effect of Non-Compliance with Section 90.—The Act contains no provision as to the results to follow from failure to specify in the prospectus the various matters and things directed to be included, and the Act does not in express terms impose any liability either on the company or the promoters or directors for failing to comply with its provisions.

The omission may in some cases give a right to rescission of the contract to take shares or to damages against directors, but to establish such a right it will be necessary to prove more than the mere omission of one or more of the required particulars.[1] The right (if any) to damages will be based upon the fact that there are omissions from the prospectus of matters which there was a duty to disclose, whereby such omissions become equivalent to misstatements, or upon the fact that a failure to perform a statutory duty gives a cause of action to the persons injured; but in either case the person seeking relief must show

[1]Wimbledon Olympia, Limited, [1910] 1 Ch. 630.

damage.[1] It will therefore be necessary for the complaining party to show that his loss has arisen as a natural result of the defendant's default in complying with his statutory duty. It would seem that, at least, he must satisfy the Court that if the proper statements had been contained in the prospectus he would not have taken his shares.[2]

That it was intended that non-compliance with the section should impose a liability is clear from Sub-section 6, which purports to restrict the liability as follows:—"In the event of non-compliance with any of the requirements of this section, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance, if he proves that—(*a*) as regards any matter not disclosed, he was not cognisant thereof; or (*b*) the non-compliance arose from an honest mistake of fact on his part"—the burden of proof of ignorance or mistake being therefore on the director. By a proviso to the sub-section, however, the burden of proof of knowledge in the case of non-disclosure of the interest of a director in the promotion or property to be acquired falls on the plaintiff, and not on the person charged.

Sub-section 9 of Section 90 provides that nothing in the section shall limit or diminish any liability which any person may incur under the general law apart from that section.

As before mentioned, the word "prospectus" in the Act

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[1]The law of liability for breach of statutory duty is thus stated by Fletcher Moulton, L. J.: "If by a Statute a duty is laid on any person, every member of the public has a right to have that duty performed. The breach of it does not give every member of the public a right of action, because damage is an essential part of such cause of action, but it is settled law that where damage has accrued to any person through breach of a statutory duty by another person the latter is liable" (David *v.* Britannic Merthyr Coal Co., [1909] 2 K. B. at page 157; see also Groves *v.* Lord Wimborne, [1898] 2 Q. B. at pages 412, 415, from which it appears that only some person belonging to the class for whose benefit or protection the Statute imposes the duty can claim relief).

[2]Compare Nash *v.* Calthorpe, [1905] 2 Ch. 237; Macleay *v.* Tait, [1903] App. Ca. 24.

only applies to cases where shares or debentures are offered *to the public* for subscription or purchase: therefore in the case of a prospectus not making an offer to the public the only obligation to make any disclosure of contracts[1] is that involved in the duty not to mislead, and it seems that a document containing particulars of the company, accompanied by a letter advising the recipient to apply for shares, issued by intending directors, may not constitute an invitation to take shares.[2]

The prospectus is an invitation to the persons to whom it is addressed to become shareholders or to take up debentures of the company, and accordingly must be drawn with great care, so that it shall not contain any misstatement of fact. The effect of misrepresentation is considered elsewhere (see *infra*, page 88 *et seq.*).

The following things should be clearly set out in every prospectus, although as regards some of them there is no statutory obligation to do so: viz.—

The name of the company in full.

The total amount of the share capital.

The nominal amount of the shares.

The respective classes of shares, with particulars of the rate of dividend on preference and deferred shares, etc.

The amounts to be paid up on each class of shares, with the dates of payment.

The proposed amount of debentures (if any), with the rate of interest and other usual particulars.

The names, descriptions, and addresses of the directors, auditors, and trustees (if any) of the company.

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[1]The Statement in Lieu of Prospectus must, however, contain particulars of the material contracts.

[2]Sleigh *v.* Glasgow and Transvaal Options, [1904] Court of Sess., 6 F. 420.

The registered office of the company (temporary or permanent).

The officers of the company (manager, secretary, etc.). The names of the bankers, solicitors, and brokers (or financial agents) of the company are also usually added.

The objects of the company.

A prospectus may be issued either before or after the incorporation of the company, but it is the almost universal custom to register the company before issuing the prospectus. When that has been done, unless the prospectus is issued more than twelve months after the company is entitled to commence business, it is compulsory, and in all cases it is most desirable, to print upon the prospectus a copy of the Memorandum of Association, in order that intending shareholders may have full notice of all the powers and objects with and for which the company is formed. An applicant for shares can withdraw his application, and a shareholder can procure his name to be removed from the Register, if he find among the powers and objects of the company any which are at variance with the statements in the prospectus, and are such as would have prevented him from applying for shares.[1] Where the Memorandum of Association, however, is set out, there is no need for further particulars as to the legal limits of the company's operations.

The formal statement of the company's name, capital, office, directors, and officers is followed by a general statement of the nature of the business the company will undertake, and the inducements which are offered to attract persons with a view to their becoming shareholders.

Since the prospectus is the basis upon which, as a rule, persons apply for shares, it is essential that every statement should be in accordance with fact. Persons who have taken shares or debentures under the prospectus can in case of

[1]Stewart's Case, [1866] 1 Ch. 574; Muir *v.* Glasgow Bank, [1879] 4 App. Ca. 337.

misrepresentation obtain relief from their contract to take the shares or debentures, and can insist upon any terms contained in the prospectus being carried out. Thus, if the prospectus names the days upon which instalments on the shares are to be payable, the company cannot call up the amount more rapidly.

But a general statement that "it is anticipated that no further call will be made" does not prevent the company calling up the whole unpaid capital; and an arrangement between the company and its members as to the times at which calls shall be made is not binding on the liquidator in a winding up.[1]

A form of application for each class of shares usually accompanies the prospectus, and also one for debentures where any are to be issued.

Effect of Misrepresentation in the Prospectus.

1. *A Shareholder's Rights Against the Company.*—If there is a material misrepresentation in the prospectus upon which a shareholder relied when applying for shares, he is entitled, if he seek relief within a reasonable time after learning the truth, and before the company is in liquidation, to have his name removed from the Register, and the amount he has paid upon the shares returned to him,[2] with interest from the time of payment.[3] But it must be noted that only the shareholder who applied for the shares on the faith of the prospectus is entitled to relief; the remedy does not extend to a purchaser from another shareholder who is not a party to the misrepresentation.[4]

The only right of an aggrieved party as against the company is for a rescission of his contract to take shares, and to be restored to the same position he was in before: he cannot,

[1]Cordova Union Gold Co., [1891] 2 Ch. 580.

[2]The best statement of the effect of the cases will be found in Scottish Petroleum Co., [1883] 23 Ch. D. 413.

[3]Karberg's Case, [1892] 3 Ch. 1.

[4]See page 98, *infra*.

as against the company, retain his shares and claim damages;[1] but the relief may be claimed after the shares in question have been forfeited for nonpayment of calls, and in such a case promptitude in seeking relief is not of the same importance, for he is then only a debtor to the company.[2] Where, however, the forfeiture is not complete, the Court will restrain the company from forfeiting the shares until the hearing of the action for rescission, usually requiring the plaintiff to pay into Court the amount of the calls.[3]

Rescission of the contract to take shares while the company is a going concern can be obtained if the shareholder is able to show—

(A) That a misstatement was made by or on behalf of the company.

(B) That it was a material one.

(C) That he relied upon it in taking the shares.

(D) That he came for relief before liquidation and within a reasonable time.

But he need not show that the statement was made fraudulently, or was known to the directors to be untrue.[4]

Questions often arise as to how far the company is responsible for the misrepresentations actually made. The effect of the authorities has been summed up as follows[5]:— To establish such responsibility it must be shown that the representations were either (1) made by the directors or general agents of the company; or (2) made by a special agent of the company acting within the scope of his authority, which includes a person whose acts are subsequently ratified; or (3) known, at some time before the contract to

[1]Houldsworth *v.* City of Glasgow Bank, [1880] 5 App. Ca. 317.

[2]Aaron's Reefs *v.* Twiss, [1896] App. Ca. 273.

[3]Lamb *v.* Sambas Rubber Co., [1908] 1 Ch. 845; Jones *v.* Pacaya Rubber Co., [1911] 1 K. B. 455, Buckley, L. J., reserved his judgment as to whether it was essential that the plaintiff should bring the amount into Court.

[4]Redgrave *v.* Hurd, [1882] 20 Ch. D. 1; Karberg's Case, [1892] 3 Ch. at page 13; Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. at page 423.

[5]Lynde *v.* Anglo-Italian Hemp Co., [1896] 1 Ch. 178.

take shares was complete, to the directors to have been made; or (4) known by the directors to form the basis of the contract; and in each case this rule applies whether the representations were known to be false or not.

From the above it will be seen that representations made even before the company was in existence, or made by persons who are strangers to the company, may become, by the subsequent knowledge of the directors that a prospectus has been shown to the applicant, a ground for rescission of the contract, as where an application for shares was made before the company was incorporated upon the faith of a prospectus prepared by the promoter, and the company adopted the prospectus and allotted the shares.[1] But a subscriber to the Memorandum cannot get relief, fór the company could not have adopted the misrepresentation before he took his shares.[2]

If a statement is true at the time it is made, but becomes untrue before the allotment of the shares (*e.g.* if a director named in the prospectus has meanwhile resigned), it will be good ground for rescinding the contract,[3] but it is doubtful whether this will give a cause of action for deceit against directors.[4]

Either in an action for deceit or in an action for rescission the omission of material facts may amount to a misrepresentation:[5] thus the omission of the names of the real vendors and interposition of a nominal vendor to

[1]Karberg's Case, [1892] 3 Ch. 1; Tamplin's Case, [1892] W. N. 146.

[2]Lord Lurgan's Case, [1902] 1 Ch. 707.

[3]Anderson's Case, [1881] 17 Ch. D. 373; Scottish Petroleum Co., [1883] 23 Ch. D. 413. This will also be the case if the other directors know that one of the directors is on the point of resigning when they go to allotment (Kent County Gas Co., [1907] 95 L. T. 756).

[4]Arkwright *v.* Newbold, [1881] 17 Ch. D. at pages 325, 329.

[5]Central Ra: way Co. of Venezuela *v.* Kisch, [1867] L. R. 2 H. L. 99; Oakes *v.* Turquand, [1867] L. R. 2 H. L. 342; Cackett *v.* Keswick, [1902] 2 Ch. 456. A concealment may, it seems, be a ground for rescission of the contract to take shares, which would not be sufficient to ground an action of deceit against directors. See *per* Lord Cairns in Peek *v.* Gurney, [1874] L. R. 6 H. L. at page 403.

conceal the true facts may be sufficient to entitle subscribers relief,[1] but this rule applies only if the omission renders the prospectus as it stands misleading,[2] or the omission is of something which there was a duty to disclose. "In an honest prospectus many facts and circumstances may be lawfully omitted, although some subscribers may be of opinion that these would have been of materiality as influencing the exercise of their judgment."[3] Fry, J., has said "where parties are contracting with one another each may, unless there is a duty to disclose, observe silence in regard to facts which he believes would be operative upon the mind of the other,"[4] and gave as instances of the duty to disclose the case where a man has unintentionally made an untrue statement and therefore becomes bound to correct it, and the case where a statement was true at the time it was made but the facts have been altered before it was acted upon, in which class falls the case of directors named in the prospectus resigning before allotment. In the words of Lord Campbell, "simple reticence does not amount to legal fraud,"[5] and in those of Chitty, J., "the obligation to speak is at the root of the proposition."[6]

On the other hand, "if by a number of statements you intentionally give a false impression and induce a person to act upon it, it is not the less false although if one takes each statement by itself there may be a difficulty in showing that any specific statement is untrue;"[7] that is, the prospectus

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[1]Components Tube Co. *v.* Naylor, [1900] 2 Ir. R. 1.

[2]New Brunswick Railway Co. *v.* Conybeare, [1862] 9 H. L. C. 711; Peek *v.* Gurney, [1874] L. R. 6 H. L. 403; McKeown *v.* Boudard Peveril Gear Co., [1896] W. N. 36, 65 L. J. Ch. 735, 74 L. T. 712.

[3]*Per* Lord Watson in Aaron's Reefs *v.* Twiss, [1896] App. Ca. at page 287. See also Arnison *v.* Smith, [1889] 41 Ch. D. 348.

[4]Davies *v.* London and Provincial Co., [1878] 8 Ch. D. at page 474.

[5]Walters *v.* Morgan, [1861] 3 De G. F. & J. 718.

[6]Turner *v.* Green, [1895] 2 Ch. 709.

[7]*Per* Halsbury, L. C., in Aaron's Reefs *v.* Twiss, [1896] App. Ca. 281. As to ambiguous and misleading statements see page 96, *infra*.

must be taken as a whole; "and everybody knows that half a truth is no better than a downright falsehood."[1]

It is a general principle of law that where a party having a right to rescind his contract, after having knowledge of such right does any act affirming his contract, he cannot afterwards set up his right to avoid the contract:[2] therefore any act by a shareholder recognising his position as a member of the company after knowledge of the misrepresentation, such as by selling or trying to sell the shares,[3] attending meetings,[4] signing proxies, paying calls, or accepting dividends,[5] will prevent the member from obtaining rescission, even though done under a mistake as to rights,[6] unless he have meanwhile definitely elected to rescind the contract, as by commencing proceedings.[7]

The shareholder must, moreover, come within a reasonable time after learning the truth; for the rights and interests of other persons intervene, and the aggrieved shareholder will not be allowed to wait and see whether the speculation turns out a favorable one, and then, according to the result, retain the benefit or repudiate the loss.[8] As the intervention of the rights of others prevents the right of the applicant to rescind, it may well be that even a charge on the uncalled capital in favour of debenture holders will prevent relief, but this has not been definitely decided.[9]

"Where a person has contracted to take shares in a company and his name has been placed on the Register, it

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[1] *Per* Lord Macnaghten in Gluckstein *v.* Barnes, [1900] App. Ca. 250, 251.

[2] Clough *v.* London and North Western Railway, [1872] L. R. 7 Ex. 26. Bank of Hamilton *v.* Johnston, 7 O. W. R. 111. McCallum *v.* Sun Savings & Loan Co., 1 O. W. R. 226.

[3] *Ex parte* Briggs, [1866] 1 Eq. 483; compare Crawley's Case, [1869] 4 Ch. 322. Nelles *v.* Ontario Investment Asso., 17 O. R. 129.

[4] Sharpley *v.* Louth and East Coast Railway, [1876] 2 Ch. D. 663.

[5] Scholey *v.* Central Railway of Venezuela, [1868] 9 Eq. 266, note.

[6] Dunlop Truffault Cycle Co., [1897] 66 L. J. Ch. 25, 75 L. T. 385.

[7] Tomlin's Case, [1898] 1 Ch. 104.

[8] Downes *v.* Ship, [1868] L. R. 3 H. L. 343; Houldsworth *v.* City of Glasgow Bank, [1880] 5 App. Ca. 317. Petrie *v.* Guelph Lumber Co., 11 S. C. R. 450. Silliker Car Co. *v.* Donohue 44 N. S. R. 315. Beatty *v.*, Nealon, 12 A. R. 50.

[9] For the principle see Scottish Petroleum Co., [1883] 23 Ch. D. 413; Tennant *v.* City of Glasgow Bank, [1879] 4 App. Ca. 615.

has always been held that he must exercise his right of repudiation with extreme promptness after the discovery of the fraud or misrepresentation."[1] What is a reasonable time is a question of fact, and will vary with the circumstances of each case, but in practice a shareholder should not delay at all after he knows the facts which entitle him to relief. "The delay of a fortnight in repudiating the shares," said Baggallay, L. J.,[2] "makes it to my mind doubtful whether the repudiation in the case of a going concern would have been in time. No doubt where investigation is necessary some time must be allowed, as in Central Railway Co. of Venezuela *v.* Kisch.[3] But where, as in the present case, the shareholder is at once fully informed of the circumstances he ought to lose no time in repudiating." He must also seek relief while the company is a going concern—*i.e.* before a winding up, whether voluntary or compulsory, or before any suspension of business, as by giving notice of insolvency; for upon the commencement of a liquidation the creditors or other shareholders are the persons interested in retaining the name of the shareholder upon the Register, and against them he has no claim to set aside his bargain.[4] It is not enough merely to serve the company with notice of repudiation. The complainant must either procure the company to remove his name from the Register of Members, or commence proceedings to compel it to do so,[5] subject to the exception, however, that if he has *agreed to be bound* by a test case brought by another shareholder he may await the

[1] *Per* Lord Davey in Aaron's Reef *v.* Twiss, [1896] App. Ca. at page 291. See also Sharpley *v.* Louth and East Coast Railway, [1876] 2 Ch. D. at page 285.

[2] Scottish Petroleum Co., [1883] 23 Ch. D. 434.

[3] [1867] L. R. 2 H. L. 99.

[4] Tennent *v.* Glasgow Bank, [1879] 4 App. Ca. 615; Stone *v.* City and County Bank, [1878] 3 C. P. D. 282; Oakes *v.* Turquand, [1867] L. R. 2 H. L. 325; Burgess's Case, [1880] 15 Ch. D. 507; Scottish Petroleum Co., [1883] 23 Ch. D. 413.

[5] Thomson's Case, [1898] 5 Mans. 282.

decision of such case[1]; or if in an action for calls he has set up a counter-claim for rescission, he is in time.[2]

When an action is brought by a shareholder claiming rescission of his contract to take shares, the Court will restrain the company from forfeiting the shares for non-payment of calls pending the decision of the action.[3] Usually the shareholder is required to bring the amount of the calls into Court, but whether this is essential is not yet decided.[3]

Where a company had discovered that its prospectus was misleading, it was allowed to include in one motion an application to cancel the allotments and return the moneys paid by 1026 persons, a special order being made as to the procedure.[4]

It is not certain whether a subscriber will be entitled, as against the company, to rescission or damages in case of the omission from the prospectus of particulars required to be inserted under Section 90 of the Act: probably he would have a right to rescission, for in this case there is a concealment of a fact which there was a duty to disclose; but this would be so only if the omission was of matters of sufficient importance to materially affect the mind of the subscriber.[5]

2. *A Shareholder's Rights Against the Directors or other Persons who have Issued a False Prospectus.*—Besides the right to rescission of his contract to take shares, the shareholder may also claim damages in an action for deceit

[1]Scottish Petroleum Co., [1883] 23 Ch. D. 413; Pawle's Case, [1869] 4 Ch. 497; Hare's Case, [1869] 4 Ch. 503. The pendency of other cases will not save him if there is no agreement to be bound by their result (see cases cited in this note).

[2]Whitel y's Case, [1900] 1 Ch. 365.

[3]Jones *v.* Pacaya Rubber Co., [1910] W. N. 257; Lamb *v.* Sambas Co., [1908] 1 Ch. 845.

[4]London Electrobus Co., [1906] W. N. 147.

[5]This was held in a case where the plaintiff was seeking damages against directors (Wimbledon Olympia, Limited, [1910] 1 Ch. 630).

against the persons who fraudulently induced him to become a shareholder, and this right does not cease when the company goes into liquidation.

But there is a wide distinction between an action for deceit and an action for rescission of contract. In the latter case it is only necessary to show that the contract was induced by an untrue statement of a material fact, whether made innocently or not;[1] while to sustain an action for deceit it is necessary to show that the directors were wrongdoers, and either made the untrue statement knowing it to be false, or made it recklessly, not caring whether it were true or false.[2] Under Section 93 of the Act, however, if the complaining shareholder shows that the statement is untrue, the directors of the company are liable, unless they show that they had reasonable grounds to believe, and in fact believed, the statement to be true (see page 100, *infra*).

To obtain damages from the directors or promoters, therefore, an aggrieved shareholder may bring an action after the company is in liquidation; but he must show—

(A) That a misstatement was made by the persons sought to be charged.[3]

(B) That it was a material one.

(C) That he was induced by the misstatement to take the shares.

(D) That he has suffered damage; for "fraud without damage, or damage without fraud, gives no cause for action; but where these two concur an action lies."[4]

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[1]Karberg's Case, [1892] 3 Ch. at page 13; Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. at page 423.

[2]Derry *v.* Peek, [1889] 14 App. Ca. 337.

[3]But see page 100, *infra*, where it will appear that directors who have taken no part in the issue of the prospectus may be liable under Section 93.

[4]Pasley *v.* Freeman, [1789] 2 Sm. L. C. 64; Smith *v.* Chadwick, [1884] 9 App. Ca. 195. But in McConnel *v.* Wright, [1903] 1 Ch. 546, it was laid down that even if no evidence is given that the shares taken were worth less than was given for them, the Court will assume that they would only

(E) But if the persons charged prove that they believed the statements to be true, and had reasonable grounds for such belief, the action will fail.

Even under the Common Law the motive with which the statement was made was immaterial, for a man is liable for a false statement knowingly made even if he have no intent to defraud,[1] and under the Act this is equally clear. It is not necessary to show that the false statement was the sole inducing cause if it forms a substantial ground for taking the shares,[2] and the Courts pay little attention to a cross-examination as to the weight attached by the applicant to each statement, holding that a material misrepresentation likely to induce the application is enough, unless the plaintiff admits that he did not act upon it.[3] If, however, the Court comes to the conclusion that the particular misrepresentation did not affect the plaintiff's mind, and that he would still have taken the shares if he had known the truth, he will have suffered no damage, and cannot recover. The Court may come to this conclusion either from the plaintiff's answers in cross-examination or from his conduct, or from the nature of the misrepresentation relied upon.[4]

As regards statements that are misleading or ambiguous, the law is that a misleading statement is an untrue statement, and it is not material in what sense the directors intended the words used to be understood if they are in fact

have been worth the price paid if the statements made had been true, and therefore will direct an inquiry as to damages upon proof of the falsity of material statements. And if the company failed within a short time after the issue of the prospectus, that will be taken as *prima facie* evidence that the shares were not worth par (*per* Lord Lindley in Shepheard *v.* Broome, [1904] App. Ca. 342).

[1]Derry *v.* Peek, [1889] 14 App. Ca. 337; Smith *v.* Chadwick, [1884] 9 App. Ca. at page 201.

[2]Edgington *v.* Fitzmaurice, [1885] 29 Ch. D. 459.

[3]*Per* Lord Halsbury in Arnison *v.* Smith, [1889] 41 Ch. D. 348, 369. And see Smith *v.* Chadwick, [1884] 20 Ch. D. 27, 44, 9 App. Ca. 187.

[4]Smith *v.* Chadwick, [1884] 9 App. Ca. 187; Macleay *v.* Tate, [1906] App. Ca. 24; Nash *v.* Calthorpe, [1905] 2 Ch. 237.

untrue or misleading,[1] and "if with intent to lead the plaintiff to act upon it they put forth a statement which they know may bear two meanings, one of which is false to their knowledge, and thereby the plaintiff, putting that meaning on it, is misled, I do not think they can escape by saying he ought to have put the other,"[2] and "if a man uses language which, taken in its natural sense, conveys a wrong impression, he cannot be heard to say he did not intend to deceive."[3] A man "is answerable for what anyone might reasonably suppose to be the meaning of the words he has used."[4] But the plaintiff must prove that he understood the statement in the sense in which it is false.[5] In considering whether a statement is misleading the prospectus must be considered as a whole, and if its tendency is to deceive there is no need to point out some one or more statements which are absolutely untrue.[6]

Under Section 93, the misstatement must be of an existing fact, and not merely an unduly sanguine expression of hope or an exaggerated view of the advantages the company offers. A general commendation of his wares by a trader is not a false statement, even if too highly coloured. But to say that something is expected when in reality it is not expected, or that directors have an intention to do something when they have not, is a misstatement of fact.[7] And a statement that property has been acquired which has not in fact then been acquired will be ground for an action against directors, even if the property be acquired a few days after the allotment of the shares.[8]

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[1]Greenwood *v.* Leathershod Wheel Co., [1900] 1 Ch. 421.
[2]*Per* Lord Blackburn in Smith *v.* Chadwick, [1884] 9 App. Ca. at 201.
[3]*Per* Lindley, L. J., in Arnison *v.* Smith, [1889] 41 Ch. D. 372.
[4]*Per* Cotton, L. J. in Arkwright *v.* Newbold, [1881] 17 Ch. D. 322.
[5]Smith *v.* Chadwick, [1882] 20 Ch. D. 45, 73; [1884] 9 App. Ca. 187.
[6]Aaron's Reefs *v.* Twiss, [1896] App. Ca. 273; see page 93, *supra*.
[7]Edgington *v.* Fitzmaurice, [1885] 29 Ch. D. 459; Karberg's Case, [1892] 3 Ch. at page 11.
[8]McConnel *v.* Wright, [1903] 1 Ch. 546.

If a false or misleading statement is made it is no protection to the defendants to say that the plaintiff had means of ascertaining the truth and was negligent in failing to inspect documents referred to in the prospectus, or to make other inquiries, for he is entitled to rely on the statements made to him.[1]

If the directors discover a mistake in the prospectus it is their duty to point it out in unambiguous terms, and not merely to send a new prospectus correctly stating the facts.[2]

The measure of damages is the difference between the actual value (not the market price) of the shares at the time of allotment and the sum paid for them.[3] To arrive at an estimate of this actual value all the circumstances of the case must be considered, including the subsequent failure of the company, unless such failure was due to causes which did not exist at the time of allotment; but the fact that the shares in the meantime have stood at a premium in the market is no proof of their value.[4]

If the misrepresentation complained of was contained in the prospectus, only original subscribers, and not purchasers of shares, can obtain damages; for the office of the prospectus is exhausted when once the allotment is made,[5] unless the prospectus was in fact issued with a view of inducing persons to become purchasers of shares, in which case the directors and other persons issuing it with this object will become liable for losses suffered by those who

[1]Reynell *v.* Sprye, [1851] 1 De G. M. & G. 660; Arkwright *v.* Newbold, [1881] 17 Ch. D. 310; Aaron's Reefs *v.* Twiss, [1896] App. Ca. 273; Gluckstein *v.* Barnes, [1900] App. Ca. at page 251.

[2]Arnison *v.* Smith, [1889] 41 Ch. D. 348.

[3]Peek *v.* Derry, [1888] 37 Ch. D. at page 541; Arnison *v.* Smith, [1889] 41 Ch. D. at page 363.

[4]Twycross *v.* Grant, [1877] 2 C. P. D. 469; Peek *v.* Derry, [1888] 37 Ch. D. 541.

[5]Peek *v.* Gurney, [1874] L. R. 6 H. L. 377 400, 411.

bought shares, even from strangers.[1] It is not necessary that the representation should be direct to the person injured; it is sufficient if it be made to another (*e.g.* to a newspaper) with the intent that it shall be repeated to and acted upon by the person who is subsequently injured.[1] "But to bring it within the principle, the injury must be the immediate and not the remote consequence of the representation thus made. . . . . . It must appear that such false representation was made with the direct intent that it should be acted upon by such third person in the manner which occasions the injury or loss."[2]

The rights given by Section 93 of the Act require a somewhat fuller statement, and are as follows:—

The directors, promoters, and other persons authorising the issue of a prospectus containing untrue statements are liable for loss to any person subscribing for shares or debentures[3] on the faith of the prospectus, unless they show that they had reasonable ground for believing, and did believe up to the time of allotment, that the statements were true, or that any statement purporting to be a report or valuation fairly represented or was a fair copy of or extract from the report or valuation (the directors or promoters having reasonable ground to believe the person who made the report or valuation was competent to make it), or that any statement purporting to be an official statement was a correct and fair representation or copy of or extract from such document.

The persons liable as above are the actual directors of the company at the time of the issue of the prospectus; the

[1]Andrews *v.* Mockford, [1896] 1 Q. B. 372; Barry *v.* Crosskey, [1861] 2 J. & H. 1.

[2]Cited from Barry *v.* Crosskey with approval by Lord Cairns in Peek *v.* Gurney, [1874] L. R. 6 H. L. at page 413.

[3]Note that this does not extend to subsequent purchasers of shares or debentures. The section is, moreover, limited to cases where the prospectus invites persons to *subscribe* for shares or debentures.

persons who, on their own authority, are named in the prospectus as present or future directors; any promoters who are parties to the preparation of the prospectus or the portion thereof containing the untrue statement[1]; and "every person who has authorised the issue of the prospectus."

A person *primâ facie* liable under this Act may escape liability if he prove—(A) That, having consented to become a director, he withdrew his consent before the issue of the prospectus, and that the prospectus was issued without his authority or consent; or (B) That the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue he forthwith gave reasonable public notice that it was so issued without his knowledge or consent; or (C) That after the issue of the prospectus, and before allotment thereunder, he, on becoming aware of an untrue statement therein, withdrew his consent thereto, and caused reasonable public notice of such withdrawal, and of the reason therefor, to be given.

A director who, being aware that a prospectus was being issued to the public, did not trouble to read it, abstained from inquiry as to its contents, and gave no notice under the Act, is responsible for the contents of the prospectus,[2] and a director who subsequently adopted a prospectus he had not originally approved was held liable[3]; but directors who did not know that the promoter had issued a prospectus escaped liability, although they subsequently adopted a similar prospectus, and allotted shares subscribed for on the faith of the earlier document.[4] Directors must exercise diligence to see that the prospectus is not misleading, themselves examining contracts and other documents to discover their contents.

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[1]See definition of "promoter" in Section 93, Sub-section 5. It does not include any person "acting in a professional capacity for persons engaged in procuring the formation of the company."

[2]Drincqbier *v.* Wood, [1899] 1 Ch. 393.

[3]Peek *v.* Derry, [1888] 37 Ch. D. 569, 579.

[4]Hoole *v.* Speak, [1904] 2 Ch. 732. This case has been much criticised.

The Act, therefore, places the onus of proving that he had reasonable ground for believing the prospectus to be true on the director; and if, in answer to the claim, a director alleges that he had reasonable grounds for his belief he will be ordered to give particulars of what those grounds were.[1] If the misstatement is due to a mistake of law, the fact of having taken the opinion of counsel will not protect the directors as constituting reasonable grounds for belief in the truth of the statement.[2]

A director who did not know of or consent to the issue of the prospectus will not be relieved unless he gave "reasonable public notice," on becoming aware of the issue, that it was done without his knowledge or consent.

In regard to actions for deceit and other wrongs the principle "*Actio personalis moritur cum personâ*" must be remembered, but this doctrine is subject to the modification that where loss results to the estate of the plaintiff or profit to that of the defendant the action survives to the extent of the profit or loss. Thus, where a person who has taken shares on the faith of a fraudulent prospectus dies, his executors can commence or continue an action for the loss suffered by his estate[3]; but where the director or promoter charged dies, his executors cannot be sued unless his estate has benefited by the fraud,[4] and the action will fail unless a complete judgment has been obtained for an ascertained amount before the death of the defendant. If an inquiry has been ordered, and is not answered, the judgment is not complete, and the action dies.[5] It has not been decided whether the principle "*Actio personalis moritur cum personâ*" applies to an action under Section 93[6]; but in

[1]Alman *v.* Oppert, [1901] 2 K. B. 576.
[2]*Per* Lord Lindley in Shepheard *v.* Broome, [1904] App. Ca. at page 347.
[3]Twycross *v.* Grant No. 2, [1879] 4 C. P. D. 40.
[4]Peek *v.* Gurney, [1874] L. R. 6 H. L. 403.
[5]Phillips *v.* Homfray, [1883] 24 Ch. D. 439.
[6]See Frankenburg *v.* Great Horseless Carriage Co., [1900] 1 Q. B. 504.

Shepheard *v.* Bray, cited below, it was assumed in both Courts that the action did not survive.

A director or other person whose name is wrongly included in a prospectus is entitled to be indemnified by the directors of the company who authorised or consented to the issue of the prospectus and any other person who authorised its issue against any damages or costs incurred in consequence (Section 93, Sub-section 3).

A director or other person who has paid damages for loss arising out of misrepresentation in the prospectus can also recover contributions from co-directors or promoters or others who might have been made liable in the first instance, and for this purpose it is immaterial whether the misrepresentations are fraudulent so as to give rise to an action at Common Law, or are only such as to create liability under Section 93;[1] but a director who has been guilty of fraudulent misrepresentation cannot recover contribution from one by whom the misrepresentation was made innocently. For enforcing this right to contribution notice of the claim against the third party may be served out of the jurisdiction.[1]

The liability to contribution was first debated at length in Shepheard *v.* Bray,[2] where Warrington, J., held that a cause of action accrued to the directors who in fact paid damages as soon as the shares had been allotted, and was in the nature of a contractual obligation, and that the executors of directors who died before the shareholders' actions were concluded were liable to contribute out of the estates of their testators. The case was appealed against, and during the hearing the respondents consented to the appeal being allowed, it being apparent that the Court entertained grave doubts of the correctness of the decision. Cozens-Hardy,

[1]Gerson *v.* Simpson, [1903] 2 K. B. 197.
[2][1906] 2 Ch. 235.

M. R., then said, "It must not be assumed that the Court as at present advised . . . are prepared to assent to all that Warrington, J., has decided."[1] The contribution was held by Warrington, J., to extend to (A) the damages paid to shareholders who brought or threatened actions, including sums paid under a reasonable compromise; (B) the costs as between party and party of the successful plaintiff shareholders; and (C) interest upon the amounts paid as from the dates of payment. But he held that there was no contribution payable in respect of (A) the costs of the directors in opposing the actions by shareholders; (B) the costs of negotiating the compromises; or (C) the costs occasioned by unsuccessful appeals by the directors, whether paid to the plaintiff shareholders or to the directors' own solicitors. In this case none of the directors had been brought in as third parties to the original action. In Gerson *v.* Simpson,[2] where the co-director was made a third party, Wills, J., ordered him to pay half the plaintiff's costs as between party and party, and half the costs of the defence as between solicitor and client. There is no doubt power to make such an order under the rules as to third party procedure, apart from the interpretation of Section 93.

It seems that if the omission is in respect of a matter which would not have influenced the subscriber in deciding whether to take shares or not he will not have any remedy,[3] for his loss will not have been caused by the default in complying with the statutory duty. In each case it will be for the jury or judge to decide whether if the proper information had been given the subscriber would have abstained from applying for shares.[4]

[1] [1907] 2 Ch. 571.

[2] Gerson *v.* Simpson, [1903] 2 K. B. 197.

[3] Wimbledon Olympia, Limited, [1910] 1 Ch. 630.

[4] Compare Nash *v.* Calthorpe, [1905] 2 Ch. 237; Macleay *v.* Tate, [1906] App. Ca. 24.

A number of persons who have subscribed on the faith of the same prospectus may join as plaintiffs in one action, but each must prove separately that he was induced by the untrue statements to take shares,[1] and claims for rescission against the company, and damages against the directors, whether for deceit or under Section 93, may be included in one action;[2] but one shareholder cannot bring an action on behalf of himself and all other persons defrauded;[3] but an action so brought may be continued on his own behalf alone.[3]

3. *The Company's Rights Against the Promoters or Vendors.*—The company has rights as against the promoters or vendors for misrepresentation inducing the purchase of a property similar to those of a shareholder against the company and the directors respectively. These rights against vendors may be divided into two classes—(A) Where the company is in a position to restore the property to the vendor unaltered, and (B) Where there cannot be such a restitution.

In the first case, if the company can show that there was a material misrepresentation which induced the purchase, it is entitled to have the contract for purchase rescinded, and to be repaid the purchase money already paid upon giving back the property. If the purchase is not completed by conveyance of the property rescission may be had, whether the representations were made innocently or fraudulently;[4] but where the purchase has been completed rescission can only be ordered in cases where fraud is established.[5] If the company cannot restore the property in the same state as that in which it was bought, there is no remedy against the vendors

[1]Arnison *v.* Smith, [18 89] 41 Ch. D. 348, where therewere fifty-four plaintiffs, of whom twelve, not giving evidence, were non-suited.

[2]Frankenburg *v.* Great Horseless Carriage Co., [1900] 1 Q. B. 504.

[3]Hallowes *v.* Fernie, [1867] 3 Ch. at page 471.

[4]Redgrave *v.* Hurd, [1882] 20 Ch. D. 1; Newbiggin *v.* Adam, [1887] 34 Ch. D. 582.

[5]Seddon *v.* North-Eastern Salt Co., [1905] 1 Ch. 326.

except by an action for deceit, and this only lies where the false representations were made fraudulently (*i.e.* the vendors either knew them to be false, or acted recklessly and without a belief that they were true[1]), unless the company can make out as its case that the vendors warranted the facts represented to be true, when an action will lie for breach of warranty, and the company may claim damages for the diminished value of the property without restoring it. Also if the thing purchased was valueless (*e.g.* a void concession or an insolvent business) there is nothing to return, and the contract may be avoided and the purchase price recovered without restitution of the property.[2]

In all cases of rescission the complainant must come without unreasonable delay after learning of the misrepresentation, or he will be held to have acquiesced or to have waived his rights; but the rules are not so stringent in cases between ordinary parties as in those relating to a shareholder proceeding against the company.[3]

The company's rights against a promoter, however, are greater than against vendors who are strangers; for a promoter is a trustee for the company, and is bound to make disclosure to the company of all material facts within his knowledge. He is not entitled to deal with the company as a stranger,[4] and accordingly the company can recover secret

[1]Clarke *v.* Dickson, [1858] E. B. & E. 148; and Sheffield Nickel Co. *v.* Unwin, [1877] 2 Q. B. D. 214, where Lush, J., at page 223, says: "A contract voidable for fraud cannot be avoided when the other party cannot be restored to his *status quo*. For a contract cannot be rescinded in part and stand good for the residue. . . . . The party complaining of the non-performance or the fraud must resort to an action for damages." In Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 423, however, it is stated by Lindley, M. R., that "fraud may exclude the application of the principle" that "a voidable contract cannot be rescinded or set aside after the position of the parties has been changed, so that they cannot be restored to their former position." See also page 432.

[2]Phosphate Sewage Co. *v.* Hartmont, [1877] 5 Ch. D. 394; Adam *v.* Newbiggin, [1888] 13 App. Ca. 308.

[3]Acquiescence is discussed at length in the case first cited in next note.

[4]Erlanger *v.* New Sombrero Phosphate Co., [1879] 3 App. Ca. 1218; Lydney and Wigpool Co. *v.* Bird, [1886] 33 Ch. D. 85; and see pages 65 to 67, *supra*. Ruethal Mining Co., *v.* Thorpe, 9 O. W. R. 942.

profits from him. If at the time of acquiring the property the vendor to the company was also a promoter, the company can either rescind the contract or retain it, reducing the purchase money to the amount the promoter actually spent upon the purchase and otherwise in relation to the property.[1]

A man is not necessarily a promoter because at the time he acquires the property he contemplates that at some future time he may form a company to purchase the property;[2] and if he does not become a promoter until after the acquisition, his only duty is to see that the amount of his profit is known to the purchasing company: otherwise the company may rescind the contract.[3] But if he has disclosed that he is making a profit, and fails to make known the amount, rescission is the company's only remedy; and if that has become impossible, the profit cannot be recovered nor damages had.[4] (See also page 65 *et seq.*, *supra.*)

Underwriting and Placing Shares.

Prior to the Act of 1910 a company had power in the ordinary course of business to pay a fair and reasonable commission or brokerage upon the issue of its share capital, and underwriting upon proper terms was to that extent

[1]Bank of London *v.* Tyrrell, [1862] 10 H. L. C. 26; Emma Silver Mining Co. *v.* Grant, [1879] 11 Ch. D. 918; Bentinck *v.* Fenn, [1888] 12 App. Ca. 652; Gluckstein *v.* Barnes, [1900] App. Ca. 240., *re* Hess Manuf. Co., 21 A. R. 66.

[2]Bentinck *v.* Fenn, [1888] 12 App. Ca. 652; Lady Forrest (Murchison) Gold Mine, [1901] 1 Ch. 582; Gover's Case, [1876] 1 Ch. D. 182. Highway Advertising Go. *v.* Ellis 7 O. L. R. 504. Hopper *v.* Hactor, 35 S. C. R. 645. Wade *v.* Kerdrick, 37 S. C. R. 32. Min. of Rlys. *v.* Quebec Southern Ry. 12 Ex. C. R. 11.

[3]Dunne *v.* English, [1874] 18 Eq. 524; Ladywell Mining Co. *v.* Brookes, [1887] 35 Ch. D. 400.

[4]Lady Forrest (Murchison) Gold Mine, [1901] 1 Ch. 582, and see cases there cited. Wright, J., considered himself bound by decisions in the Court of Appeal, but doubted, and preferred the dissentient judgment of Bowen, L. J., in Cape Breton Co., [1885] 29 Ch. D. 795.

lawful,[1] and Section 98 of the present Act expressly saves "the power of any company to pay such brokerage as it has heretofore been lawful for a company to pay." Section 98 allows a commission to be paid (without any limit as to the amount) whether there is or is not a public issue of shares, but subject to the conditions mentioned below. Sub-section 2 of Section 98 prohibits the company, save as authorised by Sub-section 1, from applying any of its shares or capital money (as to which see next page) either directly or indirectly in payment of commission; but there is no prohibition against paying commission unconditionally *out of profits,* and this would seem to be lawful unless contrary to any stipulation in the Articles.

The authority to pay a commission out of capital is only "if the payment of the commission is authorised by the Articles, and the commission paid or agreed to be paid does not exceed the amount or rate[2] so authorised, and if the amount or rate per cent. of the commission paid or agreed to be paid is in the case of shares offered to the public for subscription disclosed in the prospectus" (Section 98). If a company has not power in its Articles as originally framed to pay commission, there is no reason why the Articles should not be altered so as to include the power.

The commission may be made payable "to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the

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[1]Metropolitan Coal Consumers' Association *v.* Scrimgeour, [1895] 2 Q. B. 604. The limits within which brokerage may be paid seem to be "where it is made out that the services of the broker are reasonably necessary, that the brokers are properly employed in the issue of the capital of the company, and that the payment of a commission of so much per share is a fair and just payment for services rendered," *per* Lopes, L. J., at page 609. *Re* Licensed Victuallers' Association, [1889] 42 Ch. D. 1, carried the right further, but the point was not argued.

[2]If the Articles allow of a commission at a specified rate, this is not satisfied by a commission consisting of a lump sum (Booth *v.* New Afrikander Gold Mining Co., [1903] 1 Ch. 293).

company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company," which in business language amounts to authorising payment of commission on "taking, underwriting, or placing shares, or agreeing so to do." It will be noted that to pay a commission to a person for *taking* shares is nearly akin to issuing shares at a discount; but they are not the same things, for if the company went into liquidation before the commission was paid, the whole amount of the shares could be called up, but the shareholder would be an unsecured creditor for the commission, and might not get paid in full.[1]

Section 98, Sub-section 3, expressly allows payment of commission by a vendor, provided the other conditions as to authority and disclosure are complied with.

A contract made by a company (other than a private company) is provisional only until such time as the company is entitled to commence business, and this will of course include underwriting contracts; but as the condition for commencing business is the application for and allotment of the "minimum subscription," the fact that at least this amount is underwritten will be some guarantee that the contract will become effective.

On the other hand, the company should see that all the underwriters have paid their application money and that their cheques have been cashed, as in the event of the issue being a failure a few underwriters, by combining not to pay the money payable on application, or stopping their cheques, could prevent the company from going to allotment.[2]

The sub-section forbidding any other form of commission out of capital for taking, underwriting, or placing shares

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[1]See Keatinge *v.* Paringa Consolidated Mines, [1902] W. N. 15.

[2]As was done in Mears *v.* Western of Canada Pulp and Paper Co. [1905] 2 Ch. 353.

(Section 98, Sub-section 2) is very wide in its language, and forbids the application to this purpose of any shares or capital money of the company "either directly or indirectly," "whether the shares or money be so applied by being added to the purchase money of any property acquired by the company or to the contract price of any work to be executed for the company, or the money be paid out of the nominal purchase money or contract price, or otherwise." This was intended to stop the practice, formerly very common, of adding large amounts to the price payable to the vendors, who then arranged the underwriting, giving large blocks of shares to financiers, who guaranteed that sufficient shares should be taken to provide working capital. This is now unlawful unless authorised by the Articles and disclosed in the manner mentioned above.

Lord Davey has said of the words "apply any of its shares or capital money," that they "naturally mean apply its capital, either in the form of shares before issue . . . . . or in the form of money derived from the issue of shares,"[1] and Warrington, J., following this dictum, has decided that commission cannot be paid out of a premium payable to the company on the issue of shares.[2]

The Court will look at the substance of the transaction, and will prohibit a pretended purchase and resale, which is in fact only a device to cover payment of a commission;[3] but the commission may be of any amount, even ninety per cent.[4]

It has been held in the House of Lords that an agreement giving underwriters an option to subscribe for further shares as consideration for underwriting is not an applica-

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[1]Hilder *v.* Dexter, [1902] App. Ca. at page 480.
[2]Shorto *v.* Colwill, [1909] W. N. 218; 101 L. T. 598.
[3]Booth *v.* New Afrikander Gold Mining Co., [1903] 1 Ch. 295.
[4]Keatinge *v.* Paringa Consolidated Mines, [1902] W. N. 15.

tion of shares in payment of commission within the section, and is lawful.[1]

The total amount paid by way of commission in respect of any shares or *debentures* or allowed by way of discount in respect of any debentures must be stated in the Summary to be filed with the Registrar under Section 34, and the total amount thereof, or so much as has not been written off, must be stated in every balance sheet until the whole amount has been written off (Section 34, Sub-section 2 (*f*), and Section 99).

The prospectus must state "the amount (if any) paid within the last two preceding years or payable as commission for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions, for any shares in or debentures of the company, or the rate of any such commission" (Section 90, Sub-section 1 (*h*)). The statement must be specific, for any "waiver" clause or clause affecting to give notice of any matter not specifically stated is void (Section 90, Sub-section 4). Section 90, Sub-section 1 (*h*), expressly provides that it shall not be necessary to state the commission payable to sub-underwriters.

PAYMENT OF PRELIMINARY EXPENSES.

The preparation, printing, circulating, and advertising the prospectus of a company, and the preparation and printing of the Memorandum and Articles, as well as the fees upon registration, involve considerable expense, most of which is incurred before the company is formed, and the liability to pay the various amounts often gives rise to litigation. It is usual to take powers in the Memorandum to pay such expenses, but even without this power the company

[1]Hilder *v.* Dexter, [1902] App. Ca. 474, overruling Burrows *v.* Matabele Gold Reefs and Estates Co., [1901] 2 Ch. 23, although Lord Brampton distinguished the latter case.

is justified in paying preliminary expenses, including a commission for the placing of its shares.[1]

The question of liability, however, is distinct from that of power to pay, and even the inclusion in the Memorandum or Articles of a direction that the company shall pay, or that the company shall adopt an agreement rendering it liable to pay, the preliminary expenses will not give the promoters or persons who have rendered service in regard to the formation of the company any right of action against the company;[2] for, although the Articles of Association are binding on the company and its members as if each member had covenanted to conform thereto, this is not a provision of which outsiders can take advantage, nor can a person who is a member take advantage of it for securing benefits outside his rights as a member.[3]

A company cannot ratify contracts made before it was in existence, but must after its incorporation contract anew. Before its incorporation a company clearly cannot request the promoter to undertake work and incur expense for its benefit, and therefore the promoter, to protect himself, must see that as soon as the company is formed it enters into a proper contract to pay the preliminary costs. In doing this it must be remembered that a past consideration is not a good one, and that unless there is some new benefit given to the company there is no consideration for the contract. This is most important, for a contract to issue shares as fully paid will not protect the allottee from having to pay up the whole amount thereof, unless there was good consideration for the contract: *i.e.* either an existing debt which was ex-

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[1]Licensed Victuallers' Association, [1889] 42 Ch. D. 1; Metropolitan Coal Consumers' Association *v.* Scrimgeour, [1895] 2 Q. B. 604

[2]Rotherham Chemical Co., [1884] 25 Ch. D. 103; Melhado *v.* Porto Alegre Co., [1874] L. R. 9 C. P. 503; Empress Engineering Co., [1881] 16 Ch. D. 125.

[3]Eley *v.* Positive Assurance Co., [1876] 1 Ex. D. 88; Browne *v.* La Trinidad, [1888] 37 Ch. D. 1.

tinguished, or a promise to do further work or hand over property.[1] The promoter should, therefore, always make the agreement to pay for past work and services a part of an agreement to continue to render services, or of the contract to sell property to the company. The solicitors, printers, and advertising agents should see that they have a retainer from or a bargain with the promoter to pay them in case the company does not.

In each instance the question will be, Was the contract with or the work done for the promoter? or, Was it made or done in the hope of being paid by the company in case it should adopt the work and agree to pay the expenses? In the latter case the promoter will not be liable, even if the company does not pay, and the company is only liable if it adopt the work and agree to pay for it.

Section 90, Sub-section 1 (*i*), requires the prospectus to state "the amount or estimated amount of preliminary expenses," which seems to include even the case where such expenses are not paid or payable by the company. This makes it necessary to consider what payments are and what are not "preliminary expenses"—a question of some difficulty and one to which the answer will vary with the circumstances. The following are suggested as being clearly "preliminary expenses," but the list must not be considered exhaustive:—

1. The cost of preparing, settling, and printing the Memorandum and Articles of Association.
2. The cost of registering the company and the various documents required by the Act, including fees.
3. The cost of preparing, printing, and circulating or advertising the prospectus.
4. The cost of the preparation and execution of all preliminary agreements.

[1] Eddystone Marine Insurance Co., [1893] 3 Ch. 9.

5. Law costs in connection with the formation and registration of the company and the preparation and issue of the prospectus.
6. The cost of the preparation and printing of the debentures and the debenture trust deed (if any).
7. The cost of preparing and printing letters of allotment and printing share certificates.
8. Probably, also, the cost of preparing and making the original books and seal of the company.

The amount paid or payable for underwriting commission, and the amount paid or intended to be paid to any promoter, have to be stated separately. If the amount is not included in the figure given for preliminary expenses it will be advisable to state expressly that the amount named is exclusive of these.

COMMENCEMENT OF BUSINESS.

Prior to the Act of 1910 a company might commence business as soon after incorporation as its directors thought fit, however small might be its subscribed capital; and this is still the case with private companies.

But by Section 96 no public company registered after the 15th March, 1912, may commence business or exercise any borrowing powers unless (1) the "minimum subscription" has been allotted, subject to the payment of the whole amount thereof in cash; (2) every director has paid on each of the shares taken or contracted to be taken by him, and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription or in the case of a Company which does not issue a prospectus inviting the public to subscribe for its shares, on the shares payable in cash; and (3) a statutory declaration by the secretary or one of the

directors that these conditions have been complied with has been filed with the Registrar, who will then certify that the company is entitled to commence business, and his certificate will be conclusive evidence to that effect.[1] In the case of companies not issuing a prospectus there is a further condition that a statement in lieu of prospectus shall have been filed (Section 96).

The company can, prior to becoming entitled to commence business, make contracts, but such contracts will be provisional only, and will not bind the company until it becomes entitled to commence business, when they will without further formality become binding (Section 96, Sub-section 3). If the company is wound up without having become entitled to commence business, persons who have supplied goods or rendered services will have no claim against the company.[2] The Act does not state what the position of the person contracting with the company will be in the meantime. Presumably he will be bound, and he should therefore always insert a provision in the contract that if the company does not become entitled to commence business within a limited time he shall be entitled to rescind the contract.

Section 96, Sub-section 4, expressly authorises "the simultaneous offer for subscription or allotment of any shares and debentures or the receipt of any money payable on application for debentures."

If any company commences business or exercises borrowing powers in contravention of the section, every person responsible for the contravention is, without prejudice to

[1]The Court will not listen to any evidence that there have been irregularities if the certificate has been given (*re* Yolland, Husson and Birkett Limited, [1908] 1 Ch. 152).

[2]Otto Electrical Co., [1906] 2 Ch. 390. Even the bank which received the application moneys cannot recover for its services (New Druce Portland Co. *v.* Blakiston, [1908] 24 T. L. R. 583).

any other liability, liable to a fine of two hundred and fifty dollars for every day during which such contravention continues.[1]

The date for holding the statutory meeting is fixed "within a period of not less than one month nor more than three months from the date at which the company is entitled to commence business" (Section 73); but a private company is entitled to commence business immediately on incorporation, so that in these cases the statutory meeting must be held not less than one month nor more than three months after incorporation.

PRELIMINARIES TO COMMENCING BUSINESS AND HOLDING THE STATUTORY MEETING.

It will be convenient to set out the steps necessary to be taken in the case of all public companies before business can be commenced and the statutory meeting held.

1. Prepare and register the Memorandum and Articles of Association. If the directors are named in Articles filed at the same time as the Memorandum, the directors must have subscribed the Memorandum for their qualification shares (if any), or have signed and filed with the Registrar a contract in writing to take from the company and pay for their qualification shares, if any (Section 80).
2. The applicant for the registration of the company must at the same time deliver to the Registrar a list of the persons who have consented to be directors (Section 80).
3. Public companies not issuing a prospectus must prepare and file a statement in lieu of prospectus, which must be signed by the directors (Section 91). This is a condition precedent to the right to commence business (Section 96).

[1]See Struthers *v.* Mackenzie, 28 O. R. 381.

4. Companies issuing a prospectus will prepare a prospectus containing the particulars required by the Act and bearing the date of its publication. Every person named as a director or intended director must (by himself or his agent authorised in writing) sign a copy of this prospectus, which must be then filed with the Registrar. The date of the prospectus must not be earlier than the date of its being tendered for filing (Sections 89 and 90: see page 78, *supra*).
5. When applications for shares to the amount of the "minimum subscription" (see page 121), together with the application moneys, have been received and the cheques cashed,[1] go to allotment (Section 94, Sub-sections 1 and 7). If within forty days after the first issue of the prospectus applications to the amount of the "minimum subscription" have not been received, or the amounts payable on application therefor have not been received in cash, the application moneys actually received must be returned within forty-eight days after the issue of the prospectus (Section 94, Subsection 4).[2]
6. Within one month (*i.e.* calendar month) after allotment file with the Registrar a Return of the Shares allotted (Section 97: see papge 130).
7. File with the Registrar a statutory declaration by the secretary or one of the directors that (A) shares subject to the payment of the whole amount there-

[1]Allotment made before the money is "paid to and received by" the company is voidable; and the money is not received until the cheques are cashed (Mears *v.* Western of Canada Pulp and Paper Co., [1905] 2 Ch. 353; National Motor Mail Coach Co., [1908] 2 Ch. 228).

[2]This only applies to the first allotment of shares offered to the public for subscription. The sub-section as to returning application money is *not* made to apply to companies not issuing a prospectus.

of in cash have been allotted to an amount not less than the "minimum subscription" (see page 121), and (B) that the directors have paid the amount due on application and allotment, and obtain the Registrar's certificate that the company is entitled to commence business (Section 96: see page 113).

The company on receiving the Registrar's certificate is entitled to commence business and to exercise its borrowing powers. Not less than one month nor more than three months from the date at which it is entitled to commence business the company must hold its statutory meeting (Section 73).

8. At least seven days (*semble* these must be clear days) before the day on which the statutory meeting is to be held the directors must prepare and forward to every member the Report required by Section 73 (see page 294), containing the auditors' certificate as to receipts and payments.[1]
9. Immediately after issuing this Report the directors must file a copy of it with the Registrar (Section 73, Sub-section 5).
10. The statutory meeting must be held within the limit of time above mentioned. At the commencement of the meeting a list of the names, descriptions, and addresses of the members, showing the shares held by them, must be produced, and remain open for inspection during the meeting (Section 73, Sub-section 6).

[1]Private companies are not obliged to forward this Report to their members or to file it (Section 73, Sub-section 10).

CHAPTER VII.

SHARES AND TRANSFERS.

SHARES.

SHARES have been defined as follows:—"The common stock" (contributed by the members) "is denoted in money, and is the capital. The persons who contribute it or to whom it belongs are members. The proportion of capital to which each member is entitled is his share."[1] "The word 'share' does not denote rights only: it denotes obligations also."[2] A share is the interest of a shareholder in the company, measured by a sum of money for the purpose of liability in the first place and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders *inter se*. . . . . . A share is not a sum of money, but is an interest measured by a sum of money, and made up of various rights contained in the contract."[3]

As already stated, the Memorandum of a company limited by shares must state the amount of the company's capital, "and the division thereof into shares of a fixed amount" (Section 13); and by Section 30 it is declared that "the shares or other interest of any member in a company shall be personal estate, transferable in manner provided by the Articles of the company, and shall not be of the nature of real estate," and "each share in a company having a share capital shall be distinguished by its appropriate number."

[1] "Lindley on Companies," Sixth Edition, page 1.

[2] *Per* Lindley, L. J., in Taylor, Phillips and Rickard's Case, [1897] 1 Ch. 305 (see page 177, *infra*).

[3] *Per* Farwell, J., in Borland's Trustee *v.* Steel Brothers & Co., [1901] 1 Ch. 288.

Shares, being (as above stated) personal estate, pass to the executors or administrators—not to the heir. It is usual for the Articles to state that only the executors or administrators will be recognised as having any right to the shares: that is to say, that, although the will of a deceased shareholder gives the shares to some person other than the executors, the company will require a transfer from the executors before registering the legatee.

APPLICATIONS FOR SHARES.

The contract to take shares is generally made by application and allotment, and for this purpose a form of application for shares is usually issued with the prospectus, to be filled up by the applicant and left at the office of the company or with its bankers, accompanied by a deposit of a specified amount for each share applied for. In cases where a prospectus is not issued it is advisable to have these forms ready for applicants to fill up, in order to prevent dispute as to the conditions under which the shares were applied for. But it is not absolutely necessary to have a printed form, as a letter applying for shares, or even a verbal application, is sufficient.[1]

A person having authority may apply in the name of another.[2] In such cases the directors should always require to see the alleged authority, and consider whether its terms justify the application.

The form of application is usually to the following effect, but the words may be varied according to circumstances:—

To the Directors of The Company, Limited.

Gentlemen,—Having paid to the company's bankers (or the company's financial agents) the sum of $ being a deposit of per share on application for shares of $ each in The Company,

[1]Cookney's Case, [1859] 3 De G. & J. 170; Bloxam's Case, [1864] 4 De G. J. & S. 447.

[2]Duff's Executors' Case, [1886] 32 Ch. D. 301; Levita's Case, [1870] 5 Ch. 489; Cookney's Case, [1859] 3 De G. & J. 170. See also page 46, *supra*, and see Davidson *v.* Grange, 4 Gr. 376.

Limited, I request you to allot me that number of shares upon the terms of the prospectus dated the day of , 19 . I hereby agree to accept such shares, or any smaller number you may allot to me[1] subject to the provisions of the Memorandum and Articles of Association of the Company, and I authorise you to place my name upon the Register of Members in respect of the shares so allotted.

Usual Signature..........
Name in full..........
Address..........
Profession or Occupation..........
Date..........

Until the applicant has notice that the shares are allotted he is entitled to withdraw his application, and to claim repayment of his deposit.[2]

Allotment of Shares.

A public company cannot go to allotment unless it has either filed a prospectus or a statement in lieu of prospectus (Section 91). When this has been done, if sufficient applications for shares are received to justify the company going to allotment (not being less, in the case of all except private companies, than the minimum mentioned below), the directors meet and pass a resolution allotting the shares to such of the applicants as they think fit, and the secretary is instructed to send notices of the fact to the persons receiving an allotment, and also to advise those whose applications are refused.

As the law stood prior to 1910 the directors might go to allotment and commence business although only a portion—even a very small portion—of the capital was applied for; but one of the principal objects of the Act of 1910 was to prevent allotments being made upon insufficient applications, and business being commenced without a reasonable capital. As it is obvious that the Legislature cannot fix what is

[1] As to the importance of these words see page 126.
[2] Pentelow's Case, [1869] 4 Ch. 178; Wilson's Case, [1869] 20 L. T. 962; Gunn's Case, [1868] 3 Ch. 40.

a reasonable amount of capital, the above object is sought to be attained by providing that the persons applying shall at least have full knowledge of the amount upon which allotment will be made.

The provisions of Section 94 are to the following effect, but they apply only to "the first allotment of shares offered to the public for subscription" (Sub-section 6):—By Sub-sections 1 and 2 provision is made for what is called in the Act a "minimum subscription," which is "the amount (if any) fixed by the Memorandum or Articles *and* named in the prospectus as the minimum subscription upon which the directors may proceed to allotment; *or* if no amount is so fixed and named, then the whole amount of the share capital" offered to the public for subscription.[1] Sub-section 1 also enacts that no allotment shall be made of any share capital offered to the public for subscription unless the "minimum subscription" has been subscribed and the sum payable on application for that amount (not being less than five per cent.) has been "paid to and received by" the company,[2] which sum, payable on application, must not be less than five per cent. of the nominal amount of the shares (Sub-section 3). Sub-section 7 makes similar provisions as to companies not issuing a prospectus, in which case the minimum subscription is fixed by the Memorandum or Articles, and, if not so fixed, is the whole amount of the share capital other than that issued or agreed to be issued as fully or partly paid up otherwise than in

[1]Note that the "minimum subscription" is the whole amount offered to the public unless a smaller amount is *both* fixed in the Memorandum or Articles *and* named in the prospectus. It has been held by Neville, J., that if the Articles state that the minimum subscription is ten per cent. of the shares offered for subscription, that will suffice (West Yorkshire Darracq Agency, [1908] W. N. 236; 25 T. L. R. 77). It is difficult, however, to see how it can be said that this amount is "fixed" by the Articles.

[2]Sub-section 2 declares that the minimum subscription is to be reckoned "exclusively of any amount payable otherwise than in cash." This appears unnecessary, for the amount "offered to the public for subscription" would always be payable in cash.

cash, and the amount of five per cent. must be paid up as application money. Private companies are free from these obligations.

If more than one prospectus is issued, the words "the prospectus" mean the document on the basis of which the applicant claiming relief has actually subscribed. And if one prospectus fulfils the statutory conditions, but another does not, only those who subscribed on the latter are entitled to relief.[1] A statement that "the company is in a position at once to allot one thousand shares, according to the provisions of its Articles," is not a sufficient statement that the minimum subscription is one thousand shares.[1]

Cheques received before allotment but after banking hours, and not cashed till the day after allotment, have been held to be money "paid to and received by the company[2]"; but cheques received before allotment and subsequently dishonoured do not constitute payment, even though immediately replaced by other cheques;[3] nor do cheques received and held over, although subsequently honoured:[4] accordingly the directors should never go to allotment until the cheques for the application moneys have been cashed.

If the conditions above mentioned are not complied with in the case of a company issuing a prospectus within forty days after the first issue of the prospectus,[5] all money received from applicants must be repaid without interest, and if not repaid within forty-eight days from the issue of

[1]Roussell *v.* Burnham, [1909] 1 Ch. 127.

[2]Glasgow Pavilion *v.* Motherwell, [1904] Court of Sess., 6 F. 116; but this is doubtful (see next note).

[3]Mears *v.* Western of Canada Pulp and Paper Co., [1905] 2 Ch. 353, where doubt was thrown on the Scotch decision cited in the preceding note; Burton *v.* Bevan, [1908] 2 Ch. 240.

[4]National Motor Mail Coach Co., [1908] 2 Ch. 228.

[5]By Section 89 every prospectus must be dated, " and that date shall, unless the contrary be proved, be taken as the date of publication of the prospectus"; but the issue of the prospectus appears to mean its actual issue by being circulated or advertised.

the prospectus the directors become jointly and severally liable to repay the amounts, with interest at five per cent. from the expiration of the forty-eight days. A director who is able to show that the loss of the money was not due to any misconduct or negligence on his part will, however, escape liability (Section 94, Sub-section 4). This liability only exists where there is no allotment; if the directors proceed to allotment in contravention of the section the liability under Section 95 is substituted.[1] Any condition purporting to deprive the applicant of the benefit of this section is void (Section 94, Sub-section 5). There is no similar provision as to the return of money in the case of companies not issuing a prospectus.

As before mentioned, these provisions, with the exception of that relating to the application money being at least five per cent., only govern the first public allotment; but in cases of second or subsequent offers of shares the prospectus must state the minimum subscription for the shares then offered, the amount offered for subscription on each previous allotment made within the two preceding years, the amount actually allotted, and the amount paid up (Section 90, Sub-section 1 (*d*)).

In estimating whether the "minimum subscription" has been reached, there seems no reason for excluding shares taken by underwriters, provided that the agreement under which they take shares is complete (*e.g.* that there is no condition remaining unfulfilled at the time of allotment) and that their application money is paid.

The provisions above referred to relate only to allotments of shares, and do not govern issues of debentures.

If shares are allotted in contravention of the provisions of Section 94 the allotment is not void, but only voidable, and then only if the applicant applies within one month

[1]Burton *v.* Bevan, [1908] 2 Ch. 240.

after the holding of the statutory meeting (Section 95). It is not necessary that the dissatisfied applicant should take proceedings within the month or before liquidation is commenced if he has given notice avoiding the allotment within the month and commenced action within a reasonable time.[1] He will also be precluded from avoiding the allotment if he has expressly or by conduct affirmed it with knowledge of the irregularity.[2] The right to have the allotment avoided for this cause, however, is not taken away by reason of the company having gone into liquidation in the meantime (Section 95, Sub-section 1). Any director of the company knowingly contravening or permitting the contravention of the provisions of the Act as to allotment is liable to compensate the company and the allottee respectively for any loss, damages, or costs sustained or incurred thereby, provided that the proceedings to recover such loss, damages, or costs are commenced within two years after the date of the allotment (Section 95, Sub-section 2). A director who was not present at the meeting making the allotment and did not know of the irregularity is not liable, even though he was present and voted at a subsequent meeting confirming the minutes recording the allotment.[3] It would seem that in general the loss to the company would only be the costs of proceedings by the allottee to avoid the allotment. The loss of the allottee's subscription would not be caused by the contravention of the Act. It might, however, be contended that loss incurred in the company's business, which would never have been commenced but for the improper allotment, is caused by the contravention of the Act.

These provisions as to avoidance of the allotment and compensation by directors apply to an allotment made in

[1] National Motor Mail Coach Co., [1908] 2 Ch. 228.
[2] Finance and Issue, Limited *v.* Canadian Produce Co., [1905] 1 Ch. 37.
[3] Burton *v.* Bevan, [1908] 2 Ch. 240.

contravention of Section 94, Sub-section 7, requiring a minimum subscription in the case of companies not issuing a prospectus.

In deciding upon the making of allotments the directors must bear in mind that they are trustees for the company, and must allot the shares for the benefit of the company. "I am not aware," says Lord Davey, "of any law which obliges a company to issue its shares above par because they are saleable at a premium in the market. It depends on the circumstances of each case whether it will be prudent or even possible to do so, and it is a question for the directors to decide."[1] But when the shares command a premium, the directors must not allot them at par to members of their own body or their friends, for they should seek to obtain the benefit of the premium for the company.[2] Directors, moreover, must not allot shares to themselves for the purpose of obtaining the control of the voting power in the company,[3] although they may purchase shares for that purpose,[4] and they must not make the terms or time of payment more favourable to themselves than to the general body of members.[5] Any profit the directors make out of shares improperly allotted to themselves will belong to the company, or if they have retained the shares they will be liable for the difference between the nominal value and the market value at the time of allotment.[6]

The directors of a company cannot delegate to an officer their duties in regard to allotments.[7]

An application for shares, followed by a communication that an allotment has been made, constitutes a contract between the applicant and the company, from which neither party is at liberty to withdraw. Care, however, should be

[1]Hilder v. Dexter, [1902] App. Ca. at page 480. Harris v. Sumner, 39 N. B. R. 204. Martin v. Gibson, 10 O. W. R. 66.

[2]York and North Midland Railway Co. v. Hudson, [1853] 22 L. J. Ch. 529; Parker v. McKenna, [1875] 10 Ch. 96; Shaw v. Holland, [1900] 2 Ch. 305.

[3]Fraser v. Whalley, [1864] 2 H. & M. 10; Punt v. Symonds & Co., [1903] 2 Ch. 506.

[4]North-West Transportation Co. v. Beatty, [1881] 12 App. Ca. 589. Toronto Brewing Co. v. Blake, 2 O. R. 175.

[5]Alexander v. Automatic Telephone Co., [1900] 2 Ch. 56.

[6]Shaw v. Holland, [1900] 2 Ch. 305.

[7]Packenham Pork Packing Co.—Galloway's Case, 12 O. L. R. 100. Twin City Oil Co. v. Christie, 18 O. L. R. 324.

taken that nothing is introduced into the letter of allotment differing from the terms of the prospectus or the form of application, for in such a case the applicant may withdraw from the company, as there is no completed contract between the parties.[1] Lord Justice Cotton says, "To make a contract by letters or by offer and acceptance, what you must find is this—an offer and a simple unconditional acceptance: that is to say, an acceptance not introducing any new term. If a new term is introduced, it becomes no longer an acceptance, but a new offer, which must be accepted before there is a contract."[2] Thus, where a man applied for shares in a railway company and received a letter of allotment marked "not transferable," it was held there was a new term imported, and therefore there was no contract, and the applicant was allowed to repudiate his shares.[3] So if the application is conditional and the allotment unconditional there is no contract.[4] To allot less than the number of shares applied for does not constitute a binding contract unless words in the application authorise a partial allotment.[5]

Where directors allotted shares on terms which were illegal (*e.g.* that they should be paid for by fees earned) it was held there was no contract and the allottee was not a shareholder.[6]

The allotment must be made within reasonable time after application: otherwise the applicant may repudiate the shares.[7]

[1]Barrett's Case, [1865] 3 De G. J. & S. 30; Addinell's Case, [1866] 1 Eq. 225; Howard's Case, [1866] 1 Ch. 561; Jackson *v.* Turquand, [1869] L. R. 4 H. L. 305.

[2]Hussey *v.* Horne Payne, [1878] 8 Ch. D. 670.

[3]Duke *v.* Andrews, [1843] 2 Ex. 290.

[4]*Ex parte* Wood, Sunken Vessels Recovery Co., [1859] 2 De G. & J. 65, 28 L. J. Ch. 899.

[5]*Ex parte* Roberts, [1852] 1 Drew. 204; *re* Barber, [1852] 15 Jur. 51.

[6]Pellatt's Case, [1867] 2 Ch. 527; National House Property Co. *v.* Watson, [1908] S. C. 888, Court of Sess.

[7]Ramsgate Victoria Hotel *v.* Montefiore, [1866] L. R. 1 Ex. 109; *ex parte* Bailey, [1868] 5 Eq. 428, 3 Ch. 592; Ritso's Case, [1877] 4 Ch. D. at page 778.

In the ordinary case of an application under a prospectus the bargain is not complete until the offer contained in the application is accepted by an allotment being made by the Directors and the acceceptance communicated to the applicant.

Until the bargain is thus complete the applicant may withdraw, either by a notice in writing or by an oral communication, or even by conduct showing that the offer to take shares is withdrawn,[1] and notice of withdrawal may be given orally to a clerk in the registered office of the company if the secretary is absent.[2] If the directors know that an applicant has declared he will have nothing more to do with the company they cannot validly allot, although the applicant has not himself communicated the fact that he withdraws.[3] But it has been said that if an invalid allotment is made, and subsequently confirmed, this is binding, although the application has meanwhile—*i.e.* before confirmation—been withdrawn.[4] The communication of the acceptance of the offer may be either oral, by writing, or by conduct.[5] It need hardly be stated, however, that it is always most desirable to have writing in such a matter.

Under ordinary circumstances an applicant is deemed to authorise the allotment to be communicated by post, and in such a case the communication is considered to be made at the moment of posting the letter of allotment,[6] even though

[1]Wilson's Case, [1869] 20 L. T. 962; Dickinson *v.* Dodds, [1876] 2 Ch. D. 463.

[2]Truman's Case, [1894] 3 Ch. 272.

[3]*Per* Warrington, J., in *re* Amusements Syndicate, 2 December, 1909, following Dickinson *v.* Dodds, [1876] 2 Ch. D. 463.

[4]Badman and Bosanquet's Case, [1890] 45 Ch. D. 16. This is, however, open to doubt.

[5]Crawley's Case, [1869] 4 Ch. 322. Standard Bank *v.* Stephens, 11 O. W. R. 5820. See the following cases on constructive Allotments. In *re* Provincial Grocers Calderwoods Case, 10 O. L. R. 705. In *re* Provincial Grocers, Hills Case, 10 O. L. R. 501. *re* Canada Tin Plate Co., 8 O. W. R. 531. Fischer *v.* Borlanos, 8 O. W. R. 579. Anglo American Lumber Co. *v.* McLellan, 14 B. C. R. 93.

[6]Household Fire Insurance Co. *v.* Grant, [1879] 4 Ex. D. 216. Lord Herschell expresses the rule thus:—"Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted" (Henthorn *v.* Fraser, [1892] 2 Ch. page 33; see also Bruner *v.* Moore, [1904] 1 Ch. page 316).

the letter never reaches the applicant. But the handing of a letter to the postman to post is not of itself a sufficient posting.[1] The withdrawal of an offer or application is effective only as at the time when it reaches the company, and not as at the time of posting.[2] If, however, the application is made with a condition, the contract is not complete till the condition is fulfilled, or until the applicant has waived the condition by accepting the allotment unconditionally.[3]

An allotment made upon an application signed in a false name constitutes a good contract if the applicant intended to get the benefit of the shares, and he will be put on the list of contributories in his true name;[4] but it will be otherwise if the application was not intended to be acted upon, as in a case in which the application was sent in in order to increase the supposed number of shares applied for.[5]

Shares may be allotted to two or more persons jointly and a corporation may be the sole allottee or sole holder of shares.

Allotments are not necessarily all made at once. Fresh applications may be received and fresh allotments made as long as there are any shares unissued.

If the shares are applied for by minors, the directors should not allot, for a minor can at any time before or upon attaining full age repudiate the transaction and require repayment of the amounts paid.[6] If a married woman applies, the directors may reasonably require that the shares shall be

[1]London and Northern Bank, [1900] 1 Ch. 220.

[2]Henthorn *v.* Fraser, [1892] 2 Ch. 27.

[3]Sahlgreen and Carrall, [1868] 16 W. R. 121; Pellatt's Case, [1867] 2 Ch. 527; *ex parte* Wood, National Equitable Society, [1873] 15 Eq. 236; *ex parte* Simpson, [1869] 4 Ch. 184; Roger's Case, [1868] 3 Ch. 633. As to waiver of condition see Rankin *v.* Hop and Malt Exchange, [1869] 20 L. T. 207. In *re* Standard Fire Ins. Co., 7 O. R. 448. Freemans case, 12 O. L. R. 149. McNeil's Case, 10 O. L. R. 219. Bank of Hamilton *v.* Johnston, 7 O. W. R. 111. Turners Case, 7 O. R. 488.

[4]Savigny's Case, [1899] W. N. 1.

[5]Coventry's Case, [1891] 1 Ch. 202.

[6]See page, 49 *supra*. Hamilton *v.* Vaughan Sherrin Co., [1894] 3 Ch. 589.

fully paid up before allotment, or that the husband shall become a joint holder.

A letter of allotment is generally to the following effect:—

Sir,—In reply to your application for shares, I am instructed to inform you that the directors have allotted you shares of $ each in this company, and I have to request that, on or before the day of , you will pay to the bankers of the company [*here give the name and address of the bankers*] the sum of $, being the amount of per share on the shares so allotted.

Your obedient servant,

To.. .... Secretary.

N.B.—Please keep this letter of allotment and the receipt for the amount payable as above until the share certificates are ready to be exchanged therefor, of which notice will be given in due course.

Usually certain amounts are made payable on application and allotment, and in case of a public issue the amount payable on application must, in case of the issue of a prospectus, under Section 94, Sub-section 3, be not less than five per cent., and under Sub-section 7, where there is no prospectus, at least this amount must be paid up before allotment. Unless otherwise expressly stated (as, for instance, when part is a premium) these sums when paid go in satisfaction of the amounts payable on the shares.[1] It is a breach of duty for directors to issue shares to themselves and their friends on more favourable terms as to payment than those offered to the public, unless the latter are expressly informed of the arrangement.[1]

It is a convenient plan to have the letter of allotment, with a form of secretary's or bankers' receipt for the amount to be paid on allotment, and a counterfoil containing the necessary particulars, bound up in a book. On the letters of allotment and the receipt forms being detached, the counterfoil remains in the book, and the particulars may in

[1]Alexander *v.* Automatic Telephone Co., [1900] 2 Ch. 56.

due course be posted in the Register of Members without much trouble. Otherwise a Register of Applications and Allotments should be kept, in which all applications are entered as they come in, and the allotments as they are made or sent out, with dates, amounts paid, and other necessary particulars.

Allotments once made and communicated cannot be cancelled,[1] although under certain circumstances the shares may be forfeited, or, in some cases, the Register rectified by striking out the names of persons who complain of being wrongly included.[2]

Whenever a Company Limited by Shares makes any allotment of its shares, either upon public subscription or otherwise, it must within one month thereafter file with the Registrar—(1) a Return of the Allotments, stating the number and nominal amount of the shares comprised in the allotments, the names, addresses, and descriptions of the allottees, and the amounts (if any) paid or due and payable on each share; and (2) when shares are allotted in whole or in part for a consideration other than cash, proper contracts in writing constituting the title of the allottees to their allotments, together with any contract of sale or for services or other consideration in respect of which the allotment was made (as to which see page 141), and a Return stating the number and nominal amount of the shares so allotted, the extent to which they are to be treated as paid up, and the consideration for which they have been allotted (Section 97, Sub-section 1). In the absence of a contract in writing, a document containing the prescribed particulars must be filed (Section 97, Sub-section 2). (For specimen of Return of Allotments see page 542, *infra*.) If default is made in filing

[1]Duff's Executors' Case, [1886] 32 Ch. D. 301; compare Hall's Case, [1870] 5 Ch. 707.

[2]See "*Rectification of the Register*," page 54, *supra*, and "SURRENDER AND FORFEITURE OF SHARES," page 366, *infra*.

the contract or particulars, a penalty of two hundred and fifty dollars a day may be imposed on every director, manager, secretary, or other officer of the company who is knowingly a party to the default; but the Court may grant relief and extend the time for filing if the omission was accidental or due to inadvertence or if it is equitable to grant relief (Section 97, Sub-section 3).

Small companies frequently make allotments of shares from time to time, often of small amounts. The officers of such companies should bear in mind that a Return must be made of every such allotment, however small.

SHARE CERTIFICATES.

As soon as conveniently may be after allotment the share certificates should be prepared, and notice sent to the shareholders that they are ready to be exchanged for the letters of allotment, receipts for deposit, etc.

Section 101 requires every company—unless the conditions of issue otherwise provide—to complete and have ready for delivery the certificates of shares within two months after allotment or registration of any transfer of shares under penalty of twenty-five dollars a day during the time the default continues, which penalty attaches to the company and every director, manager, secretary, or other officer knowingly a party to the default.[1] If it is not intended to issue the share certificates till the shares are fully paid, this must be provided for by the "conditions of issue," as in any case some allottees may be more than two months in making their payments.

When a company has a share capital it must distinguish each share by its appropriate number (Section 30), and the Articles almost invariably give to each member a right, free

[1] The same provisions apply to debentures and certificates of debenture stock.

of charge, to a first certificate or certificates indicating the share or shares to which he is entitled. The usual and more convenient practice is to include in one certificate all the shares held by a member; but sometimes, where the shares are of large amount, a separate certificate is issued for each share. The Articles also generally state how such a certificate is to be signed, the most usual provision being that it shall be signed by two directors, countersigned by the secretary, and impressed with the seal of the company.

The company must not enter on the certificate any memorandum that it has a lien on the shares.[1]

A certificate under the seal of the company is *primâ facie* evidence of the title of the person named to the shares (Section 31), but it does not give the person an absolute, or as it is called an indefeasible, right to the shares. If it can be shown that the holder obtained the shares from some person who could not give him a title to them, the name of the true owner will be retained upon or restored to the Register, and the holder lose the shares. But if the holder acquired the shares in good faith, having given value for them, relying upon an untrue certificate issued by the company, the company will be estopped from denying his title to the shares which he was induced to buy or pay for by being shown the certificate.[2] This, however, gives the holder only a right to damages against the company, and not to the shares as against the true owner,[3] and if the certificate is a forgery the company comes under no liability, even when the forgery was the act of its secretary;[4] also if the certificate is

[1]W. Key & Son, [1902] 1 Ch. 467.

[2]Bahia and San Francisco Railway Co., [1868] L. R. 3 Q. B. 584; Tomkinson *v.* Balkis Consolidated Co., [1893] App. Ca. 396; Ottos Kopje Diamond Mines, [1893] 1 Ch. 618. McCracken *v.* McIntyre, [1877] 1 S. C. R. 479.

[3]Hart *v.* Frontino Co., [1870] L. R. 5 Ex. 111; and see Note on next page.

[4]Ruben *v.* Great Fingall Consolidated, [1904] 2 K. B. 712, [1906] App. Ca. 439.

in fact correct, stating that a certain person is the registered holder of the shares, the company will not be liable to a purchaser from him by reason of such holder having meantime transferred the shares, even though the company has parted with the certificate after knowing of the sale of the shares.[1]

The certificate, moreover, only shows the legal title to the shares, and accordingly, if the person who relies upon the certificate, made out in the name of the person selling to him, does not get his title made complete by taking a transfer into his own name, and procuring himself to be registered as holder of the shares, he may find that a previous equitable title (as, for instance, a mortgage) stands in his way.[2] Thus, where a debtor assigned all his property to trustees for his creditors, but retained his share certificates, and subsequently sold the shares to a purchaser for value, the title of the trustees who had given notice to the company prevailed.[3] But if the purchaser has completed his legal title by being registered as the holder of the shares, he will not be affected by any equitable rights of which he did not know at the time he bought the shares. The statement usually contained in a certificate that no transfer will be registered without production of the certificate does not render the company liable for any loss which may arise to a person holding the certificate from a transfer being completed without its production,[4] so that even a deposit of the certificate with a blank transfer may fail to protect a lender.

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[1]Longman *v.* Bath Electric Tramways, [1905] 1 Ch. 646.

[2]Shropshire Union Railway *v.* The Queen, [1876] L. R. 7 H. L. 496; Moore *v.* North-Western Bank, [1891] 2 Ch. 599; Kelly *v.* Munster and Leinster Bank, 29 L. R. Ir. 19.

[3]Peat *v.* Clayton, [1906] 1 Ch. 659.

[4]Guy *v.* Waterlow Brothers, [1908] 25 T. L. R. 515. Compare the argument in Rainford *v.* James Keith and Blackman, [1905] 2 Ch. 147; and Longman *v.* Bath Electric Tramways, [1905] 1 Ch. 646. Compare Smith *v.* Walkerville Iron Co., 23 A. R. 95.

Forms differing in appearance (*e.g.* in colour or size) should be used for preference, ordinary, and deferred shares. It is convenient also to state on the certificate the respective rights of holders of different classes of shares, and the certificate ought always to state how much is paid up on each share. Where capital is reduced or calls have been made and paid on shares after the issue of the certificates, the certificates should be called in and either endorsed with a statement of the altered facts or new certificates issued.

SHARE WARRANTS TO BEARER.

Section 45 provides for the issue of share warrants to bearer if the Articles of Association authorise such issue. The effect of the issue of a share warrant is to make the bearer of it absolutely entitled to the fully paid shares or stock named in it, and the ownership can accordingly be passed by mere delivery. No person purchasing a share warrant need make any inquiry as to the title of the person who sells it, any more than if he were receiving a dollar bill; but if the holder has in fact stolen or fraudulently obtained a share warrant, he can of course be compelled to surrender it in the same way as a thief or cheat would have to give up a dollar bill.

The company may provide for the payment of dividends by coupons or otherwise (Section 45, Sub-section 1). It is usual to do this by coupons attached to the warrant, each stating that the bearer is entitled to the dividend for a certain year or half-year, or to the first, second, or third dividend declared, and in such case the bearer of the coupon, and not of the warrant, is entitled to the dividend.

Subject to the regulations of the company, the bearer of a share warrant can return it to the company, and be re-entered upon the Register as a shareholder, the warrant being thereupon cancelled (Sub-section 3).

The Articles of Association should provide when and upon what conditions the holder of a share warrant is to be treated as a member of the company or to give votes, and upon what terms a lost or destroyed share warrant may be replaced. The Act, however (Section 45, Sub-section 4), declares that the holding of share warrants shall not be a qualification for a director or manager in cases where the Articles require any such qualification.

On the issue of a share warrant a company must strike out of its Register the name of the original holder of the shares or stock represented, and enter particulars as to the date of issue of the warrant, and a statement of the shares or stock represented by it, distinguishing each share by its number (Section 45, Sub-section 5).

Private companies cannot take power to issue share warrants, and if they adopt Table A must negative the clauses relating to them, for there must be a restriction on the right of transfer.

Payment of the Nominal Amount of Shares and Issue of Fully or Partly Paid Shares.

The fact of becoming a member of a company limited by shares renders the person liable to contribute to its assets to the extent of the nominal amount of the shares held by him.

Until a liquidation takes place, the amounts are payable at the times and in the manner prescribed by the Articles of Association, which almost invariably declare that so much as is not paid at the times fixed by the prospectus or agreement to take shares may be called up by the directors as and when they think fit. Whatever amount has not been previously called up by the directors and paid to the company may be called up by the liquidator upon a winding up, or whenever he may subsequently think fit (see Part III., Chapter 25., *infra*), and this, being a statutory power of

the liquidator, cannot be taken away by the Articles or by contract.

CALLS ON SHARES.

Members of a company are liable to pay up the nominal amount of their shares. The time and manner of payment are determined by the agreement between the company and the members, which is usually, to some extent, fixed by the terms of the prospectus, and, so far as the matter is not one of express agreement, depends upon the Articles of Association. Thus, subscribers to the Memorandum are not liable to pay until calls are made,[1] but persons who receive an allotment upon the terms of a prospectus must pay the amounts prescribed upon application and allotment and any further instalments mentioned, the balance (if any) depending upon the calls made.

In the absence of special conditions of allotment nothing is payable till a call is made, and an arrangement that some shareholders shall hold their shares with nothing or only a very small amount paid while others pay more is lawful, but in the case of shares offered to the public for subscription at least five per cent. must be made payable on application (Section 94, Sub-section 3). The directors must not favour themselves in this matter without the sanction of the company,[1] and a company cannot commence business until the directors have paid as much in respect of application and allotment moneys as is payable by other members (Section 96, Sub-section 1 (*b*)).

When the shares in a company are not fully paid, the balance unpaid can be called up by a proper authority at any time, unless this is forbidden by the Articles or by a special resolution, and a member of the company cannot escape from his liability to pay unless he shows that he has been wrongly

[1]Alexander *v.* Automatic Telephone Co., [1900] 2 Ch. 56.

made a member, and has come with all diligence to have his name removed from the Register. It will not avail a member to show that the affairs of the company have been badly managed, or that its property has been wasted: he is still liable to pay any calls that are regularly made.

The Act does not specify how a call is to be made, and the manner of doing it must be determined by the Articles of Association, and Section 46 enables a company, if authorised by its Articles, to make arrangements for a difference between the holders of shares in the amount of calls or the time for payment. Calls are dealt with by Clauses 12 to 17, in Table A. Calls made in a winding up will be dealt with in connection with that subject (see *infra,* page 470); here only calls made while the company is carrying on its business will be considered.

By Section 67 a company may by special resolution declare that any portion of its capital not already called up shall not be capable of being called up except in the event and for the purpose of the company being wound up. A provision to that effect *in the Articles* can be varied by special resolution making the amount unpaid callable at any time.[1] But a similar provision declared by special resolution would appear to be irrevocable, and capital which can only be called up in a winding up cannot be included in a charge given by debentures on uncalled capital.[2]

Table A provides that the directors may from time to time make such calls upon the members[3] as they think fit,[4] and requires fourteen days' notice to be given to the members, who are then liable to pay at the times appointed by the directors. Under this or a similar clause a call can only

[1]Malleson *v.* National Insurance Co., [1894] 1 Ch. 200.

[2]Bartlett *v.* Mayfair Property Co., [1898] 2 Ch. 28.

[3]Note that a man (other than a subscriber to the Memorandum) is not a member until his name is entered in the Register. It would seem therefore that until so entered he cannot be sued for a call.

[4]This power being discretionary cannot be delegated Provident Life *v.* Wilson 25 U. C. R. 53.

be made by a proper quorum of the directors, duly appointed and qualified, unless the Articles of Association allow an unqualified director to act, or there is a provision that acts of directors shall be valid notwithstanding any defect;[1] but a call irregularly made can be confirmed at a meeting where there is no irregularity.[2] Where the resolution making a call does not state the time and place of payment the call cannot be enforced.[3]

Clause 12 of the new Table A provides that no call shall exceed one fourth of the amount of the share, but this does not prevent two calls being made on the same day of the full amount if they are payable with a sufficient interval between them.[4]

The directors are the proper judges whether a call is necessary, and Courts of Law will not interfere with their discretion[5] unless it clearly appears that the call is for an object not within the powers of the company. The powers of the directors are, however, fiduciary, and must be used, not for some purpose of their own, but for the benefit of the shareholders.[6] They must therefore not make any arrangement by which other persons are liable for calls, but they themselves are not, unless the company knows of and sanctions the arrangement.[7] Nor must they make calls on some of the shareholders to the exclusion of others[8] unless arrangements have been made under provisions in the Articles in accordance with Section 46 enabling the com-

[1]Dawson *v.* African Consoldated Co., [1898] 1 Ch. 6; British Asbestos Co. *v.* Boyd, [1903] 2 Ch. 439.

[2]Austin's Case, [1871] 24 L. T. 932.

[3]Cawley & Co., [1889] 42 Ch. D. 209. It may be argued that this does not apply under the new table A, where nothing is said as to place of payment. See the following cases on irregular calls, Union Fire Insurance Co., *v.* O'Gara 4 O. R. 359; Ross *v.* Macher, 8 O. R. 417. Gas Co., *v.* Russel 6 U. C. R. 657. Provincial Insurance Co. *v.* Worts, 9 A. R. 56. National Insurance Co., *v.* Egleson, 29 Gr. 406.

[4]Universal Corporation *v.* Hughes, [1909] S. C. 1434, Court of Sess.

[5]Bailey *v.* Birkenhead Railway Co., [1850] 12 Beav. 433.

[6]Gilbert's Case, [1870] 5 Ch. 559.

[7]Alexander *v.* Automatic Telephone Co., [1900] 2 Ch. 56. Christopher *v.* Noxon, 4 O. R. 672. Provincial Ins. Co.. *v.* Cameron, 31 C. P. 523.

[8]Preston *v.* Grand Collier Dock Co., [1840] 11 Sim. 327.

pany to make differences between the holders of shares in the amount of calls to be paid and the time of payment.

A call made after the death of a member is payable out of his estate.[1]

When shares are transferred after a call has been made and before it is paid the liability is not transferred to the transferee.[2] The company, however, can protect itself by refusing to register the transfer until the call is paid, and it seems can make a fresh call in respect of the same amount as long as it is unpaid.[3]

Table **A** provides that calls in arrear shall bear interest, and in special Articles it is usual to make this at a high rate, so as, in fact, to be penal. Otherwise it might be worth while to pay interest on the calls in arrear, because the money required was earning interest elsewhere.

Clause 17 of Table A (conformably with Section 46 of the **Act**) allows calls to be paid in advance, and an arrangement to be made for the advance payments to bear interest. This interest is a debt from the company, and must be paid although there are no profits out of which dividends are payable.[4] Trustees and others often avail themselves of this provision; but it has some disadvantages: the shares would not be readily saleable on a Stock Exchange unless a very large number of shares are so paid up and a quotation obtained, and it is very doubtful whether money thus paid up can be repaid except by the company going through the complicated process necessary for making a reduction of its capital. Money so paid in advance is re-

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[1]New Zealand Gold Extraction Co. *v.* Peacock, [1894] 1 Q. B. 622.

[2]*Per* Lindley, L. J., in Taylor, Phillips and Rickard's Case, [1897] 1 Ch. at page 306. Montreal Mining Co., *v.* Cuthbertson, [1852] 9 U. C. R. 78.

[3]New Balkis Eersteling *v.* Randt Gold Mining Co., [1904] App. Ca. 165—a case of a call repeated after forfeiture. But if the former holder pays calls even after forfeiture this will relieve the purchaser (Randt Gold Mining Co., [1904] 2 Ch. 468).

[4]Lock *v.* Queensland Investment and Mortgage Co., [1896] App. Ca. 461.

payable in a winding up before any money paid up in pursuance of calls is repaid to the members.[1]

If a compromise between various classes of shareholders is proposed, those who have paid in advance of calls form a separate class, of which a meeting should be separately called if the scheme affects their position.[2]

Another course which is sometimes adopted is for a member to make an ordinary loan to the company on the terms that it is to be set off against any call made. This plan works very well so long as the company is a going concern; but if the company is wound up, the debt cannot be set off against calls made by the liquidator,[3] and the shareholder will have to pay his calls and wait for a dividend upon his loan.

The following form of resolution of directors making a call may be used:—

Resolved—That a call of five dollars per share be made upon the members of the company in respect of the amount unpaid on their shares, and that the same be payable on or before the day of at the registered office of the company, and that all calls unpaid by that day shall bear interest at the rate of per centum per annum from the day when the same shall become payable until payment.

If calls remain unpaid, the members liable should be sued for the amount. Any dividends becoming payable upon the shares of such members should be retained by the company, and as a last resort (if the Articles give the power) the shares should be forfeited. As will be seen where Forfeiture is considered (page 366, *infra*), this will not relieve members from liability to pay previous calls.

Methods of Payment for Shares.

Shareholders must pay for their shares in money or money's worth—that is to say, in cash, or by goods,

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[1]Wakefield Rolling Stock Co., [1892] 3 Ch. 165.
[2]United Provident Assurance Co., [1910] W. N. 199.
[3]Grissell's Case, [1866] 1 Ch. 528.

property, services, or some other valuable consideration. *Primâ facie* the payment must be made in cash, but a company may agree with a holder of shares to accept some other form of payment, or an existing debt may be set off against a present liability to pay calls.

Until the date when the Act of 1910 came into force (the 1st July, 1910), the law was that all shares were held subject to the payment of the whole amount thereof in cash, unless otherwise determined by a contract made in writing and filed with the Registrar on or before the issue of such shares (Section 50, Companies Act, R.S.B.C., 1897, Chap. 44). This is now repealed, but Section 304 of the present Act expressly affords relief in cases where shares have been issued as fully paid up and no contract filed. The company or any person interested in such shares may apply to the Court for such relief, which will be granted if the Court is satisfied that the omission to file a contract was accidental or due to inadvertence.

The Act does not contain any provision as to how payment otherwise than in cash may be agreed or determined. Section 97, Sub-section 1 (*b*), requires a company to file with the Registrar, "in the case of shares allotted as fully or partly paid up otherwise than in cash, a contract in writing constituting the title of the allottee to the allotment, together with any contract of sale, or for services or other consideration in respect of which that allotment was made," as well as "a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid up, and the consideration for which they have been allotted," and for default there is a penalty of two hundred and fifty dollars

a day; and Sub-section 2 recognises that the contract may not be in writing, and allows particulars to be filed in place of a contract: this makes it clear that a written contract is not required. There still must be some contract which must constitute "the title of the allottee": that is to say, a contract with a third party will not suffice, for this gives the allottee no title; but a contract to issue shares to a person "or his nominees" and a nomination by him will, it seems, suffice. It is to be observed, however, that there is no provision that the amount of the shares shall be payable in cash in the absence of such a contract, so that failure to comply with the Act may entail penalties, but not the very serious consequences to the allottee which resulted under Section 50 of the Act of 1897.

That payment in money's worth is sufficient payment has been well established.[1] The extinguishment of a debt due from the company to the shareholder is payment,[2] or any circumstances creating a set-off[3] and an agreement to render services, as by becoming manager for five years, may be a good payment.[4] But an agreement to supply goods at a future time is not a good consideration,[5] for it seems that a company cannot contract that future calls shall be set off against goods to be from time to time supplied.

The company cannot by a contract make that which is not a good consideration in law a payment for shares. Thus past services for which the company was not liable to pay

[1]Drummond's Case, [1869] 4 Ch. 772; Pell's Case, [1870] 5 Ch. 11; Baglan Hall Colliery Co., [1870] 5 Ch. 346; Jones's Case, [1870] 6 Ch. App. 48.

[2]Forbes and Judd's Case, [1870] 5 Ch. 270, 272; Baglan Hall Colliery Co., [1870] 5 Ch. 346, 356.

[3]Spargo's Case, [1873] 8 Ch. 407; Larocque *v.* Beauchemin, [1897] App. Ca. 358.

[4]*Re* Theatrical Trust, [1895] 1 Ch. 771.

[5]Pellatt's Case, [1867] 2 Ch. 527; *ex parte* Clark, [1869] 7 Eq. 550.

could not free the shareholder from liability even under a contract to that effect;[1] and a contract to issue shares at a discount—*i.e.* for a less sum than the whole nominal amount—is of no validity;[2] but if the consideration is in kind the Court will not inquire whether it was really of value equal to the nominal amount of the shares issued, unless the consideration was illusory or permitted of an obvious money value;[3] but the written contract goes very far to establish the transaction.[4] In fact, a company can agree to purchase property and pay for services at any price it thinks proper, and may make the payment in shares, provided that it does so honestly and not colourably, and has not been so imposed upon as to be entitled to repudiate the bargain.[5] But an issue of debentures at a discount, with a right to exchange them for fully paid shares at par, is illegal.[6]

If a person has come under an obligation to take shares, either by signing the Memorandum or by agreement, he must pay for them in money or money's worth, and cannot satisfy his liability by receiving an allotment of fully paid shares to which some other person is entitled;[7] but, of course, if he takes an assignment of a debt of the company to a third party, he can set that off against his liability to pay calls.[8]

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[1]Eddystone Marine Insurance Co., [1893] 3 Ch. 9.

[2]See page 145, *infra*.

[3]Theatrical Trust, [1895] 1 Ch. 771; Almada and Tirito Co., [1888] 38 Ch. D. at page 423; *re* E. J. Wragg, [1897] 1 Ch. 796.

[4]*Re* Innes & Co. in Court of Appeal, [1903] 2 Ch. 254.

[5]*Re* E. J. Wragg, [1897] 1 Ch. 796; Felix Hadley & Co. *v.* Hadley, [1897] 76 L. T. 161. *Re* Hess Manuf. Co. Sloan's Case 23 S. C. R. 644. Wade *v.* Kendrich, 37 S. C. R. 32. North Bay Supply Co. 6 O. W. R. 85. Lindsay *v.* Imperial Steel & Wire Co., 21 O. L. R. 375.

[6]Moseley *v.* Koffyfontein Mines, [1904] 2 Ch. 108.

[7]Migotti's Case, [1867] 4 Eq. 238; Forbes and Judd's Case, [1870] 5 Ch. 270; Bennet's Case, [1867] 15 W. R. 1058, 16 L. T. 475; Fraser's Case, [1873] 28 L. T. 158, 42 L. J. Ch. 358.

[8]Dent's Case, [1873] 8 Ch. 768, 777; Ferrao's Case, [1874] 9 Ch. 455.

If a winding up intervenes, a person who is liable for calls cannot set off against them a debt from the company to himself,[1] and shareholders should therefore bear in mind that future calls are not extinguished by an indebtedness of the company, for the set-off will not arise until the calls are made and are presently payable.

By Section 97 "a contract in writing constituting the title of the allottee" to an allotment of fully or partly paid shares is to be filed within a month, as well as the contract for sale, etc., in respect of which the allotment was made. Therefore the best course is to have the contract executed in duplicate, in order that one part may be registered and the other retained. However, if the original is registered, a copy duly certified by the Registrar will be received in evidence as of equal validity with the original document (Section 269, Sub-section 4).

A contract made with a trustee for the company is not binding on the company unless a new contract is made after incorporation,[2] and accordingly, although it was held in Hartley's Case[3] (which, though discussed in the Privy Council,[4] has not been overruled) that a contract with a trustee duly filed was a sufficient protection, it would appear to be safer to file a contract with the company itself. Under the Act of 1897 it was essential that the contract should be complete, executed by both parties, and binding on them,[5] and neither executed as an escrow[6] nor made with a non-existing body.[7] It was not necessary under

[1] *Re* Barrow-in-Furness Land &c. Co., [1880] 14 Ch. D. 400.

[2] Northumberland Avenue Hotel Co., [1886] 33 Ch. D. 16. A resolution of the Board adopting the contract will not suffice (North Sydney Investment Co. *v.* Higgins, [1899] App. Ca. 263).

[3] Hartley's Case, [1875] 10 Ch. 157.

[4] See Smith *v.* Brown, [1896] App. Ca. 614.

[5] New Eberhardt Co., [1890] 43 Ch. D. 118; Smith *v.* Brown, [1896] App. Ca. 614.

[6] Dalton Time Lock Co. *v.* Dalton, [1892] 66 L. T. 704.

[7] Anglo-Colonial Syndicate, [1891] 65 L. T. 847.

that Act to state in the contract the numbers of the shares allotted,[1] but it is very convenient to do so with a view to saving disputes and for the purpose of identifying the shares.

A company cannot issue its shares at a discount, or agree to accept less than one hundred cents in the dollar in payment for them,[2] even if the shares already issued are unsaleable at par, for this is a reduction of the capital of the company; but if a contract to this effect has been made the company cannot compel the other party to accept the shares so as to come under a liability to pay the full amount in cash: that is to say, it can only compel him to fulfil his contract, which is to take partly paid shares,[3] and even if he has accepted the shares the company cannot before liquidation compel him to pay the full amount of the shares;[4] yet if the shares have been accepted and the shareholder's name entered in the company's Register, it cannot be removed, and he is liable in a winding up at the instance of creditors, or to adjust the rights of other members, to pay for the shares in full, notwithstanding his agreement to take them at a discount.[5] If before their names are entered on the Register of Members the recipients of the shares object, they cannot be placed on the Register; for they have only agreed to take shares which are fully or partly paid up, and those shares the company is not able to give them.[6]

On the principle that a company may be estopped from denying the truth of representations made by itself or its

[1] *Ex parte* Ford, [1885] 30 Ch. D. 153.

[2] Ooregum Gold Mining Co. *v.* Roper, [1892] App. Ca. 125; Almada and Tirito Co., [1888] 38 Ch. D. 415. North West Electric Co. *v.* Walsh, 29 S. C. R. 33. McCracken *v.* McIntyre, 1 S. C. R. 479.

[3] *Re* MacDonald, Sons & Co., [1894] 1 Ch. 89, 7 Rep. 322. Compare Arnot's Case, [1887] 36 Ch. D. 702.

[4] Pioneers of Mashonaland Syndicate, [1893] 1 Ch. 731.

[5] *Ex parte* Sandys, [1889] 42 Ch. D. 98; Welton *v.* Saffery, [1897] App. Ca. 299; Pioneers of Mashonaland Syndicate, [1893] 1 Ch. 731.

[6] *Re* MacDonald, Sons & Co., [1894] 1 Ch. 89, 7 Rep. 322.

agents, shares which are not in fact fully paid, but in respect of which a certificate is issued that they are fully paid, and this even though they have subsequently been that they were improperly issued, will be treated as if fully paid,[1] and this even though they have subsequently been bought back by some person who knows all the facts;[2] and the transferees of vendors' shares the certificates of which did not state that they were fully paid, but which were declared to be fully paid by a letter accompanying the certificates, escaped liability.[3] Even a director may be protected by a certificate, signed by himself, stating that the shares are fully paid if he acted in good faith.[4] If the certificates bear upon them notice of the irregularity, such as having the word "Bonus" printed on them,[5] or if the recipient has knowledge of certain facts which inform him that the shares have not been paid for in cash, he remains liable to pay the full amount.[6] It is not enough that he *might* have or even *ought* to have known that the shares were not fully paid if the Court finds that in fact he did not.[7]

TRANSFER OF SHARES.

The original allottee of the shares of a company remains personally entitled to the benefits and subject to the obligations of the shares until he has got rid of them either (A) by transfer, (B) by death, or (C) by forfeiture or sur-

[1]Parbury's Case, [1896] 1 Ch. 100; British Farmers' Co., [1878] 7 Ch. D. 533; *re* Concessions Trust, [1896] 2 Ch. 757. *re* Wiarton Beet Sugar Co.—Freeman's Case, 12 O. L. R. 149. Northwest Electric *v.* Walsh, 29 S. C. R. 33.

[2]*Ex parte* Sandys, [1889] 42 Ch. D. 98; *re* New Chile Gold Mining Co., [1892] W. N. 193, 68 L. T. 15.

[3]*Re* MacDonald, Sons & Co., [1894] 1 Ch. 89, 7 Rep. 322.

[4]Coasters, Limited, [1911] 1 Ch. 86.

[5]Eddystone Marine Insurance Co. No. 2, [1894] W. N. 30; *ex parte* Bloomenthal, [1896] 2 Ch. 525.

[6]Markham and Darter's Case, [1899] 1 Ch. 414. See also *re* Clinton Thresher Co., 15 O. W. R. 645. Niagara Falls Co., 15 O. W. R. 326.

[7]Bloomenthal *v.* Ford, [1897] App. Ca. 156, in which the House of Lords came to a different conclusion on the facts from that arrived at by the Court of Appeal, but accepted the same view of the law. Lord Herschell's judgment gives a fine exposition of the law of estoppel.

render. The first two, which are commonly referred to as "the Transfer and Transmission of Shares," will now be dealt with. In case of transfer the transferee takes the place of the transferor, and in case of transmission the estate of the former holder takes his place as regards benefits and liabilities.

One great distinction between a general partnership and a company is that in the former the partners cannot, and in the latter the members can, transfer their shares without the consent of their co-members, unless specially forbidden by the Articles of Association.

Shares are personal property, and may be transferred in manner provided by the Articles of the company (Section 30).[1] Accordingly, if the Articles allow it, or if the company is governed by the regulations contained in Table A, a transfer may be made by an instrument not under seal.[2] It is not unusual to prescribe in the Articles the form of transfer, and if this is done the form must be followed in all essential matters;[3] but if the Articles only say "The following form *may* be adopted," then any form may be used that includes the provisions stipulated by the Articles. The regulations in Table A, and the common form in Articles, prescribe that the transfer must be signed by both the transferor and the transferee. This is generally an essential point, for unless the transferee has agreed to become a shareholder he ought not to be put upon the Register of Members; but when omitted, if the transfer has

[1]A provision in the Articles for a compulsory transfer of shares is not repugnant to the nature of personal property nor obnoxious to the rule against perpetuity (Borland's Trustee *v.* Steel Brothers & Co., [1901] 1 Ch. 279).

[2]*Ex parte* Sargent, [1874] 17 Eq. 273.

[3]The omission of the address of the transferor or the denoting number of the share, if both are known to the directors and there can be no ambiguity, is immaterial and will not invalidate a transfer (Letheby & Christopher, Limited, [1904] 1 Ch. 815).

been acted upon and recognised by the transferee, it will be held to be effectual.[1] The form in Table A requires a witness to attest the transfer of shares: this should never be omitted in practice.

The transferee may be any person capable of holding shares. It frequently happens that a transfer is made to a firm in its firm name, and, if accepted by the company and the firm name entered in the Register of Members, the partners become individually members and liable for calls;[2] but this is not a proper course to pursue, for the Act requires the names of the members to be entered in the Register, and also the company may be placed in difficulties, not knowing whether the Partnership Articles authorise the taking of shares,[3] nor having knowledge of the persons who constitute the firm. The company should in such a case require the transfer to be made to the partners in their individual names.[4]

The usual procedure is for the seller of shares to cause a transfer to be prepared, and, having executed it, to hand it with the certificate of shares to the purchaser, who also executes the transfer and lodges it, with the certificate, at the company's office, requesting that his name may be entered on the Register in place of the seller's. If the certificate is for more shares than those sold, it is generally lodged by the seller with the company, and two new certificates are made out—one, in the name of the transferee, for the shares sold; the other, in the name of the transferor, for the balance.

The effect of a transfer has been defined as follows:— "The word 'share' does not denote rights only—it denotes obligations also; and when a member transfers his share he

[1]Taurine Co., [1884] 25 Ch. D. 118.
[2]Weikersheim's Case, [1873] 8 Ch. 831; Dunster's Case, [1894] 3 Ch. 478.
[3]Niemann *v.* Niemann, [1889] 43 Ch. D. 198.
[4]Vagliano Anthracite Collieries, [1910] W. N. 187.

transfers all his rights and obligations as a shareholder as from the date of the transfer. He does not transfer his rights to dividends or bonuses already declared, nor does he transfer liabilities in respect of calls already made; but he transfers his rights to future payments and his liabilities to future calls."[1] The company will usually refuse to pass a transfer where there are unpaid calls, and even if the transfer is passed may, if the vendor fails to pay, make a fresh call for the amount unpaid on the transferee.[2] If, however, the transfer is preceded by a contract of sale, as in the case of purchases on Stock Exchanges, the purchaser is entitled as against the seller to all dividends declared (and it would seem is also liable for all calls made) after the contract.[3] In sales on Stock Exchanges, made near the time of dividend the bargain usually expresses that the sale is either *ex div.* or *cum div.*, generally written *x. d.* and *c. d.*

In the transfer the amount of the consideration must be stated and the distinctive numbers of the shares transferred, and the full names, addresses, and occupations of all the parties to the transfer should be given, but the omission of the latter particulars does not invalidate the transfer if the company has the means of supplying them.[4] The instrument must be forwarded to the company, with a request that a new certificate may be prepared and issued to the transferee. The old certificate should accompany the instrument of transfer for the purpose of being cancelled or destroyed, and a new certificate issued in its place. Indeed, the Articles usually provide that unless the certificate is produced the transfer will not be passed (see Table A,

[1]*Per* Lindley, L. J., in Taylor, Phillips and Rickard's Case, [1897] 1 Ch. 305.

[2]New Balkis Eersteling *v.* Randt Gold Mines, [1904] App. Ca. 165.

[3]Black *v.* Homersham, [1879] 4 Ex. D. 24.

[4]Letheby & Christopher, Limited, [1904] 1 Ch. 815.

Clause 20), and a company receiving the purchase money for shares the certificate for which was, to the knowledge of the directors, in the hands of a stranger, has been held liable to pay over the amount to the actual holder, who was, in fact, mortgagee of the shares.[1]

By the custom of Stock Exchanges the purchase price is payable on the delivery of the transfer and certificate, and the vendor is entitled to keep the purchase money, even though the transfer is subsequently not passed by the directors of the company,[2] for the vendor does not warrant that the purchaser will be accepted. If the certificate contains more shares than those transferred, a "certificated transfer"—*i.e.* a transfer with a certificate upon it that the certificate has been lodged with the company—is used in place of the certificate of shares (see page 163, *infra*).

Upon receipt of a transfer the secretary should first satisfy himself that the instrument is properly executed, and is correct in other particulars, such as the aggregate and distinctive numbers of the shares, and that the transferor is the registered holder of the shares expressed to be transferred. This is the secretary's duty, and if he is a responsible person the directors are not personally liable if they accept his investigations as sufficient.[3]

Section 101 requires the company to have the new certificate complete and ready for delivery within two months after the registration of any transfer (see page 131, *supra*).

Before issuing the new certificate to the transferee the secretary should, for the company's protection, send some such notice as the following to the transferor:—

SIR,—I have to inform you that an instrument of transfer, purporting to be signed by you, transferring shares in this company to

[1]Rainford *v.* James Keith and Blackman, [1905] 2 Ch. 147.
[2]London Founders' Association *v.* Clarke, [1888], 20 Q. B. D. 596.
[3]Dixon *v.* Kennaway, [1900] 1 Ch. 833.

has been lodged, and unless I hear from you to the contrary per return of post the said shares will in due course be registered in the name of the transferee.[1]

If the transfer is in order, and no objection is received from the reputed transferor, the secretary should bring the document before the directors at the next board meeting.

When brought before the board, if the shares are not fully paid, it is the business of the directors, where they have power to refuse transfers, to see that the transferee is a person who may reasonably be expected to be able to pay any calls that may be made; but if the shares are fully paid and the transferor is not indebted to the company, a transfer, properly executed, should be registered at once, except in cases where the directors are empowered to reject transfers to persons of whom they do not approve, and if not so registered the Court will, upon application under Section 43, rectify the Register, if necessary treating this as done at the time when the directors ought to have done it, as, for instance, making the registration operate as if effected before the liquidation, so as to relieve the transferor from being placed on the list of contributories,[2] or to enable him to dissent from a scheme of reconstruction,[3] or to relieve him from a call made after the transfer,[4] and the directors cannot by delaying registration enable the company to take a lien which would defeat the transfer.[5]

If the directors know that a transfer is made in breach of trust or in fraud of a person having equitable rights, they should not pass the transfer without notifying the person interested, and if they do they may come under a personal liability, although the company is not liable, being protected

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[1]Even the sending of this notice does not protect the company in case of their acting upon a forged transfer (Barton *v.* London and North Western Railway Co., [1890] 24 Q. B. D. 77).

[2]Nation's Case, [1866] 3 Eq. 77.

[3]Sussex Brick Co., [1904] 1 Ch. 598.

[4]Cawley & Co., [1889] 42 Ch. D. 209.

[5]McArthur, Limited *v.* Gulf Line, [1909] S. C. 732, Court of Sess.

by Section 35,[1] which forbids notices of trust being entered in the Register. Where after executing a transfer one of the transferors gave the company notice not to register it, Eve, J., held that it was the directors' duty to give the transferor notice that unless he took proceedings they would register the transfer, and where they had not done so ordered the company to register the transfer.[2]

Where a transfer has been passed by mistake, and the transferee's name entered in the Register, this may be corrected by the company, and the Register amended.[3] If the transferee proves not to be a responsible person, the Court will not rectify the Register by inserting his name, even though the board has delayed for a long time to make inquiries.[4]

If the Articles are silent, however, the directors cannot refuse to register a transfer.[5] When there is no express power of rejection the fact that the transferee of fully paid shares is insolvent is not alone sufficient cause for rejecting a transfer, nor the fact that the transfer is made with an indirect motive, as to increase the voting power of the transferor,[6] or even if it be made to a pauper with a view of the transferor escaping further liability upon his shares,[7] or is made to a person of small means as trustee for the real purchaser,[8] unless the transfer is only colourable,[9] or is made with some reservation of rights to or liabilities by the transferor,[10] when it can be refused or subsequently set aside as void, as may be done if the transfer is to a per-

[1]Societe Generale *v.* Tramways Union, [1885] 14 Q. B. D. 424.
[2]Grundy *v.* Briggs, [1910] W. N. 17.
[3]Anderson's Case, [1868] 8 Eq. 509.
[4]Shipman's Case, [1868] 5 Eq. 219.
[5]McKain *v.* Birkbeck Co., 7 O. L. R. 341.
[6]Moffatt *v.* Farquhar, [1878] 7 Ch. D. 591.
[7]De Pass's Case, [1859] 4 De G. & J. 544; Reg *v.* Lambourn Valley Railway, [1888] 22 Q. B. D. 465; Masters' Case, [1872] 7 Ch. 294.
[8]King's Case, [1871] 6 Ch. 196; Massey and Giffin's Case, [1907] 1 Ch. 582.
[9]Hyam's Case, [1860] 1 De G. F. & J. 75.
[10]Battie's Case [1870] 39 L. J. Ch. 391; Chinnock's Case [1860] Joh. 714.

son not capable of accepting it: *e.g.* an infant.[1] Equally, if the directors, having power to refuse a transfer, have been imposed upon, and so induced to accept the transferee as a shareholder, the transfer can subsequently be set aside, and the name of the transferor restored to the list of contributories.[2] A transfer to an infant or person of unsound mind should also be rejected.

The right of a shareholder to transfer his shares has recently been discussed at length in the Court of Appeal in England, and the following propositions laid down[3]:—"The regulations of the company may impose fetters upon the right of transfer. In the absence of restrictions in the Articles, a shareholder has, by virtue of the Statute (Section 30 of B.C. Act), the right to transfer his shares, without the consent of anybody, to any transferee, even though he be a man of straw, provided it is a *bonâ fide* transaction in the sense that it is an out-and-out disposal of the property, without retaining any interest in the shares.[4] . . . In the absence of restrictions it is competent to a transferor, notwithstanding that the company is *in extremis,* to compel registration of a transfer to a transferee . . . . . not competent to meet the unpaid liability on the shares, even if the transfer be for the express purpose of relieving the transferor from liability." In the same case the following rules are laid down.[5] A transfer may be set aside, even though the directors have no power to reject, when it is not an out-and-out transfer, reserving to the transferor no beneficial right to the shares, direct or indirect. Whether the transfer is of this character is a question of fact.[6] The

[1]Curtis's Case, [1868] 6 Eq. 455.
[2]Payne's Case, [1869] 9 Eq. 223; *ex parte* Kintrea, [1870] 5 Ch. 95.
[3]Discoverers' Finance Corporation, Lindlar's Case, [1910] 1 Ch. 316.
[4]See Weston's Case, [1868] L. R. 4 Ch. 20, 27.
[5]Discoverers' Finance Corporation, Lindlar's Case [1910] 1 Ch. 318.
[6]*Ibid* page 319.

transfer cannot be impugned merely on the ground that the transferor agrees to indemnify the transferee in whole or in part or to pay him for accepting the transfer,[1] or on the ground that as between the transferor and the transferee the latter may have some equity (*e.g.* on the ground of misrepresentation) to have the transaction set aside, for the liquidator cannot avail himself of this.[2]

If, however, the Articles contain a clause empowering the directors to reject a transferee of whom they do not approve, "the transferor cannot escape liability if he has actually by falsehood, or passively by concealment, induced the directors to pass and register a transfer (even though it be an out-and-out transfer) which if he had not so deceived or concealed they would have refused to register. Here, again, the question is one of fact. It is not sufficient to show that the transferee's address was incorrect, or that the description of his occupation was not accurate, or the like. The Court must arrive at the conclusion that therefrom resulted such a state of things as that if the directors had known the truth they would not have registered the transfer."[3]

There is a third class of case, namely, where "a transferor has obtained the advantage of executing and registering his transfer to a man of straw upon an opportunity obtained by him fraudulently or in breach of some duty which he owed to the corporation,"[4] *e.g.* by procuring the postponement of the winding up so as to enable him to put his transfer through, or inducing the directors to pass his transfer in breach of their duty. In such a case also the transfer may be set aside.

[1]Discoverer's Finance Corporation [1910] 1 Ch. page 319.

[2]*Ibid.* page 321, disapproving a contrary opinion of Parker, J., in the same company's case, [1908] 1 Ch. 141.

[3]*Ibid.* page 321.

[4]*Ibid.* page 322.

If the directors *bonâ fide* exercise their discretion to refuse a transfer within the powers given to them, the Court will not over-ride their decision or even compel them to state their reasons,[1] and this although their power to refuse is limited to particular grounds.[2] The fact that the transferee is already a member of the company does not prevent the directors from refusing to pass a transfer to him of further shares.[3] The power is a trust to be exercised for the benefit of the company;[4] and if the Articles give the company a lien on the shares of members indebted to it, the directors should refuse to register a transfer of shares subject to the lien till the debt is paid: otherwise the company loses its security.[5]

Upon a sale of shares the seller is only bound to execute a proper transfer and deliver it with the share certificate to the purchaser. He does not warrant that the company will accept the transferee.[6] If after a sale of shares the directors, acting within their powers, refuse to pass the transfer, the transferor remains on the Register, but becomes a trustee for the transferee, and must collect and pay over to the transferee the dividends as they accrue.[7] Where a vendor purported to sell shares by numbers and the company issued certificates bearing these numbers, but shares with these numbers were already registered in the names of third parties, it was held that there was a total failure of consideration, and the purchaser could recover the purchase money from the vendor.[8]

If the directors, acting to the best of their judgment, approve a transfer, they will not be responsible for any loss

[1] *Ex parte* Penney, [1873] 8 Ch. 446.
[2] Coalport China Co., [1895] 2 Ch. 404.
[3] Dublin North City Milling Co., [1909] 1 Ir. R. 179.
[4] Bennett's Case, [1854] 5 De G. M. & G. 284.
[5] Bank of Africa *v.* Salisbury Gold Co., [1892] App. Ca. 281.
[6] Skinner *v.* City of London Marine Corporation, [1885] 14 Q. B. D. 882.
[7] Stevenson *v.* Wilson, [1907] S. C. 445, Court of Sess.
[8] Platt *v.* Rowe, [1909] 26 T. L. R. 49.

which may arise from admitting an unsubstantial shareholder.[1] If they acted collusively with the person seeking to escape, it would be otherwise.[2]

Articles of private companies frequently contain clauses requiring the members desiring to make a sale to offer their shares in the first instance to other members, sometimes even fixing the price. Such provisions are valid, and will be enforced by the Courts.[3] Moreover, in such a case a sham offer to the other members will not suffice: *e.g.* where a man offered his shares to his co-members at £30, but contemporaneously sold them to a friend at £11, the Court of Appeal in England (in an unreported case) held[4] that he had not complied with the provisions of the Articles of Association.

The instruments of transfer should be numbered in consecutive order, and a record of their numbers and dates made in the Register of Members against the names of the transferors. They should be retained by the company as evidence of the transaction and of the transferees having undertaken to be bound by the regulations of the company, of which the company may at any time have to give proof.

A transfer in blank (*i.e.* where the name of the transferee is not filled in) is frequently given when the intention is to give a charge or mortgage upon the shares, or for other purposes. In these circumstances, where the regulations do not require that the transfer shall be by deed, there is an implied authority to the person receiving the transfer to fill in his own name or that of his nominee when the proper time comes,[5] and an obligation on the transferor to do

[1]Faure Electric Accumulator Co., [1889] 40 Ch. D. 141.

[2]*re* Peterboro Cold Storage Co., 9 O. W. R. 850.

[3]Borland's Trustee *v.* Steel Brothers & Co., [1901] 1 Ch. 279; Attorney-General of Ireland *v.* Jameson, [1904] 2 Ir. R., K. B. D. 644.

[4]On the same principles as guided the Court in Manchester Ship Canal Co. *v.* Manchester Race Course Co., [1901] 2 Ch. 37.

[5]*Ex parte* Sargent, [1874] 17 Eq. 273; France *v.* Clark, [1884] 26 Ch. D. 257.

nothing to hinder the completion of the title of the person whose name is inserted as transferee.[1] But if the holder improperly fills in his own name or that of another, the title to the shares does not pass; and equally if he hands the transfer still in blank to another, who fills it up, that other only has the rights which the first holder would have had: *i.e.* if the first holder be a mortgagee, the subsequent holder can only claim a mortgage on the shares; for, having received the transfer in blank, he has reason to believe that an absolute sale had not been made,[2] and this is equally the case if he had any other reason for knowing or believing that the shares were not properly transferred.[3]

On the other hand, if the holder received the shares upon a transfer which had been filled up apparently in due order, and took them for value without any notice of fraud or irregularity, and completed his title by registration, or by putting himself in a position to require immediate registration, his title is valid even against the person defrauded;[4] but until the title of the purchaser is thus completed that of the true owner prevails.[5]

A transfer in blank is not a complete security to the holder. If the transfer is by deed any subsequent alteration of or addition to the deed renders it void as a deed. It is, no doubt, still evidence of an agreement to transfer, and so gives the transferee an equitable title, but until the transferee has completed his legal title any person having an earlier or better equity can enforce it.[6] Notice to the com-

[1]Hooper *v.* Herts, [1906] 1 Ch. 549.

[2]France *v.* Clark, [1884] 26 Ch. D. 257; Williams *v.* Colonial Bank [1888] 38 Ch. D. 388; Fox *v.* Martin, [1895] W. N. 36, 64 L. J. Ch. 473.

[3]Sheffield *v.* London Joint Stock Bank, [1888] 13 App. Ca. 333; Nanney *v.* Morgan, [1888] 37 Ch. D. 346.

[4]Societe Generale *v.* Walker, [1886] 11 App. Ca. 20; Sheffield *v.* London Joint Stock Bank, [1888] 13 App. Ca. at page 345; Colonial Bank *v.* Hepworth, [1887] 36 Ch. D. 36. Smith *v.* Rogers, [1899] 30 O. R. 256.

[5]Ireland *v.* Hart, [1902] 1 Ch. 522.

[6]Ireland *v.* Hart, [1902] 1 Ch. 522; Societe Generale *v.* Walker, [1886] 11 App. Ca. 20. Hamilton *v.* Grant, 30 S. C. R. 566.

pany of an incomplete deed does not perfect the transferee's title so as to make it prevail over that of a person having a prior equity, for the company is precluded by Section 35 from taking notice of trusts.[1] Even when a deed is not required, it appears that if the original transferor died, the authority to fill in the blanks would be at an end,[2] although no doubt an equity would subsist to compel the executors to give effect to the contract; and if the transferor, in fraud of the first transferee, executes another transfer to a third person, who gets this deed registered, the latter's title prevails; but the company, if it has notice of the earlier transfer, should not register the latter.[3] In such a case it should give notice to the respective transferees, and require them to obtain a decision from the Court upon their rights.

Frequently the form of transfer is printed on the back of the certificate, and this being executed in blank is handed about as if the document were a share warrant to bearer, which to all intents and purposes it is. It is, howeven, a loose practice as, on the one part, if the company were a dividend paying concern the dividend warrants would be issued to the registered member who might be unable to trace its present holder, and *vice versâ* the holder, if he came to hear of the dividend, might be unable to trace the dividend warrant. On the other part, if the company went into liquidation and the shares were not fully paid the registered members, who might possibly have sold the shares years ago, would be placed on the list of contributories and find it difficult to ascertain the whereabouts of the party who in equity would be the contributory. Many other possible complications might be cited, but suffice it to say that

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[1]Societe Generale *v.* Walker, [1886] 11 App. Ca. 20.

[2]*Ex parte* Sargent, [1874] 17 Eq. 273; Powell *v.* London and Provincial Bank, [1893] 1 Ch. 612 and 2 Ch. 555; Kelly *v.* Munster and Leinster Bank, 29 L. R. Ir. 19. But see Carter *v.* White, [1884] 25 Ch. D. 666.

[3]Peat *v.* Clayton, [1906] 1 Ch. 659.

the transferee should at once send in the certificate and transfer to the office of the company for registration.

A forged transfer is no transfer, and gives the alleged transferee no rights, nor does such transferee acquire any rights by the simple fact of the company issuing to him a certificate stating that he is the holder of the shares which the transfer purports to assign.[1] But if any person has paid money or given valuable consideration, relying, not upon the forged transfer, but upon the company's certificate, the company is liable to make good, by way of damages, any loss which such person may have suffered.[2] The like result will follow if the transferee has been "put to rest" by the certificate, so as not to claim repayment of the purchase money from the vendor at a time when he might successfully have done so, the onus of proof that he cannot now recover being upon the transferee; but if the company desires to set up that he could not have got his money back at the time of the transfer, the onus of proving this is upon the company.[3] But in every case the person claiming relief must show that he has suffered loss by having been misled by the certificate.[4]

If the company, acting upon a forged transfer, remove the true owner from the Register and substitute the supposed transferee, it can be compelled to replace the true owner and restore him his shares, paying him also any dividends that may have been declared in the meanwhile;[5]

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[1]Simm *v.* Anglo-American Telegraph Co., [1879] 5 Q. B. D. 188.

[2]Bahia and San Francisco Railway Co., [1868] L. R. 3 Q. B. 584; Hart *v.* Frontino Co., [1870] L. R. 5 Ex. 111; Balkis Consolidated Co. *v.* Tomkinson, [1893] App. Ca. 396; Ottos Kopje Diamond Mines, [1893] 1 Ch. 618. See also the comments on these cases in Sheffield Corporation *v.* Barclay, [1903] 2 K. B. 580.

[3]Dixon *v.* Kennaway, [1900] 1 Ch. 833.

[4]Simm *v.* Anglo-American Telegraph Co., [1879] 5 Q. B. D. 211.

[5]Barton *v.* North Staffordshire Railway Co., [1888] 38 Ch. D. 458; Barton *v.* London and North Western Railway Co., [1890] 24 Q. B. D. 77.

but the company need not pay any compensation to the supposed purchaser.

A contract is to be implied on the part of the person lodging a transfer that he will indemnify the company if the document prove to be a forgery, and the broker who deposits the forged transfer in good faith is equally liable to the company for any loss it may suffer thereby;[1] also, if the forgery is discovered before the transferee has acquired rights by estoppel, the company may recover the certificate and remove the transferee's name from the Register.[2] So, if the broker represents that he has authority to act for the supposed transferor when in fact he has not, even if he is acting in good faith, he is liable upon an implied contract that he has authority,[3] and a person who identifies a transferor as being the person entitled to transfer is liable if it turns out that a fraud is being committed and a stranger is impersonating the owner of the shares.[4]

Transfers of stock or shares in any company may be stopped by any person interested in such stock or shares giving the company notice.

TRANSMISSION OF SHARES.

A transmission of shares occurs upon the holder dying, or being found a lunatic. The persons with whom the company must deal in such a case are the executors or administrators of a deceased shareholder, and the committee of a lunatic one, all of whom may be described by the words "the representatives of the former holder." When the shares pass to such representatives, the estate of the former holder remains entitled to any benefits and liable to pay any calls that are made until some person is put upon the Register as

[1] Sheffield Corporation *v.* Barclay, [1905] App. Ca. 392.
[2] *Per* Romer, L. J., in the Sheffield Corporation Case, [1903] 2 K. B. 594.
[3] Starkey *v.* Bank of England, [1903] App. Ca. 114.
[4] Bank of England *v.* Cutler, [1907] 1 K. B. 889.

the actual holder of the shares,[1] other than as executor, administrator, guardian, or trustee (Section 39), but such representative holders are not personally liable for calls, even if their names are upon the Register. The directors cannot reject an executor's claim to shares bequeathed by his testator, relying upon the Article which enables them to refuse transfers,[2] nor insist on entering them as holding the shares in a representative capacity.[3] They must also enter the names in the order desired by the executors.[3] But in the absence of express provisions in the Articles (such as those found in Table A, Clause 114) the representatives are not entitled to have any notices sent to them or to the deceased unless they have become members by formal registration.[4]

Whether the executors or other representatives have taken the shares into their own names or not, they can transfer them (Section 37). If in their own names, they will transfer as the registered holders; otherwise, they will transfer as executors or administrators, or as the case may be.

Sections 38, 39, and 40 of the Act are not found in the English Companies Act of 1908. They are special provisions of the Provincial Legislature, and are difficult to harmonise with Section 35 of the Act which enacts that no trusts are to be entered on the Register of shareholders.

Before any dividends are paid to or any transfers accepted from representative shareholders, their own title to the shares must be made out. A committee of a lunatic must prove his appointment as such, producing the Order of the Court. In the case of executors or administrators the probate of the will or the letters of administration should be

[1]James *v.* Buena Ventura Syndicate [1896] 1 Ch. 456; New Zealand Gold Extraction Co. *v.* Peacock, [1894] 1 Q. B. 622.
[2]Bentham Mills Spinning Co., [1879] 11 Ch. D. 900.
[3]T. H. Saunders & Co., [1908] 1 Ch. 415.
[4]Allen *v.* Gold Reefs of West Africa, [1900] 1 Ch. 656.

produced to the company, and the secretary should endorse the fact of their production upon those documents.[1] He should also make an entry in the Register of the death or lunacy of the shareholder, and of the names and addresses of the executors or administrators, or committee, or of the person to whom they transfer, whether legatee, next-of-kin, or purchaser.

On the death of a holder of partly paid shares it seems the company cannot intervene to prevent the distribution of the estate, unless a call has actually been made.[2]

Where several persons are registered as the joint holders of shares, and one dies, the survivors are entitled to the shares, but before dealing with them they should be required to produce evidence of the death of the former co-owner. This is usually done by the production of a copy of the certificate of death. If there is any discrepancy in the description, a statutory declaration of the identity of the shareholder with the person named in the certificate of death should also be produced.

CERTIFICATION OF TRANSFERS.

In conection with transfers of shares a system is in operation of which judicial notice has been taken, and which seems to require some words of explanation. It is the custom on the leading Stock Exchanges when shares are transferred for the transferor to hand over to his broker, with the instrument of transfer, the certificate of the shares transferred. Before passing the instrument of transfer to the purchaser's broker, the transferor's broker lodges the certificate at the company's office, and the secretary certifies the fact on the margin of the instrument of transfer, and

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[1] In New York Breweries *v.* Attorney-General, [1899] App. Ca. 62, the House of Lords held that a company recognising the title of foreign executors who had not taken out probate in England was liable to pay the probate duty and penalties.

[2] *Re*, King, Mellor *v.* South Australian Land Co., [1907] 1 Ch. 72.

such "certification" is accepted by the purchaser's broker as evidence that the transferor has a title to the shares mentioned in that instrument. The following is the form of certification commonly adopted:—

Certificate for shares, paid, has been lodged a the company's office.

The Company, Limited,

Date. Secretary.

If the share certificate includes more shares than are to be transferred, a "balance ticket" is usually handed to the broker for the remaining shares, to be exchanged later for a share certificate.

The certified transfer is then handed to the purchaser's broker to be executed by the purchaser, and lodged at the company's office with the prescribed transfer fee. In due course the transfer is passed by the board, entered up in the Register, and a new share certificate issued for the shares sold, and another certificate for those retained, which is supplied to the original member, his broker or agent, in exchange for the "balance ticket."

In cases where a broker or agent is not employed, the transferor and transferee should go through the same or a similar procedure.

In the case of Bishop *v.* Balkis Consolidated Co. (1890, 25 Q. B. D. 520), Lindley, L. J., said: "It is to the interest of every company to do what it can to assist its shareholders to deal with their shares in the way in which shares in other companies are ordinarily dealt with. . . . In my opinion, it is proved that to give 'certifications' is incidental to the transaction, in the ordinary business way, of part of the legitimate business of all companies having capital divided into shares which are transferable by deed or other instrument." It was further held in that case that if the certification were made by a proper officer of the company, the company would be bound to give effect to it

as if it were true, but that the certification was only a statement that a certificate was lodged, and did not amount to any representation that the proposed transferor had a good title, and the company was not bound to make good a loss arising from the invalidity of intermediate transfers. But if the certification, directly or by reference, states that a certificate of fully paid shares has been lodged, and on the faith of such certification the purchaser completes the purchase, it has been held that the company cannot subsequently make him liable for calls on the ground that the shares were not fully paid.[1]

The authority of the cases referred to has been much shaken by the judgment of the House of Lords in the case of George Whitechurch, Limited, *v.* Cavanagh,[2] where it was held that the company was not estopped by the certification of its secretary (no certificate having in fact been lodged), on the ground that "it cannot be supposed that a company authorises the secretary to do more than give a receipt for certificates that are actually lodged." But presumably an authority to bind the company by certification might be given expressly, and if so there does not appear to be any reason why such an authority should not be implied in cases where dealings in the shares would otherwise be difficult or impossible. In the case cited the House of Lords found as a fact that the secretary was not acting for the benefit of the company, but for a private object: it may therefore be questioned whether the decision would be binding in different circumstances.

Where a certificate of shares was in the possession of the company and the secretary duly certified a transfer, but afterwards by inadvertence handed the certificate to the

[1] *Re* Concessions Trust, [1896] 2 Ch 757.
[2] [1902] App. Ca. 117.

transferor, who fraudulently pledged it with third parties, it was held that the company was not liable to these third parties either for negligence or by estoppel, for it owed no duty to them, and the issue of the certificate was not the proximate cause of their loss.[1]

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[1]Longman v. Bath Electric Tramways, [1905] 1 Ch. 646.

CHAPTER VIII.

BORROWING.

GENERAL BORROWING POWERS.

BESIDES raising capital by means of shares, companies very frequently, either at the time of their incorporation or subsequently, raise money by borrowing. This may be done in various ways—by an ordinary unsecured loan, by making and discounting bills or promissory notes, by a mortgage on the property of the company, or by the issue of debentures. In all these cases it is necessary to see, first, whether the company has power to borrow; secondly, whether the directors have authority to exercise the company's borrowing powers without a resolution of the company; thirdly, whether there is any limit on the amount which may be borrowed, and, if so, whether that limit is reached; and, fourthly, whether the company or the directors have power to secure the repayment of the money borrowed by a mortgage or charge on all or any part of the assets of the company. For the answers to all these questions the Memorandum and Articles of Association must be carefully consulted.

If the Memorandum is silent, a power to borrow will not be implied "unless it be properly incident to the course and conduct of the business for its proper purpose." Thus a building society,[1] in the absence of an express power, cannot borrow at all; but a shipping company,[2] an omnibus company,[3] a colliery company,[4] and generally any trading company[5] has an implied power to borrow, even if the

[1]Blackburn Benefit Building Society *v.* Brooks, [1882] 22 Ch. D. 61. *re* Farmers Loan Co., 30 O. R. 337.

[2]Australian Auxiliary Steam Clipper Co. *v.* Mounsey, [1858] 27 L. J. Ch. 729, 5 K. & J. 733.

[3]Bryan *v.* Metropolitan Saloon Omnibus Co., [1858] 4 De G. & J. 123.

[4]Jackson *v.* Rainford Coal Co., [1896] 2 Ch. 340.

[5]General Auction Estate Co., *v.* Smith, [1891] 3 Ch. 432; Young *v.* David Payne & Co., [1904] 2 Ch. at page 612. Walmsley *v.* Rent Guarantee Co., 29 Gr. 484.

Memorandum and Articles are entirely silent on these points. Moreover, even a company which has not power to borrow may give a creditor rights similar to those which he could acquire by taking the company's property in execution, and accordingly without waiting for process may create a charge in favour of a creditor.[1]

When there is a power to dispose of the property of the company, it can be used to secure the debts of the company properly incurred (*i.e.* by borrowing, if authorised) by giving a mortgage over the property, unless the Memorandum expressly prohibits it.[2]

If the Memorandum or Articles of Association give a limited power to borrow and mortgage, there is an implied veto on borrowing or mortgaging beyond the limits set,[3] and if the directors borrow beyond the limits the securities issued are void.[4] And this was held to be so even in a case where the borrowing was originally *ultra vires,* but the company obtained power to borrow and then issued securities for the loans previously obtained.[5] However, even where the loan is unauthorised, lenders whose money has been used to pay off authorised loans may stand in the place of and enforce the remedies of those whose loans were so paid.[6] The directors of a company also may be personally liable in damages if they represented that they had authority to issue the debentures when they had not.[7]

But this distinction must be noted: If the borrowing is beyond the powers of the company (*e.g.* not justified by its

[1]Stagg *v.* Medway (Upper) Navigation Co., [1903] 1 Ch. 169.

[2]*Re* Patent File Co., [1871] L. R. 6 Ch. 83.

[3]Wenlock *v.* River Dee Co., [1885] 10 App. Ca. 354. Struthers *v.* MacKenzie, 28 O. R. 381.

[4]Howard *v.* Patent Ivory Co., [1888] 38 Ch. D. 156.

[5]*Ex parte* Watson, [1882] 21 Q. B. D. 301.

[6]Blackburn and District Benefit Building Society, [1885] 29 Ch. D. 902; Wenlock *v.* River Dee Co., [1888] 38 Ch. D. 534; Neath Building Society *v.* Luce, [1890] 43 Ch. D. 158.

[7]Firbank *v.* Humphreys, [1887] 18 Q. B. D. 54; Looker *v.* Wrigley, [1880] 9 Q. B. D. 397.

Memorandum), the loan and all securities for it are entirely void;[1] but if the borrowing is only beyond the powers of the directors, and the company could by altering its Articles of Association or otherwise have authorised the loan, then it is capable of being ratified by the company, and by acquiescence or otherwise may become valid.[2]

A lender is not bound to inquire for what purpose money is being borrowed,[3] but if he knows that the loan is for an illegitimate purpose he cannot recover the money lent,[4] and if a company is the lender the private knowledge of one of its directors will not be imputed to the lending company.[5]

If a company has power (express or implied) to borrow, it can create mortgages or charges to secure the repayment of the loan,[6] but if the power is express, any limitations contained in the power must be observed. Thus, if the Memorandum contains the necessary authority, the company can charge or mortgage all its property, of whatever nature, including even book debts not yet due,[7] and also its uncalled capital,[8] although this is, "strictly speaking, more in the nature of power than of property;[9]" but not capital which can only be called up in the event of a winding up as provided by Section 67.[10]

[1]Chapleo *v.* Brunswick Building Society, [1881] 6 Q. B. D. 696; Wenlock *v.* River Dee Co., [1885] 10 App. Ca. 354.

[2]Irvine *v.* Union Bank of Australia, [1877] 2 App. Ca. 366.

[3]Marseilles Extension Railway Co., [1872] 7 Ch. 161; Young *v.* David Payne & Co., [1904] 2 Ch. 608. If Davis's Case (1871, 12 Eq. 561) held the contrary, it is overruled by these cases.

[4]Davis's Case, [1871] 12 Eq. 561.

[5]Young *v.* David Payne & Co., [1904] 2 Ch. 608.

[6]*Re* Patent File Co., [1871] L. R. 6 Ch. 83; Australian Auxiliary Steam Clipper Co. *v.* Mounsey, [1858] 27 L. J. Ch. 729; Bryan *v.* Metropolitan Saloon Omnibus Co., [1858] 3 De G. & J. 123.

[7]Illingworth *v.* Houldsworth, [1904] App. Ca. 353; Bloomer *v.* Union Coal Co., [1873] 16 Eq. 383; compare Tailby *v.* Official Receiver, [1889] 13 App. Ca. 523.

[8]Newton *v.* Anglo-Australian Investment Co., [1895] App. Ca. 244.

[9]Bank of South Australia *v.* Abrahams, [1875] L. R. 6 P. C. 271.

[10]Bartlett *v.* Mayfair Property Co., [1898] 2 Ch. 28.

A power to mortgage "assets,"[1] or "property and rights,"[2] or a power to borrow on mortgage of "property and effects, or in such other manner as the company may determine,"[3] includes uncalled capital,[4] except as above mentioned. But a power to charge "property," or "property and funds,"[5] or "real and personal estate,"[6] or "property and effects,"[7] or "undertaking and property, present and future,"[8] does not authorise a charge on uncalled capital, unless the Articles of Association treat the uncalled capital as part of the property chargeable.[9] A power to borrow money on a mortgage of its undertaking authorises a company to charge a part of its property: *e.g.* its barges.[10]

The security need not be given at the time the loan is made, for a company may give existing creditors security for their debts, such as a bill of sale,[11] a mortgage,[12] or debentures.[13]

If the Memorandum or Articles of Association give a borrowing power, and do not restrain the exercise of it by the directors, the directors, acting on their general power to conduct the business, can borrow and mortgage without any further authority from the company.

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[1]Page *v.* International Agency, [1893] W. N. 32, 68 L. T. 435.

[2]Howard *v.* Patent Ivory Co., [1888] 38 Ch. D. 156; *re* Pyle Works, [1890] 44 Ch. D. 534.

[3]Jackson *v.* Rainford Coal Co., [1896] 2 Ch. 340.

[4]Phoenix Bessemer Steel Co., [1875] 44 L. J. Ch. 683.

[5]Bank of South Australia *v.* Abrahams, [1875] L. R. 6 P. C. 265; Stanley's Case, [1866] 4 De G. J. & S. 407.

[6]Colonial Trusts Corporation, [1880] 15 Ch. D. 465.

[7]Sankey Brook Coal Co., No. 2, [1871] 10 Eq. 381.

[8]*Re* Streatham Estates Co. [1897] 1 Ch. 15; Johnson *v.* Russian Spratt's Patent, [1898] 2 Ch. 149.

[9]Hume *v.* Drachenfels Banket Gold Mining Syndicate, [1895] 2 Mans. 146.

[10]Reeve *v.* Medway (Upper) Navigation Co., [1905] 21 T. L. R. 400.

[11]Shears *v.* Jacob, [1866] L. R. 1 C. P. 513; Deffell *v.* White, [1867] L. R. 2 C. P. 144.

[12]*Re* Patent File Co., [1871] L. R. 6 Ch. 83; Australian Auxiliary Steam Clipper Co. *v.* Mounsey, [1858] 4 K. & J. 733, 27 L. J. Ch. 729.

[13]Landowners &c. Co. *v.* Ashford, [1880] 14 Ch. D. 11; Howard *v.* Patent Ivory Co., [1888] 38 Ch. 56; Seligman *v.* Prince, [189 5] 2 Ch. 617.

A company can borrow money and incur debts in any manner in which an individual can do so.

A company may make bills of exchange and promissory notes for the purpose of obtaining credit if it has power in its Memorandum so to do, or if its business is such as to make the use of bills necessary, but not otherwise,[1] and when it has this power the bills or notes may be signed by any person authorised by the company. If when the company has not this power the directors purport to make bills on its behalf, they will be personally liable to a *bonâ fide* holder for having represented that they had an authority they did not possess,[2] unless the want of authority appears from the Memorandum or Articles. Holders of bills and notes of a company are unsecured creditors, and in a winding up would receive a dividend with the ordinary creditors.

An overdraft from bankers is a borrowing, and is legitimate if the company has borrowing powers; but if these are limited, the amount of the overdraft must be counted in estimating the amount the company has borrowed.[3] A banker has a lien upon his customers' securities deposited with him for overdrafts,[4] unless the securities are deposited for some specific purpose,[5] and could avail himself of this lien against a company as well as against any other client. Stock brokers also have a general lien on securities held by them for clients.[6] But in the case of either bankers or brokers the express terms of the deposit may negative or

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[1]Bateman *v.* Mid-Wales Railway Co., [1866] L. R. 1 C. P. 499; *re* Peruvian Railways Co., [1867] L. R. 2 Ch. at page 622.

[2]West London Commercial Bank *v.* Kitson, [1884] 13 Q. B. D. 360.

[3]Looker *v.* Wrigley, [1880] 9 Q. B. D. 397; Brooks *v.* Blackburn Benefit Building Society, [1885] 9 App. Ca. 865, 868.

[4]Bock *v.* Gorrisen, 2 De G. F. & J. 434; London Chartered Bank *v.* White, [1879] 4 App. Ca. 422; Jones *v.* Peppercorne, [1859] Joh. 430.

[5]Brandao *v.* Barnett, [1846] 12 Cl. & F. 787; Leese *v.* Martin, [1873] 17 Eq. 224.

[6]London and Globe Finance Corporation, [1902] 2 Ch. 416; Jones *v.* Peppercorne, [1859] Joh. 430.

limit the implied right to a lien.[1] A pledge of securities gives a power of sale on default of payment at the due date, or, if no date for payment is fixed, after notice.[2]

A company having power to borrow and mortgage may make an ordinary mortgage of its real or personal property without issuing debentures. A pretended sale which is really a disguised borrowing will be treated as a borrowing, and will not give the pretended purchaser any better security than a mortgage.[3]

Public companies registered since the 1st July, 1910, may not exercise any borrowing powers until the time when they are authorised to commence business, as to which see page 113, *supra* (Section 96).

Borrowing on Debentures.

The most usual form of borrowing by a company is on debentures. These are bonds given under the seal of the company, and evidence the fact that the company is liable to pay the amount specified, with interest, and generally charge the payment of it upon the property of the company. They are usually issued for sums varying from $100 upwards, and are offered to the public by means of a prospectus in the same manner as shares. The applications for and allotments of debentures are similar to those in the case of shares; but, as a debenture holder is a creditor, and not a member of the company, widely different results follow.

Although moneys raised by debentures or on loan are capital moneys, they do not form part of the share capital of the company, but are a loan to and a debt due from the company, and interest is payable whether there are or are not profits. Debentures are the bonds or deeds which

[1]Wilde *v.* Radford, [1864] 33 L. J. Ch. 51; *re* Bowes, [1886] 33 Ch. D. 586.
[2]Deverges *v.* Sandeman, [1902] 1 Ch. at page 593; Donald *v.* Suckling, [1870] L. R., 1 Q. B. 604.
[3]Old Bush Mills Distillery, *ex parte* Bank of Ireland, [1896] Ir. R. 301; Coveney *v.* Persse, [1910] 1 Ir. R. 194.

evidence the loan, and, if they purport to give a charge, create the security for its repayment. The question whether a company has power to issue debentures accordingly depends upon whether it has power to borrow money; and the question whether it has power to create a charge by the debentures or by a trust deed, and what assets it may charge, depends upon the powers of the company to secure the repayment of borrowed money by mortgaging all or some part of its assets. This matter has been already considered.

Although debentures are well-known instruments in the mercantile world, there is, strangely enough, no complete legal definition of them, nor are they defined in the Companies Act. It has been said by Chitty, J., that "a debenture means a document which either creates a debt or acknowledges it, and any document which fulfils either of these conditions is a debenture."[1] But this is probably too wide a definition.

Debentures may be either (A) a mere promise to pay, or (B) a promise to pay secured by a mortgage or charge. The mortgage or charge may be created by words in the debenture itself, or by a deed to the benefit of which the debenture holders are declared to be entitled, or by a combination of these two methods. Debentures, moreover, may be payable to the registered holder and those persons to whom he assigns, or to the bearer, in which latter case they pass by delivery.

A would-be subscriber for or purchaser of a debenture should therefore inquire carefully what sort of debenture he gets for his money. If it is not a mortgage debenture, the holder will only be able to prove in a winding up with other creditors, and the holder of such a debenture cannot prevent the company from making mortgages or charges which will rank in priority to his claim. If it is a mort-

[1]Levy *v.* Abercorris Slate Co., [1888] 37 Ch. D. 264. Bank of Toronto *v.* Cobourg Ry. Co., 7 O. R. 1.

gage debenture, it should be ascertained whether the charge is fixed or only a floating one, and whether the company has any property worth seizing: *e.g.* a tramway line where the venture is worked at a loss is not worth the price of old iron. A purchaser should also see that a copy of the Registrar's certificate of registration is endorsed on the debenture (see page 209, *infra*).

Fixed and Floating Charges.

The charge created by a debenture may be either "fixed" or "floating." When the charge is fixed it affects the title to the property, and the company can only deal with the property affected subject to the charge. But when the charge is a "floating" one the company may, in the ordinary course of its business, deal with the property covered by the charge, mortgaging, selling, disposing of it, or using it up as the business requires, at any time before the charge attaches.[1] What is "the ordinary course of business" will vary with the character of the company, and where the company is not a trading company a specific charge may be created ranking in priority to a floating charge for the purpose of raising money for the general objects of the company.[2] Even after the event has happened which entitles the debenture holder to intervene, the charge remains a floating one if he allows the company to continue to use the property charged in its business.[3] The debenture holder has under his floating charge an immediate equity or charge on the property, but the company has the benefit of a licence or right to deal with the property charged in the course of its business until the charge attaches as a fixed charge, or, as it is often called,

[1]Florence Land Co., [1879] 10 Ch. D. 530; Wheatley *v.* Silkstone &c. Coal Co., [1885] 29 Ch. D. 715; Hamilton's Windsor Ironworks, [1879] 12 Ch. D. 707; Colonial Trusts Corporation, [1879] 15 Ch. D. at page 472

[2]Coxmoore *v.* Peruvian Corporation, [1908] 1 Ch. 604.

[3]Edward Nelson & Co. *v.* Faber, [1903] 2 K. B. 376.

"crystallises." This does not occur immediately on the happening of the events which entitle the debenture holder to intervene, for "unless something has occurred entitling the debenture holders to make such an application" (*i.e.* an application to the Court for a receiver), "and the application has in fact been made, or an action brought by them or on their behalf to realise their security, or unless something has happened which entitles the debenture holders to determine their licence to the company to carry on their business, and they have actually done so, the company is entitled to do all the things which the licence entitles them to do."[1] A company having several branches may, notwithstanding debentures may have been issued, sell the whole of the business of one branch,[2] or even the whole of its undertaking, provided such sale is within the powers contained in the Memorandum of Association.[3]

"Floating" charges are recognised by the Act, and must be registered with the Registrar (Section 102, Sub-section 1 (*f*)).

To avoid the risk of being postponed to future charges by the creation of fixed mortgages on all or part of the property of the company, it has become common in the case of floating charges to insert a declaration that the company shall not have power to mortgage the property in priority to or equally with the charge created by the debentures, which will in general secure the priority of the debentures; but even in such a case the security may be defeated by a sale,

[1]Evans *v.* Rival Granite Quarries, [1910] 2 K. B. 979; *per* Vaughan Williams, L. J., at page 986. At page 993, Fletcher Moulton, L. J., says: "Mere default on the part of the company does not change the character of the security; the debenture holder must actually intervene." At page 1002, Buckley, L. J., says: "No equity arises in a debenture holder whose security is a floating charge, from his merely giving notice to seize a particular asset of the company. He must do something to turn his security from a floating into a fixed charge."

[2]Metropolitan Bank of England and Wales *v.* Vivian & Co. [1900] 2 Ch. 654.

[3]*Re* Borax Co., [1901] 1 Ch. 326.

even though it contain an option to the purchaser to require a re-purchase by the company,[1] or the security may become postponed to some extent to the claims of others, for until the charge becomes fixed a garnishee can obtain execution,[2] or a landlord may distrain,[3] or the lien of a solicitor may attach and obtain precedence,[4] and a creditor can set off a debt due from the company to him against one due from him to the company, although the latter is secured by second debentures expressed to be subject to the floating charge,[5] and while the charge remains an equitable one a subsequent mortgagee who completes his title by getting in the legal estate or giving notice to the debtors obtains priority if at the time of making his advance he did not know of the earlier charge,[6] or did not know that the earlier floating charge contained a provision forbidding the creation of prior specific mortgages.[7] A subsequent lender, who has no notice of the debentures, or of the fact that they forbid prior charges, taking a deposit of the title deeds, may also obtain priority, under the doctrine that where the mortgagor has ostensible authority to deal with the property all dealings with a *bonâ fide* mortgagee are valid.[8]. Even taking second

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[1]Coveney *v.* Persse, [1910] 1 Ir. R. 194. But this must not be a mere pretended sale which is in reality a mortgage (same case, and Old Bush Mills Distillery, *ex parte* Bank of Ireland, [1896] Ir. R. 301).

[2]Evans *v.* Rival Granite Quarries, [1910] 2 K. B. 979; Robson *v.* Smith, [1895] 2 Ch. 118. Where a sheriff, having seized property of the company, received payments on the terms that he should not sell, he was held entitled to retain these sums against a receiver subsequently appointed (Robinson *v.* Burnell's Vienna Bakery, [1904] 2 K. B. 624); but if the debenture holders intervene before the garnishee obtains his money, they will be preferred (Norton *v.* Yates, [1906] 1 K. B. 112).

[3]Roundwood Colliery Co., [1897] 1 Ch. 373.

[4]Brunton *v.* Electrical Engineering Corporation, [1892] 1 Ch. 434.

[5]Edward Nelson & Co. *v.* Faber, [1903] 2 K. B. 367.

[6]English and Scottish Trust *v.* Brunton, [1892] 2 Q. B. 1, 700; Coveney *v.* Persse, [1910] 1 Ir. R. 194.

[7]Standard Rotary Machine Co., [1906] 95 L. T. 829; Valletort Laundry Co., [1903] 2 Ch. 654.

[8]*Re* Castell and Brown, [1898] 1 Ch. 315; Perry Herrick *v.* Attwood, [1858] 2 De G. & J. 21.

debentures which contain a reference to the first debentures is not notice of the contents of the first debentures.[1]

The rights of debenture holders under a floating charge to the property comprised in their security take precedence over those obtained by an execution creditor, even after a sale by the sheriff, so long as the money remains in his hands;[2] but where money has been paid to the sheriff on the terms that he shall not sell the property seized, he has been allowed to retain this against the receiver.[3] If an execution is put in, or garnishee order obtained, the trustees or debenture holders ought at once to give the sheriff notice to withdraw, or to the debtor not to pay the garnishor, for if the security becomes a fixed one before the goods are sold or the debt paid the debentures will prevail.[4]

The equities of the debenture holder entitle him to oust the sheriff after he has seized if the security has crystallised before he has sold,[5] or to deprive the garnishor of his advantage if the crystallisation of the security has taken place before he has collected the money,[6] but if the debenture security is allowed to continue to float the execution creditor's or garnishor's right will prevail, and a garnishee order *nisi* will be made absolute notwithstanding the opposition of the debenture holder or a claim made by him on the debtor to pay the money direct to the debenture holder,[7] for a debenture holder cannot single out and take a particular

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[1] Valleto [illegible] Laundry Co., [1903] 2 Ch. 654.

[2] *Re* Opera, Limited, [1891] 3 Ch. 260; Taunton *v.* Sheriff of Warwickshire, [1895] 1 Ch. 734.

[3] Robinson *v.* Burnell's Vienna Bakery, [1904] 2 K. B. 624.

[4] Davey *v.* Williamson, [1898] 2 Q. B. 194, as explained in Evans *v.* Rival Granite Quarries, [1910] 2 K. B., at page 1000.

[5] Opera, Limited, [1891] 3 Ch. 260; Davey *v.* Williamson, [1898] 2 Q. B. 195; Duck *v.* Tower Co., [1901] 2 K. B. 314.

[6] Norton *v.* Yates, [1906] 1 K. B. 112.

[7] Evans *v.* Rival Granite Quarries, [1910] 2 K. B. 979.

debt or piece of property while allowing the company to trade with the rest of its assets.[1]

Cases of considerable hardship have occurred where debenture holders have allowed a company to trade on credit, and have applied for a receiver only when the trade creditors were seeking to enforce their rights; but the rule that an execution creditor or garnishor takes subject to all equities affecting the debtor is well established,[2] and the Court has been compelled to appoint a receiver, who takes possession of all the assets and leaves the unsecured creditors unsatisfied.[3] The position of an execution creditor garnishing a debt owing to a company is not a favorable one, for if the debenture security has attached, not only is he postponed to debentures already issued,[4] whether a receiver has or has not been appointed at the time his order is made absolute,[5] but even after the service of the garnishee order absolute on the company it can, for good consideration, issue debentures which take priority over the rights of the garnishor.[6]

It is usual and convenient, therefore, to create the security in such manner that the lands and immoveable property of the company are covered by a fixed charge (usually contained in a trust deed), while the stock-in-trade, chattels, and book debts of the company and its future property are included in a floating charge. The debentures usually specify in what events (such as liquidation, default in payment of principal or interest for a stated period, etc.) the charge is to be enforceable, and in interpreting these the Court will always lean against treating the charge on goods required for the business as being fixed while the business is

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[1] Robson *v.* Smith, [1895] 2 Ch. 118; approved by C. A., [1910] 2 K. B. 989 to 1000

[2] Standard Manufacturing Co., [1891] 1 Ch. 627, 641; Opera, Limited, [1891] 3 Ch. 260.

[3] London Pressed Hinge Co., [1905] 1 Ch. 576.

[4] Norton *v.* Yates, [1906] 1 K. B. 112.

[5] Cairney *v.* Back, [1906] 2 K. B. 746.

[6] Geisse *v.* Taylor, [1905] 2 K. B. 658, Div. Court (Kennedy, J., doubting).

going on,[1] for where an intention appears that the company should receive and deal with the property charged it is assumed that only a floating security is intended.[2]

The principal tests whether a charge is floating were given by the English Court of Appeal as follows:—First, if it is a charge upon all of a certain class of assets, present and future; secondly, if the assets charged would in the ordinary course of business be changing from time to time; and, thirdly, if expressly or by necessary implication the company has the power, until some step is taken by the debenture holders or trustees, of carrying on its business is the ordinary way so far as regards the assets charged.[3]

Redemption of Debentures.—Irredeemable Debentures.

Debentures may be for a fixed term of years, or repayable on notice, or irredeemable[4] (Section 111). Perpetual or irredeemable debentures are in effect the granting of an annuity in perpetuity to the holder, and special power should be taken in the Memorandum if it is desired to create annuities.

Under the ordinary law any provision in a debenture or trust deed which amounts to a clog or fetter upon the company's power to redeem the property charged is void in the case of a company as completely as in the case of an individual. Thus, where a company deposited debentures with a provision that the lender might at any time within twelve

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[1]Government Stock Investment Co. *v.* Manila Railway, [1897] App. Ca. 81; Evans *v.* Rival Granite Quarries, [1910] 2 K. B. 979.

[2]Illingworth *v.* Houldsworth, [1904] App. Ca. 355.

[3]Houldsworth *v.* Yorkshire Woolcombers' Association, [1903] 2 Ch. 284, affirmed in the House of Lords *sub nom.* Illingworth *v.* Houldsworth, 1904] App. Ca. 355, where it was held that a general charge on book debts, present and future, was a floating charge, although not expressed to be so, and required registration under the Act.

[4]"Irredeemable" may mean, if the context so requires, "not liable to be called in," as well as "such that the company cannot claim to redeem the stock" (Wellby *v.* Stocks, [1909] 26 T. L. R. 41).

months purchase the debentures at forty per cent. of their face value, the provision was held bad.[1]

Even if there is no express statement to that effect, the principal moneys will become payable upon the company going into liquidation,[2] and the charge will attach on the property as it exists at that time:[3] that is to say, the property can no longer be dealt with except subject to the charge. The right of the debenture holder to enforce his security also attaches if the company parts with the whole, or substantially the whole, of its undertaking and ceases to be a going concern,[4] unless such a sale is authorised by its Memorandum of Association,[5] but not if a company having several branches sells the undertaking of one branch only.[6]

Debentures to Bearer.

Debentures payable to bearer are very common. According to the general law a debt cannot be assigned by delivery of the document which creates or evidences the debt; but there is an exception in certain cases where the law merchant makes such an assignment valid (*e.g.* in the case of a bill of exchange); and it has been held by Kennedy, J., and Bigham, J., that the custom to treat debentures to bearer as negotiable by delivery is sufficiently proved to take effect under the law merchant, of which custom judicial notice will now be taken without express evidence;[7] and even

[1] Samuel *v.* Jarrah Timber Corporation, [1904] App. Ca. 323. As to what constitutes a clog on the equity of redemption see Noakes *v.* Rice, [1902] App. Ca. 24; Lisle *v.* Reeve, [1902] App. Ca. 461; Bradley *v.* Carritt, [1903] App. Ca. 253; and Briggs *v.* Hoddinott, [1898] 2 Ch. 307.

[2] Wallace *v.* Universal Automatic Co., [1894] 2 Ch. 547. But the proposition is disputed by some authorities.

[3] Panama Mail Co., [1870] 5 Ch. 318; Colonial Trusts Corporation, [1880] 15 Ch. D. 465; Wallace *v.* Universal Automatic Co., [1894] 2 Ch. 547.

[4] Hubback *v.* Helms, [1887] 56 L. J. Ch. 536.

[5] *Re* Borax Co., [1901] 1 Ch. 326.

[6] Metropolitan Bank of England and Wales *v.* Vivian & Co., [1900] 2 Ch. 654.

[7] Bechuanaland Exploration Co. *v.* London Trading Bank, [1898] 2 Q. B. 658; Edelstein *v.* Schuler & Co., [1902] 2 K. B. 144.

without reference to the law merchant it had previously been held that, by a doctrine of estoppel, a company may be prevented from denying its liability to pay a debenture if it has invited persons to accept a transfer by delivery, and has held out or represented that the debenture so transferred gives the bearer a right to be paid; and equally that a declaration in the debenture that the delivery of the bond to the company will be a valid discharge to it, for payment will bind the original and intermediate holders. The cases which deal with this subject are numerous: some of the most important are referred to in the foot-note.[1] Debentures can accordingly be framed so as in effect to be payable to bearer.

Debenture Stock.

Debenture stock is of the same nature as ordinary debentures,[2] except that, instead of each bond securing a definite amount, the whole sum secured is treated as a single stock, and certificates are issued declaring the holder to be entitled to a definite sum, part of the stock. This sum is not necessarily a round sum, but may be for any number of dollars, and may include fractions of a dollar unless express limitation is made in that respect. The debenture stock may be repayable at a fixed date, or may be irredeemable, according to the deed creating it, and may be secured in any manner in which a debenture may be secured. The loans of railway companies under the special Statutes governing such companies are almost invariably in the form of stock, and are usually perpetual.

[1] *Re* Agra and Masterman's Bank, [1867] 2 Ch. 397; *re* Blakeley Ordnance Co., [1868] 3 Ch. 154; Natal Investment Co., [1868] 3 Ch. 361; *re* Imperial Land Co., [1871] 11 Eq. 487; Goodwin *v.* Roberts, [1876] 1 App. Ca. 476; Eaglesfield *v.* Londonderry, [1877] 4 Ch. D. 693; Romford Canal Co., [1883] 24 Ch. D. 85. The case of Crouch *v.* Credit Foncier (1873, L. R. 8 Q. B. 385) must now be taken to be overruled. Geddes *v.* Toronto Rly. Co., 14 C. P. 513. Gott *v.* Gott, 9 Gr. 165. Young *v.* McNider, 25 S. C. R. 272. Pairish *v.* McFarlane, 14 S. C. R. 738.

[2] Debenture stock passes under a bequest of "all my debentures" (Morrice *v.* Aylmer, [1875] L. R. 7 H. L. 717; Murray *v.* Herring, [1908] W. N. 153)

Debenture stock is often made to be irredeemable, following the practice in the case of railway companies in this respect; but sometimes the division of the principal money into stock instead of fixed amounts is effected, although repayment is to be made in the same manner as with ordinary debentures.

Interest on Debentures.

The interest on debentures is a debt, and is payable whether there are or are not profits, and although such interest is usually to be charged against income account before arriving at the profit for the year, interest paid on capital borrowed for constructing works may during the period of construction properly be added to the capital and treated as part of the cost of construction.[1]

It is usually declared that if default is made in paying interest for a specified time the principal shall become immediately payable.

Sometimes, however, interest is declared to be payable only out of profits, in which case the company must apply all available profits for this purpose, and not set aside any part as reserve until the interest is paid in full.[2] Such debentures are usually called "income bonds."

When a receiver is appointed the moneys available are applied, first, in paying interest due, and the balance in repaying the capital, although, if the debenture holders so require, they may have the moneys received applied in repaying capital in the first instance.

Where three companies, each having power to borrow on debentures, purported to issue debentures jointly, charged on all their respective properties, it was held that each

[1]Hinds *v*. Buenos Ayres Grand National Tramways, [1906] 2 Ch. 654.
[2]Heslop *v*. Paraquay Central Railway, [1910] 54 Sol. J. 234.

company was liable only to the amount it had actually received, and the debentures were void as to the balance.[1]

Issue of Debentures.

A public company registered since 1st July, 1910, may not exercise the right to borrow money or issue debentures until it is entitled to commence business (Section 96: see page 113, *supra*).

The issue of debentures is made by the directors, who cause the seal of the company to be affixed to the documents, and deliver them to the allottees when the full amount is paid to the company. Debentures sealed but not delivered are not "issued."[2] But the word "issue" has not a technical meaning, and debentures agreed to be issued will be treated as issued.[3]

Section 101 requires that the debentures or certificates of debenture stock shall be complete and ready for delivery within two months after allotment or registration of any transfer.[4]

The applications for and allotment of debentures are usually made in the same manner as in the case of shares; but the provisions of the Act as to a minimum subscription in case of shares do not apply to an issue of debentures.

The same rules apply in the case of shares and debentures for ascertaining when the contract for the issue is complete, with the exception, however, that contracts relating to mortgage debentures are not binding unless in writing, for the mortgage creates an interest in land, and so

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[1]Johnston Foreign Patents Co., [1904] 2 Ch. 234.

[2]Mowatt *v.* Castle Steel and Iron Works, [1887] 34 Ch. D. 58; Levy *v.* Abercorris Slate and Slab Co. [1887] 37 Ch. D. 260; Derby Canal Co. *v.* Wilmot, [1808] 9 East 360.

[3]Perth Electric Tramways, [1906] 2 Ch. 216; citing Levy *v.* Abercorris Slate and Slab Co., [1887] 37 Ch. D. 264.

[4]For penalty in case of default see page 131, *supra*.

brings the transaction within the Statute of Frauds. Shares,[1] on the other hand, are personal property.

Section 113 makes a contract with a company to take up and pay for debentures of the company enforceable by an order for specific performance. Besides this, the position of an applicant for debentures who makes default in paying up the balance is not a good one. As he is not willing to perform his part of the bargain, it seems that he has no right to compel the company to carry out the contract by giving him security or paying him interest, and it is doubtful if he can even recover his principal.[2] Where a loan has been made, specific performance of the agreement to give security will be decreed,[3] and an agreement to issue debentures for money paid creates a charge, although the debentures are not actually issued.[4]

Debentures must be executed and issued in accordance with the regulations of the company, and if any irregularity is apparent on the face of them their validity will be affected, but if apparently in order the holder need not inquire whether all formalities have been complied with.[5] A provision in the Articles of Association that irregularities shall not affect the debentures will protect a *bonâ fide* holder of a debenture issued under such circumstances that the holder might have discovered the irregularity.[6]

Where debentures are issued creating a charge, it is almost always the custom to declare expressly that the

[1]Driver *v.* Broad, [1893] 1 Q. B. 539, 744.
[2]Bass *v.* Clivley, [1829] Tamlyn 80.
[3]Hermann *v.* Hodges, [1873] 16 Eq. 18.
[4]Strand Music Hall, [1865] 3 D. G. J. & S. 147; Pegge *v.* Neath Tramways, [1898] 1 Ch. 183; *re* Queensland Land and Coal Co., [1894] 3 Ch. 181; Simultaneous Printing Syndicate, [1901] 1 K. B. 171; Perth Electric Tramways, [1906] 2 Ch. 216.
[5]County of Gloucester Bank *v.* Rudry Merthyr Co., [1895] 1 Ch. 629; Romford Canal Co., [1883] 24 Ch. D. 85. This will not render a company liable on a *forged* debenture (Ruben *v.* Great Fingall Consolidated Co., [1904] 2 K. B. 712, [1906] App. Ca. 439).
[6]Davies *v.* R. Bolton & Co., [1894] 3 Ch. 678.

charges created by all the debentures of the series are to rank equally, and without priority one over another. If this is omitted, each debenture creates a charge ranking in priority to all others issued subsequently, but postponed to all issued before it.[1]

Unlike shares, debentures may be issued at a discount: *e.g.* a debenture for $100 may be issued in consideration of $95 advanced to the company, the effect of the discount being in effect an addition to the interest paid,[2] and commission may be paid to underwriters or others for placing or guaranteeing the taking up of debentures. But a provision that debentures issued at a discount may be exchanged for fully paid shares at par is illegal and void,[3] and equally bonus shares must not be given to subscribers for debentures. If they are given, the holder will be liable for calls.[4]

If a commission is paid or discount allowed in respect of debentures, the total amount must be stated in the Annual Summary filed next after making the payment or allowance, and the amount remaining unwritten off must be stated in each balance sheet of the company (Section 99), and a statement of the amount or rate of the commission or discount included in the particulars filed with the Registrar under Section 34, but failure to comply with this provision will not affect the validity of the debentures. The amount of commission payable for placing debentures, or which has been paid during the preceding two years, will also need to be stated in every prospectus (Section 90, Sub-section 1 (*h*)).

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[1]Gartside *v.* Silkstone Co., [1882] 21 Ch. D. 762; Howard *v.* Patent Ivory Co., [1888] 38 Ch. D. 156, 171; Lister *v.* H. Lister & Sons, [1893] 68 L. T. 826.

[2]Anglo-Danubian Steam Co., [1875] 20 Eq. 339; Campbell's Case, [1877] 4 Ch. D. 470; Webb *v.* Shropshire Railway Co., [1893] 3 Ch. 307.

[3]Moseley *v.* Koffyfontein Mines, [1904] 2 Ch. 108.

[4]Welton *v.* Saffery, [1897] App. Ca. 299.

It is a common practice to issue debentures repayable with a premium: *i.e.* a debenture of $100 is only to be satisfied by paying, say, $105. In such a case the limit (if any) of the borrowing power must be carefully considered to see that the limit is not exceeded: *e.g.* if the words be, "Provided that the amount secured shall not exceed $10,000," the bonus must be included in estimating the amount secured.[1] But it would seem that if the words be, "Provided that the amount borrowed shall not exceed $10,000," the bonus need not be included. On the other hand, it is not uncommon to issue debentures at a premium: *e.g.* a debenture for $100 is only issued on payment of $105. It is submitted that in such a case, if the words of limit are, "The amount raised or borrowed shall not exceed $10,000," the premium forms part of the amount raised; and this inference would be stronger if, in addition, the debenture is only repayable at $105 or more, for in such a case the real transaction is that $105 is borrowed and will be repaid, although interest is only payable on $100.

Debentures may be issued in respect of an existing debt,[2] and even where there is no power to mortgage the company may give to a creditor who is in a position to levy execution a charge to secure his debt.[3] Title deeds or debentures may also be deposited to secure an existing debt.[4]

Debenture stock, says Lord Lindley, "can be mortgaged as well by the company which issues it as by an ordinary holder;"[5] that is to say, debentures may be deposited as security for a loan to a larger nominal amount than the loan. In such a case the holders rank for dividend upon the

[1]Rowell & Son *v.* Commissioners of Inland Revenue, [1897] 2 Q. B. 194.
[2]Howard *v.* Patent Ivory Co., [1888] 38 Ch. D. 169; Seligman *v.* Prince, [1895] 2 Ch. 617.
[3]Stagg *v.* Medway (Upper) Navigation Co., [1903] 1 Ch. 169.
[4]*Re* Patent File Co., [1871] L. R. 6 Ch. 83.
[5]Samuel *v.* Jarrah Timber Corporation, [1904] App. Ca. 330.

face value of the debentures held by them until their whole loan is paid off;[1] and where debentures expressed to carry interest are deposited as security, the security is good up to the amount of the principal and the interest unpaid on the debentures, even though the company is in liquidation.[2] There is a danger that debentures thus deposited may pass into the hands of a *bonâ fide* purchaser, who, if he has no notice that they were deposited to secure a smaller sum, may recover upon them their full face value.[3]

Cancellation and Re-Issue of Debentures.

It frequently happens that a company, after making an issue of a series of debentures, pays off or purchases some of the debentures and subsequently re-issues the same debentures, or other debentures in place of them, expressed to rank equally with the outstanding debentures of the series. It was, however, held that this was not legitimate unless, by the terms of the original issue of debentures, power was reserved to the company to make a re-issue. Thus, where a company having bought and taken a transfer to itself of debentures, then re-sold them, it was held that the purchasers had no right to rank with the other debenture holders of the series,[4] and the same result followed if the debentures had been issued as security for a loan which was paid off, and were then re-issued,[5] even though the original issue was only by the deposit of the debentures in blank (*i.e.* without the name of the holder or the date),[6] for such a deposit creates

[1]Regent's Canal Ironworks Co., [1876] 3 Ch. D. 43; W. Tasker & Sons, Limited [1905] 2 Ch. 598; Perth Electric Tramways, [1906] 2 Ch. 216.

[2]*Re* Vint, [1905] 1 Ir. R. 112.

[3]Robinson *v.* Montgomery Brewery, [1896] 2 Ch. 841.

[4]George Routledge & Sons, Limited, [1904] 2 Ch. 474.

[5]W. Tasker & Sons, Limited, [1905] 2 Ch. 587.

[6]*Re* Perth Electric Tramways, [1906] 2 Ch. 216.

a charge on the assets of the company.[1] Where an English company deposited debentures to secure the amount which should be due on closing an account with a bank, and when this sum stood at £85,000 borrowed £500, which it was agreed orally should be charged on the debentures, and then paid off the £85,000, it was held that the debentures were "spent," and could not be recharged with the £500, which was held not to be part of the current account, but a fresh loan.[2] It appeared also from the judgments in the cases cited that not even by taking a transfer into the names of trustees, nor by any other means, could a company purchasing or paying off its own debentures keep them alive, for the debt was in either case extinguished and the security dead.

Section 112 of the Companies Act, however, now provides that where *either before or after the passing of the Act,* a company has redeemed debentures previously issued it shall (subject to the exceptions below mentioned) have power, *and shall be deemed always to have had power,*[3] to keep the debentures alive for the purposes of re-issue, and where any company has purported to exercise this power[4] it is entitled to re-issue the debentures either directly or by holding others in their place, and on the re-issue the holder "shall have, and shall be deemed always to have had, the same

[1] *Re* Strand Music Hall, [1865] 3 De G. J. & S. 147; *re* Regent's Canal Ironworks Co., [1876] 3 Ch. D. 43.

[2] London General Investment Trust *v.* Russian Petroleum Co., [1907] 2 Ch. 540.

[3] The words in italics make the section retrospective but Sub-section 5 declares that the section is not to prejudice any judgment or order obtained before the 1st July, 1910, as between the parties to the proceedings in which it was obtained. A Winding-up Order does not fall within this provision so as to invalidate debentures re-issued previously (New London and Suburban Omnibus Co., [1908] 1 Ch. 621).

[4] It is very difficult to say how a company "purports to" keep debentures alive; but it is apparently a condition of its power to re-issue them, and if the company has merely paid off some of its debentures and done nothing more it can hardly be said to have "purported" to keep them alive. The making of a transfer of debentures to trustees would no doubt be sufficient.

rights and priorities as if the debentures had not previously been issued," thus keeping their right to be treated as part of the same issue and not becoming postponed to second mortgage debentures issued in the meantime.[1]

The only exceptions are if the Articles of Association of the company or the conditions of issue of the debentures "expressly otherwise provide" (words which may give rise to difficulty[2]), or if "the debentures have been redeemed in pursuance of any obligation on the company so to do (not being an obligation enforceable only by the person to whom the redeemed debentures were issued or his assigns)": that is to say, if the debentures are redeemed in pursuance of a general obligation to pay off so many per annum, or as part of an obligatory scheme for creating a sinking fund, they will not be re-issuable; but if paid off because the due date has arrived,[3] or because, having been deposited to secure a temporary advance, the loan has been called in, and the company has purported to keep them alive, the debentures may be re-issued, for in these latter cases the repayment is made in pursuance of "an obligation enforceable only by the person to whom the redeemed debentures were issued or his assigns."

Sub-section 2 declares that where debentures have been transferred, either before or after the passing of the Act, to a nominee of the company with the object of keeping them alive, a transfer from that person shall be deemed to be a re-issue.

Sub-section 3 provides that where the company has, either before or after the passing of the Act, deposited any

[1]Fitzgerald *v.* Persse, Limited, [1908] 1 Ir. R. 279.

[2]*E.g.* there may be found in the debentures words obviously inconsistent with a re-issue being made, yet not "expressly" forbidding it. Will a re-issue then be lawful?

[3]If there is a covenant with trustees for debenture holders to pay off the whole issue at the due date it may be that this will prevent them from falling within the exception, for then there is an obligation enforceable by the trustees.

of its debentures to secure advances from time to time on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the company having ceased to be in debit. This is to meet the case of deposits with banks and the like. Thus, if a company deposits, say, debentures for $10,000 to secure its overdraft of varying amount, and its account is for a while in credit, and then again in debit, the security will be good as against the new debit.

Nothing in the section is to prejudice any power to issue debentures in the place of any debentures paid off, or otherwise satisfied or extinguished, reserved to a company by its debentures or the securities for the same (Sub-section 5). In other words, the powers given by the Act and the debentures are cumulative.

Transfer of Debentures.

Debentures are usually transferred by a form of transfer similar to that used for transferring shares, and executed in the same manner. It is not, however, necessary, although it is usual, for the purchaser to execute the deed.

Where debentures do not contain a charge, they are simply debts, and can be transferred by a writing not under seal, and an oral agreement to sell them can be enforced. But if they contain a charge on freehold or leasehold property they create an interest in land, and require to be transferred by deed under seal, and any agreement to sell such a debenture must be in writing, so as to satisfy the Statute of Frauds.[1] The title to a debenture payable to bearer passes by delivery upon the principle explained on page 179, *supra*.

It is common to provide that debentures may be transferred "free from equities between the company and the

[1]Driver *v.* Broad, [1893] 1 Q. B. 539, 744.

original or any intermediate holder." Without these words the holder of a chose in action can only transfer such rights as he has, and if the company has any set-off against the transferor it can enforce it against the transferee.[1] These words will effectually negative any such right where the transfer is complete; but an equitable mortgagee of debentures will be subject to any equities existing at the time he gives notice of his mortgage, so that a debt then due but not payable may be set off against the debenture debt,[2] and he will be postponed to the company's claim if it is declared that only the title of the registered holder will be recognised,[3] and if the transfer, although complete, is only upon a trust, the company can insist upon any set-off or equity which it has against the *cestui que trust*.[4] If the conditions authorise transfers the company cannot refuse to register a transfer, and the transfer may be made after liquidation or judgment in a debenture holder's action as well as before, and the same rule as to equities will then prevail, for the claim of the general body of debenture holders under their charge is no greater than that of the company against the particular debenture holder who holds the transferred debenture.[5]

Debentures may be disposed of by will, and on an intestacy pass to the legal personal representative.

Enforcing Debentures and Realising the Security.—Receivers and Managers.—Foreclosure.—Sale.

If default is made in the payment of the principal or interest secured by mortgage debentures, the holders have all

[1] *Re* Smith, [1901] 1 Ir. R. 73; Gwelo Matabeleland Exploration Co., [1901] 1 Ir. R. 38.

[2] Christie *v.* Taunton Belmard & Co., [1893] 2 Ch. 175.

[3] *Re* Smith, [1901] 1 Ir. R. 73.

[4] *Re* Brown and Gregory, [1904] 1 Ch. 627, [1904] 2 Ch. 448.

[5] Farmer *v.* Goy & Co., [1900] 2 Ch. 149. But see Palmer's Decoration Co., [1904] 2 Ch. 743.

the remedies which mortgagees would have in like circumstances: *i.e.* they may sue on the covenant to pay; they may obtain a receiver of the rents and profits, or apply for a sale of the mortgaged property; or they may, if the whole of the debenture holders are parties to the action,[1] proceed by way of foreclosure;[2] or the trustees, if they have the legal estate or a power to enter, may take possession. In each case the debenture and trust deed (if any) must be consulted to see, first, whether there has really been a default, and, secondly, what remedies are available without the assistance of the Court, and what require an action to be commenced. The strict performance of all conditions is of the utmost importance, for without this no order will be made for the appointment of a receiver or administration of the trust (for instance, if payment is stipulated to be made at a certain time and place, the condition is not broken unless demand is made by the debenture holder at that place[3]).

As to the manner and time of a floating charge becoming fixed see page 173, *supra*.

The charge created in equity by an agreement to issue debentures, if duly registered, will give an equal protection to the debenture holder as a complete debenture,[4] and so will a debenture informally issued if the holder had no notice of the informality.[5] But certain rights accruing before the receiver takes possession take precedence, as stated on page 175.

Under Sections 114 and 250 certain other payments are also given priority (see page 490, *infra*).

The provisions of the trust deed usually give ample powers to the trustees to take possession and sell, and these

[1]Elias *v.* Continental Oxygen Co., [1897] 1 Ch. 511.
[2]Oldrey *v.* Union Works, [1895] W. N. 77.
[3]Thorn *v.* City Rice Mills, [1889] 40 Ch. D. 357; *re* Escalera Silver Co., [1908] 25 T. L. R. 87.
[4]Simultaneous Printing Syndicate *v.* Foweraker, [1901] 1 K. B. 771.
[5]Duck *v.* Tower Galvanising Co., [1901] 2 K. B. 314.

may be acted upon; but the charge given by a debenture does not (unless express words to that effect are used) empower the holders to sell the property included. If default is made, a sale can only be had by an Order of the Court.[1] The Court can make an Order for sale on a motion for judgment in default of defence or on admission in the pleadings; but unless all subsequent chargees are parties, the Order will be for sale with the approbation of the Judge, and absent persons interested will be given notice to attend in Chambers.[2]

The Court has jurisdiction, at the instance of a mortgagee or debenture holder, to appoint a receiver, and in certain cases a manager, for the protection of the property or security,[3] and debenture holders can, in respect of a floating charge, obtain an injunction restraining the company from parting with the whole of its assets (*e.g.* on a reconstruction) without providing for the amount of the debentures.[4] Therefore if the property charged is in danger of being lost or diminished in value, the debenture holders should apply for the appointment of a receiver, and, if they have a charge on the business or "the undertaking of the company," or "the undertaking and property," or "all the estate, property, and effects," for a manager.

The action for a receiver may be commenced before there is any default, and if default occurs before the hearing the appointment may be made.[5] A receiver may also be ap-

[1]Blaker *v.* Herts and Essex Waterworks, [1889] 41 Ch. D. 399; adopted by the Court of Appeal in Marshall *v.* South Staffordshire Tramways, [1895] 2 Ch. at page 53; and even the Court will not order a sale in the case of a public undertaking. See cases cited in this note and Gardner *v.* London, Chatham, and Dover Railway Co., [1867] 2 Ch. 201.

[2]Stewart *v.* Crigglestone Coal Co., [1906] 1 Ch. 523.

[3]Boyle *v.* Bettws Llantint Colliery Co., [1876] 2 Ch. D. 727; Peek *v.* Trimsaran Coal, Iron, and Steel Co., [1876] 2 Ch. D. 115.

[4]*Re* Borax Co., [1899] 2 Ch. 130. This decision was reversed on appeal on the special ground that the sale was authorised by the Memorandum (1901, 1 Ch. 326); but the general principle is not affected.

[5]Carshalton Park Estate, Limited, [1908] 2 Ch. 62.

pointed even before the principal or interest is in arrear, if the assets are in danger[1] or a sale will be necessary in the near future.[2]

Many appointments have been made under this power, which is usually referred to as "the power in cases of jeopardy,"[3] but if any opposition is offered the Court scans closely the circumstances, and will not allow a debenture holder to obtain a receiver merely because the security he has accepted is a risky one. Indeed, it now seems that the jeopardy must be from some act which would be wrongful as against the debenture holder. Unless special powers are given in the debenture, a receiver can only be appointed by obtaining an Order of the Court, and where, by the terms of the debentures, a person or company is authorised to appoint a receiver, this must be exercised as a trust for the benefit of all the holders of debentures: otherwise the Court will intervene and itself appoint a receiver.[4]

Within seven days after the appointment of a receiver or manager, the person obtaining the Order appointing him, or making the appointment under the powers of any instrument, must give notice of the fact to the Registrar, who, on payment of the prescribed fee, must enter the fact in the Register of Mortgages (Section 103). If default is made, there is a penalty not exceeding twenty-five dollars a day (Sub-section 2).

The title deeds to property included in the trust deed usually remain in the custody of the trustees, but if it be more convenient the Court may direct that the receiver shall

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[1]McMahon *v.* North Kent Iron Works Co., [1891] 2 Ch. 148; Edwards *v.* Standard Rolling Stock Syndicate, [1893] 1 Ch. 574; Thorn *v.* Nine Reefs, [1892] 67 L. T. 93; Wissner *v.* Levison & Steiner, [1900] W. N. 152.

[2]Smith *v.* Wilkinson, [1897] 1 Ch. 158.

[3]The right of the debenture holders thus to make their security attach was discussed by Buckley, J., in London Pressed Hinge Co. [1905] 1 Ch. 576.

[4]Stuart *v.* Maskelyne Typewriter &c. Co., [1898] 1 Ch. 133.

have custody of them, giving the trustees access to them when necessary.[1]

A manager is appointed where the charge includes the business of the company,[2] and a general charge on the "property" includes its business, so as to authorise the appointment of a manager;[3] but if the charge is only upon the land (*e.g.* an hotel building) no manager of the business there carried on will be appointed, although a receiver of the rents may be.[4] The Court will only appoint a manager with a view to an immediate sale, as it will not undertake the permanent management of any concern, and it is usual to direct that the manager shall not act for more than a fixed time (generally three months) without the leave of the Court.

When a receiver has been appointed it is a contempt of Court to interfere with his possession without the leave of the Court, and any persons having rights against the property must apply for such leave before exercising or attempting to exercise them, and any person having ground for complaint against a receiver for his conduct in the receivership must apply in the debenture holders' action.

In some cases the receiver will be authorised by the Court to borrow money and to charge the repayment in priority to the debentures;[5] and such a power may be exercised by reborrowing after the original loan is paid off.[6]

When such loans are made to the receiver the expenses of the receivership, including the receiver's remuneration and of managing the business, as well as the plaintiff's costs

[1]Fisher *v.* Ind, Coope & Co., [1909] 26 T. L. R. 11.
[2]Makins *v.* Percy Ibbotson & Co., [1891] 1 Ch. 133.
[3]Salter *v.* Leas Hotel Co., [1902] 1 Ch. 332.
[4]Whitley *v.* Challis, [1892] 1 Ch. 64.
[5]Greenwood *v.* Algeciras Railway, [1894] 2 Ch. 205; Lathom *v.* Greenwich Ferry Co., [1895] W. N. 77, 72 L. T. 790, 2 Mans. 408.
[6]Milward *v.* Avill, [1897] 4 Mans. 403.

in the action, take priority over the loans;[1] and where the receiver, acting under powers contained in the debentures, borrows for the purpose of carrying on the business, he has power to create a charge ranking in priority to the debentures, and also to pledge the personal credit of the debenture holders for the repayment of loans so obtained,[2] but this is not so if he is appointed by the Court.[3] The receiver will not be liable personally for loans made in pursuance of leave given to him by the Court to borrow moneys unless he has taken that liability upon himself by the terms of the loan.[4] The fact that a receiver has obtained liberty to borrow up to a fixed sum does not disentitle him to incur expenses beyond that amount, and to claim repayment of them in priority to the debentures if they are such expenses as he might have incurred without the leave of the Court.[5] But this right to indemnity extends only to expenses justifiably incurred, which he had reasonable grounds for believing he would be able to pay, and not to expenses incurred by way of speculation, even though with the object of increasing the value of the business.[6]

The receiver and manager frequently carries on the business, and in doing so makes fresh contracts. In such a case, if appointed by the Court, he pledges his own credit, and is personally liable.[7] But if appointed under a power in the debentures he is agent for the company, and his dealings will be governed by the ordinary principles relating to the acts of an agent, the company being his principal:[8] neither

[1]Glasdir Copper Mines, Limited, [1906] 1 Ch. 365; Strapp *v.* Bull & Sons, [1895] 2 Ch. 1; Hoffmann *v.* A. Boynton, Limited, [1910] 1 Ch. 519.

[2]Robinson Printing Co. *v.* Chic, Limited, [1905] 2 Ch. 123.

[3]Boehm *v.* Goodall, [1910] W. N. 259.

[4]Hoffmann *v.* A. Boynton, Limited, [1910] 1 Ch. 519.

[5]British Power Traction and Lighting Co., [1906] 1 Ch. 497.

[6]Halifax Joint Stock Bank *v.* British Power Traction Co. No. 2, [1907] 1 Ch. 528.

[7]Burt *v.* Bull, [1895] 1 Q. B. 276.

[8]Owen *v.* Cronk, [1895] 1 Q. B. 265. Bissell *v.* Ariel Motors, [1910] 27 T. L. R. 73.

before nor upon the company going into liquidation does he become the agent of the trustees for the debenture holders who appointed him, nor are they liable for the debts incurred by him.[1] By completing contracts made by the company before his appointment the receiver does not become personally liable for the obligations created by such contracts, but the other party has a right of set-off in respect of cross claims under the contract.[2] The receiver of a lease, whether appointed by the Court or the debenture holders only, stands in the shoes of the debenture holders or their trustees, and if they are not assignees of the lease, and therefore not personally liable for the rent, the receiver cannot be compelled to pay rent to the landlord.[3] If the receiver is appointed under an express power which does not state that he is agent of the company he will be agent of the mortgagees, and any claim by the company or its liquidator against him must be made by action and cannot be by summons in the winding up.[4] If a receiver and manager properly incurs expenses in carrying on business, he is entitled to be repaid out of the property in priority to the rights of the persons for whose benefit he acted, and his remuneration takes precedence over even the plaintiff's costs of the action wherein he was appointed.[5] If appointed under powers in the debenture authorising him to carry on the business, he may even pledge the personal credit of the debenture holders,[6] but receivers appointed by the Court must bear in mind that their right to be repaid moneys expended or liabilities incurred by them is limited to the assets

[1]Gaskell *v.* Gosling, [1897] App. Ca. 575, reversing the C. A.
[2]Forster *v.* Nixon's Navigation Co., [1907] 23 Times L. R. 138.
[3]Hand *v.* Blow, [1901] 2 Ch. 721.
[4]*Re* Vimbos, Limited, [1900] 1 Ch. 470.
[5]Strapp *v.* Bull & Sons, [1895] 2 Ch. 1; Batten *v.* Wedgwood Coal Co., [1885] 28 Ch. D. 317; Glasdir Copper Co., Limited, [1906] 1 Ch. 365; British Power Traction and Lighting Co., [1906] 1 Ch. 497.
[6]Robinson Printing Co. *v.* Chic, Limited, [1905] 2 Ch. 123.

of the estate they are managing, and they have no further claim against the company or the debenture holders, nor can they even claim to be subrogated to the rights of the creditors whom they pay against the debtors personally.[1]

A receiver on his appointment by the Court is required to give security for the amounts he may receive. If he incurs personal liability he is *primâ facie* entitled to indemnity out of the estate, and persons who have given him credit can stand in his shoes to claim the indemnity. If, however, he owes the company or estate money he cannot enforce his indemnity until he has made good what he owes, and those who claim through him are in no better position,[2] nor can they require his sureties to make good his default if, including the amount he is entitled to by way of indemnity, there is a balance in his favour.[3]

A receiver, whether appointed by the Court or the debenture holders, cannot purchase for himself the mortgaged property without the leave of the Court.[4]

When a receiver or manager of a company's property or business is appointed by the Court he is required, under the Order appointing him, to carry in and pass his accounts in the same manner as every other receiver; but there have been complaints that where a receiver is appointed by the debenture holders themselves, the company and the unsecured creditors are practically without any means of learning what is being or has been done with the assets of the company. Section 104 enacts that every such receiver or manager who has taken possession shall, once in every half-year while he remains in possession, and also on ceasing to act, file with the Registrar an abstract, in the prescribed form, of his receipts and payments during the period to

[1]Boehm *v.* Goodall, [1911] 1 Ch. 155.
[2]*Re* Johnson, [1880] 15 Ch. D. 555.
[3]British Power Traction and Lighting Co., No. 3, [1910] W. N. 1 4.
[4]Nugent *v.* Nugent, [1907] W. N. 169.

which the abstract relates, and shall also on ceasing to act as receiver or manager file with the Registrar a notice to that effect, which notice is to be entered in the Register of Mortgages or Charges. In case of default the receiver or manager is liable to a fine not exceeding two hundred and fifty dollars. This provision will enable interested persons to learn how the realisation of the assets is proceeding.

A charge on the uncalled capital does not enable the receiver in a debenture holder's action, or the Court at his request, to make a call in the winding up; but the Court will direct the liquidator to make the call, and give the receiver authority to enforce it;[1] or the uncalled capital may be foreclosed.[2] The Court will not usually appoint any person other than the receiver to get in the unpaid capital, even at the request of the debenture holders.[3]

The application to the Court by debenture holders to enforce their security may be made by summons.[4] In an ordinary action a motion for judgment must not be made without pleadings unless the company appears and consents.[5]

One debenture holder may apply on behalf of himself and all the others, but this does not give him authority to make any agreement binding the others in regard to the subject-matter of the action.[6] The necessary parties to the action include the company, the trustees (if any) of the trust deed securing the debentures, and any other mortgagees known to the plaintiff,[7] such as the holders of second and third debentures, or some person appointed to represent them. The plaintiff should ask for—(1) a declaration of

[1]Fowler *v.* Broad's Patent Night Lights Co., [1893] 1 Ch. 724.
[2]Sadler *v.* Worley, [1894] 2 Ch. 170.
[3]Westminster Syndicate, [1908] 99 L. T. 924.
[4]General South American Co., [1876] 2 Ch. D. 337; Oldrey *v.* Union Works, [1895] W. N. 77, 72 L. T. 627.
[5]Higgs *v.* Kitson's Empire Lighting Co., [1910] W. N. 154.
[6]Securities Investment Co. *v.* Brighton Alhambra, [1893] 62 L. J. Ch. 516.
[7]Wilcox & Co., [1903] W. N. 64.

the debenture holders' charge; (2) an inquiry what debentures have been issued; (3) an inquiry what property is comprised in the charge; (4) an account of the amount due for principal and interest; (5) a receiver and, if necessary, a manager of the business.[1] If there are several sets of debentures these inquiries must be further elaborated.[2]

Where there is a trust deed the writ should ask for a declaration of charge and that it may be enforced, and that the trusts of the deed may be carried into execution.

If there is only one debenture holder he may discontinue the action at pleasure, the rule in such case differing from a creditor's administration action;[3] but where a foreclosure order *nisi* is made, or an order for accounts and inquiries, the company, as mortgagor, can insist that it shall be proceeded with.[4]

Where the company is in liquidation a debenture holder may, instead of proceeding by action, take out a summons to have a declaration of his charge made and his security realised.[5]

The plaintiff in a debenture holder's action is allowed his costs as between party and party only,[6] unless the estate is insufficient for payment of the debentures in full, when he is entitled to costs as between solicitor and client.[7]

The trustees will be allowed their full costs in priority to the claims of the debenture holders, although appearing by

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[1]As to filing notice of appointment of a receiver see page 193.

[2]As to the practice in a debenture holder's action and hearing as a short cause see Parkinson *v.* Wainwright, [1895] 64 L. J. 493, 72 L. T. 485; Brinsley *v.* Lynton Hotel, [1895] 2 Mans. 244; Warwick *v.* Thurlow, [1895] 1 Ch. 776; Cumming *v.* Metcalfe's London Hydro, [1895] 2 Mans. 418. Minutes of the Order must be prepared and left for the Judge (*re* Automatic Machines, Limited, [1902] W. N. 206).

[3]*Re* Alpha Co., [1903] 1 Ch. 203.

[4]Stevens *v.* Theatres, Limited, [1903] 1 Ch. 857; Taylor *v.* Mostyn [1884] 25 Ch. D. 48.

[5]Colonial Trusts Corporation, [1880] 15 Ch. D. 465.

[6]*Re* Queen's Hotel Co., Cardiff, [1900] 1 Ch. 792.

[7]Smith *v.* Lubbock, [1901] 2 Ch. 357.

the same solicitor as the company; but the company will not be allowed as against the debenture holders any separate costs,[1] and where the action is by or on behalf of holders of first mortgage debentures the holders of second or third mortgage debentures who are made defendants will not be allowed any costs unless there is a surplus after satisfying the claims of the first mortgage debenture holders.[2]

Subject to the right of persons entitled to preferential payment under Sections 114 and 250 (see page 490, *infra*), the moneys collected are applicable, after payment of costs and expenses, first in payment of interest, and then of capital rateably among the debenture holders, and persons holding debentures to secure a smaller sum than the face value rank equally with other debenture holders until they have received payment of the full sum due to them, after which they receive nothing further.[3]

Where payments are made from time to time they should be allocated in the order above mentioned, but the terms of interim orders directing the payments are not conclusive, and the moneys may be subsequently allocated in the manner most beneficial to the debenture holders.[4]

Debenture holders who have received but not cashed cheques for interest are entitled to rank as secured creditors for such interest, even though their forbearance in not cashing the cheques was deliberate and for the purpose of obliging the company.[5]

A debenture holder who owes money to the company is not entitled to a dividend on his debentures until he has

[1]Mortgage Insurance Corporation *v.* Canadian Agricultural Co., [1901] 2 Ch. 377.

[2]*Re* Clayton Engineering Co., [1904] W. N. 28, 90 L. T. 283.

[3]Regent's Canal Ironworks Co., [1876] 3 Ch. D. 43; W. Tasker & Sons, [1905] 2 Ch. 598.

[4]Smith *v.* Law Guarantee and Trust Society, [1904] 2 Ch. 569; Pigeon *v.* Calgary Land Co., [1908] 2 Ch. 652, 78 L. T. 97, 99 L. T. 706.

[5]Erchholtz *v.* J. Defries & Sons, [1909] 1 Ch. 423.

paid what he owes,[1] and persons to whom he has transferred debentures after the appointment of the receiver cannot claim payment till his debt is satisfied, the amounts due being retained even though there is sufficient to pay all the debentures in full and the amount claimed against the debenture holder is in dispute.[2]

A debenture holder may, when his principal or interest is in arrear, petition for the winding up of the company.[3]

Trust Deeds for Securing Debentures.

Trust deeds have some considerable advantages.[4] The effect of such a deed is to vest in the trustees, who may be either private individuals or a Trust Company, the property mortgaged, and at the same time to provide persons who can act upon an emergency and take steps on behalf of all the debenture holders without delay. In such a deed there is also more scope than in the conditions printed on a debenture for setting out the terms and provisions of the mortgage and the manner and conditions of its enforcement.

The deed should contain an express declaration that the trustees' remuneration shall be paid out of the mortgaged property; for a covenant by the company to pay, even if

[1]Farmer *v.* Goy & Co., [1900] 2 Ch. 153.

[2]Partridge *v.* Rhodesia Goldfields, [1910] 1 Ch. 239. In this case there was no clause that transferees took free from equities.

[3]Borough of Portsmouth &c. Tramways Co., [1892] 2 Ch. 362.

[4]Until the Bills of Sale Act Amendment Act 1912 was passed, the mortgages or charges created by a Company and requiring registration with the Registrar of Joint Stock Companies under the Companies' Act, were excluded from the operation of the Bills ot Sale Act. Since the passing of this Amendment Act, however, mortgages and charges of a Company's personal chattels must be registered under the Bills of Sale Act. Where the charge is contained in each of a series of debentures, or where it is contained in a trust deed to secure debentures, considerable difficulty will be experienced in strictly complying with the provisions of the Bills of Sale Act. In fact, in some cases strict compliance will be impossible, and it is anticipated that a further amendment will be made to the Bills of Sale Act dealing with the registration of a mortgage or charge by a Company of its personal chattels under the Bills of Sale Act.

coupled with a power to the trustees to retain their remuneration out of moneys coming into their hands, will not suffice if the property is realised in an action.[1]

Where the trust deed is registered under Sub-section 3 of Section 102, and the charge contained therein is not extended by the debentures, it would not appear to be necessary to file the debentures;[2] but if there is no trust deed, one of the debentures must be filed with the Registrar (Section 102, Sub-section 3).

The trust deed sometimes provides for a sinking fund to redeem the debentures from time to time. If it is intended that this should be cumulative—*i.e.* that the interest on the redeemed debentures should be added to the sinking fund—this must be expressly stated, for it will not be inferred.[3]

The trust deed usually declares that the principal money shall become payable in certain events, including the event of the company committing any breach of the covenants contained. This does not, however, give each debenture holder a right to assert that the principal is payable because of some trivial default.[4]

Power is sometimes given to the trustees to settle disputed questions. In such case an exercise of their discretion is valid.[5]

Meetings of Debenture Holders. Power to Vary Rights.

Section 110 gives every debenture holder the right (on payment of twenty-five cents in case of a printed trust deed, or of ten cents for every hundred words in case the trust deed has not been printed) to have a copy of the trust deed forwarded to him; and the same section gives every deben-

[1] Hodgson *v.* Accles, [1902] W. N. 164, 51 W. R. 57.
[2] *Re* Harrogate Estates, [1903] 1 Ch. 498.
[3] Morrison *v.* Chicago and North-West Granaries Co., [1898] 1 Ch. 263.
[4] Melbourne Brewery Co., [1901] 1 Ch. 453.
[5] Noakes *v.* Noakes & Co., [1907] 1 Ch. 64.

ture or share holder a right to inspect and require copies of the Register of Debenture Holders (see page **59**, where the penalties for default are set out).

It is common, either in the trust deed or in the conditions on the debentures, to provide for meetings of debenture holders being held, and to give power to a majority (usually a three-fourths majority) to vary the terms of the security, or generally to sanction alterations. Such provisions are valid,[1] and the minority will be bound by the decision of the majority. But in such cases care must be taken that the provisions of the trust deed or the debentures are strictly complied with. A majority must not *give* away the rights of the whole body;[2] but a real difficulty in getting payment is a good ground for adopting any authorised modification if it seems to improve the position.[3] But if only a compromise is authorised, there must be a real dispute before resort is had to these powers,[4] which will suffice to sanction an arrangement giving shares in a new company in exchange for debentures[4] or the creation of a mortgage ranking in priority to the debentures.[5] Even where these powers have not been taken, a compromise can, with the sanction of the Court, be effected under Section 129.[7]

Where debentures are issued to a bank or other lender to secure a smaller sum than the face value of the debentures the holder is entitled in voting at meetings of the debenture holders to as many votes as the face value confers on him.[6]

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[1] *Re* Dominion of Canada Co., [1886] 55 L. T. 347; Follit *v.* Eddystone Granite Quarries, [1892] 3 Ch. 75; and compare Alabama, New Orleans &c. Railway Co., [1891] 1 Ch. 213.

[2] Mercantile Investment Co. *v.* International Co. of Mexico, [1893] 1 Ch. 484.

[3] Mercantile Investment Co. *v.* River Plate Loan Co., [1894] 1 Ch. 578.

[4] Sneath *v.* Valley Gold Co., [1893] 1 Ch. 477; Mercantile Investment Co. *v.* River Plate Loan Co. [1894] 1 Ch. 578; Mercantile Investment Co. *v.* International Co. of Mexico, [1893] 1 Ch. 484, note.

[5] Follit *v.* Eddystone Granite Quarries, [1892] 3 Ch. 75.

[6] *Re* Kent Collieries, [1907] 23 Times L. R. 407, 558.

[7] See page 508, *infra*.

Time given to the company for paying debentures under such a provision,[1] or a reconstruction of the company which gives substituted rights,[2] does not release sureties who have guaranteed the payment by the company.

If the deed contains no provision for giving notice to the debenture holders, notice by advertisement is sufficient, and will be deemed to have been given on the day of the advertisement appearing.[3]

REGISTRATION OF MORTGAGES AND CHARGES.

The company must keep a Register of Mortgages and Charges, and enter therein particulars of all mortgages "specifically affecting property of the company" (Section 108, see page 58, *supra*).

In addition to keeping such a Register, Section 102 requires certain mortgages and charges created after the 1st July, 1910, or true copies thereof to be registered by filing the same with the Registrar within twenty-one days after the date of their creation if they come under either of the following descriptions. The Companies' Mortgages Registration Act, 1905, had similar provisions in regard to mortgages or charges created after the 8th April, 1905, but they were not so extensive as those in the present Act. This Act was repealed in the following session of the Legislature and its provisions embodied in an Act amending the Companies Act, R.S.B.C., 1897, which is cited as Companies' Act Amendment Act, 1906. Mortgages and charges created after the 8th April, 1905, and before the 1st July, 1910, depend for their validity upon whether they were duly registered under those Acts, and their provisions cannot there-

[1]Finlay *v.* Mexican Investment Co., [1897] 1 Q. B. 517. Compare Andrew *v.* Macklin, [1866] 6 Best & Smith 201; Ellis *v.* Wilmot, [1874] L. R. 10 Ex. 10.

[2]London Chartered Bank of Australia, [1893] 3 Ch. 540; Dane *v.* Mortgage Insurance Co., [1894] 1 Q. B. 54.

[3]Sneath *v.* Valley Gold Co., [1893] 1 Ch. 477.

fore be ignored. The mortgages and charges requiring registration under the Acts of 1910 are (those not included in the Acts of 1905 and 1906 being printed in italics)—

1. A mortgage or charge for the purpose of securing any issue of debentures.
2. A mortgage or charge on uncalled share capital of the company.
3. A mortgage or charge created or evidenced by an instrument which if executed by an individual would require registration as a bill of sale.
4. *A mortgage or charge on any land, wherever situate, or any interest therein.*
5. *A mortgage or charge on any book debts of the company.*
6. A floating charge[1] on the undertaking or property of the company.

The deposit of a negotiable instrument securing the payment of any book debt of the company (*e.g.* a bill of exchange or promissory note or a debenture) for the purpose of securing an advance is not to be treated as a mortgage or charge on the book debts, and the holding of debentures of another company charging land is not to be deemed an interest in land, so that the charging of such debentures will not fall within the Act (Section 102, Sub-section 1, (*i*) and (*j*).

Anything which creates a charge in equity or law (being of either of the classes above described) therefore requires registration. Thus, an agreement to create a mortgage or issue a mortgage debenture constitutes an equitable charge; but it seems this will only be effective if filed within twenty-one days. Whether, however, the prior agreement is or is

[1]As to the meaning of a "floating charge" see page 173, *supra*, and Government Stock Investment Co. *v.* Manila Railway, [1897] App. Ca. 81; Tailby *v.* Official Receiver, [1889] 13 App. Ca. 523; Illingworth *v.* Houldsworth, [1904] App. Ca. 353.

not filed, the actual mortgage or debenture must be registered within twenty-one days of its creation, and it will then constitute a valid legal charge,[1] for "the formal instrument supersedes and gives the go-by to the prior agreement."[2]

Any mortgage or charge as above specified not registered within twenty-one days after the date of its creation is, "so far as any security on the company's property or undertaking is thereby conferred," void against *bonâ fide* purchasers and mortgagees for valuable consideration and the liquidator and any creditor of the company; but this does not invalidate the contract or obligation for repayment of the money thereby secured, which will accordingly, even if not registered, rank as an unsecured debt. Section 102, moreover, makes the money secured become immediately payable when the mortgage or charge becomes void under that section. There was no similar provision in the Acts of 1905 or 1906 referred to above.

If the mortgage or charge is created outside of the Province the time for registration is thirty days instead of twenty-one. If the mortgage or charge is created in the Province but comprises property outside of the Province, it is sufficient if the deed or instrument is registered, notwithstanding that further proceedings (*e.g.* registration outside of the Province) may be necessary to comply with the law of the country in which such property is situate (Section 102, Sub-section 1 (*g* and *h*)).

A lien created in the ordinary course of business on moveable goods—and also it seems a mortgage of capital called up but still unpaid, unless given to secure debentures—is not within the Act, and does not require registration.

[1]Bristol United Breweries *v.* Abbot, [1908] 1 Ch. 279.
[2]Columbian Fireproofing Co., Limited, [1910] 2 Ch. 120.

The Registrar is bound to keep a Register of all Mortgages and Charges required to be registered, and on payment of a fee, prescribed by the Lieutenant-Governor in Council, to enter the date of creation, the amount secured, short particulars of the property mortgaged or charged, and the names of the mortgagees or persons entitled to the charge (Section 102, Sub-section 2), and any person may inspect such Register on payment of a fee not exceeding twenty-five cents (Sub-section 8).

Where the mortgage or charge is to secure a series of debentures the deed containing the charge, or if there is no such deed one of the debentures of the series, or a true copy of such deed or debenture, must be delivered to and filed with the Registrar within twenty-one days after the execution of the deed containing the charge or if there is no such deed after the execution of any debentures of the series together with the following particulars:—

(*a*) The total amount secured by the whole series; and

(*b*) The dates of the resolutions authorising the issue of the series, and the date of the covering deed (if any) by which the security is created or defined; and

(*c*) A general description of the property charged; and

(*d*) The names of the trustees (if any) for the debenture-holders.

The fees payable to the Registrar of Titles on filing any instrument under Section 102 are set out in Table "B," Schedule 1, of the first schedule of the Companies Act.[1]

Any mortgage or charge created by a company on any of its lands must be registered in the Land Registry Office for the district in which such lands are situated. This

[1]See page 690, infra.

registration is required under the Land Registry Act and is quite distinct from that required by Section 102 of the Companies Act, but where a mortgage or charge is one that requires to be registered under the provisions of the Land Registry Act, or of the Bills of Sale Act,[1] the fee for registering under Section 102 of the Companies Act is one dollar only.

Where a trust deed has not been registered and the company sells property already mortgaged and conveys other property purchased with the proceeds to the trustees for the debenture holders, there is a new mortgage requiring registration.[2] But if particulars of the debenture issue and the trust deed have been registered under Sub-section 3, and the deed contains a general floating charge, it is not ncessary to identify each item, and therefore, where specifically mortgaged property is withdrawn and other property substituted, with or without a further mortgage under the powers of the trust deed, the charge on the substituted property is protected by the original registration;[3] and if the trustees themselves, without the intervention of the company, sell part of the mortgaged property and reinvest the proceeds in other property which is conveyed direct to them, it is not necesssary to register the transaction, although the property thereby comes under the trusts for the debenture holders.[4]

Section 102, Sub-section 4, further requires that where any underwriting commission has been paid, or any allowance or discount made on the placing or issue of debentures, the amount or rate of such commission, allowance, or discount must be included in the Particulars filed; but the omission to do this will not affect the validity of the

[1] See note 4, page 201, *supra*.
[2] Cornbrook Brewery *v.* Law Debenture Corporation, [1904] 1 Ch. 103.
[3] Cunard Steamship Co. *v.* Hopwood, [1908] 2 Ch. 564.
[4] Bristol United Breweries *v.* Abbot, [1908] 1 Ch. 279.

debentures issued, and the deposit of debentures to secure a debt of the company is not, for the purposes of this subsection, an issue of the debentures at a discount.

The Registrar must give a certificate of the registration of any mortgage or charge, stating the amount thereby secured, and the company must cause a copy of the certificate so given to be endorsed on every debenture or certificate of debenture stock issued, the payment of which is secured by the mortgage or charge so registered[1] (Section 102, Subsections 5 and 6). But where the company has issued debentures or certificates of debenture stock, and further charges are created to the benefit of which the holders are entitled, it will not be necessary for the company to endorse on the debentures or debenture stock certificates already issued a certificate of the registration of the charge (Subsection 6). The certificate of the Registrar is conclusive evidence that the requirements of the Act as to registration have been complied with, even if there is an omission in supplying the necessary particulars, *e.g.* the date of the resolution authorising the issue of the series.[2] The Court will refuse to go behind this certificate, and will not inquire whether there has been any irregularity.[3]

It is the duty of the company to effect the registration, and to supply the necessary particulars; but any person interested therein may, if he think fit, himself register the mortgage or charge (Section 102, Sub-section 7). Every person taking a mortgage or charge should protect himself by registering his security if the company has failed to do so. Section 102, Sub-section 7, entitles him to recover from the company any fees he has to pay.

[1]As to the form of certificate see *re* Harrogate Estates, Limited, [1903] 1 Ch. 498.

[2]Cunard Steamship Co. *v.* Hopwood, [1908] 2 Ch. 564.

[3]*Re* Yolland, Husson and Birkett, [1908] 1 Ch. 152.

The company must also keep at its registered office a copy of every instrument creating a mortgage or charge requiring registration,[1] and allow inspection by members or creditors of the company in like manner as the Register of Mortgages, and subject to the same penalties in case of default; but in the case of a series of uniform debentures it will suffice to keep a copy of one of such debentures (Section 102, Sub-section 9).

Where debentures have been issued, but not registered, the company may at any time before liquidation, by arrangement with the holders, cancel the debentures and issue a new series in their place, registering the new issue within twenty-one days;[2] and a deliberate issuing of substituted debentures every fourteen days to avoid registration does not invalidate the final debenture if registered within twenty-one days after its issue.[3]

The Register of Mortgages to be kept by the Registrar may be rectified by supplying any omission or correcting any misstatement, or the time for registration may be extended by a Judge of the Supreme Court on the application of the company or any person interested;[4] but this will only be allowed if the Judge is "satisfied that the omission to register a mortgage or charge within the time hereinbefore required, or that the omission or misstatement of any particular with respect to any such mortgage or charge, was accidental, or due to inadvertence[5] or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that

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[1]Note that this does not include all mortgages made by the company (see page 205, *supra*); but the Register of Mortgages kept by the company will include all containing a specific charge.

[2]*Re* N. Defries & Co., [1903] 1 Ch. 500.

[3]*Re* Renshaw & Co., [1908] W. N. 210.

[4]Swinfen Eady, J., has held that it is not proper to apply for an extension of time as a means of determining whether or not registration is necessary (Cunard Steamship Co., [1908] W. N. 160).

[5]Morrison Thompson Hardware *v.* Westbank, [1911] 16 B. C. R. 314. 1 W. W. R. 21

on other grounds it is just and equitable to grant relief" (Section 105). Where a solicitor had advised that it was not necessary to register, that was held to be "sufficient cause."[1]

"The Registrar of Companies may, on evidence being given to his satisfaction that the debt for which any registered mortgage or charge was given has been paid or satisfied, order that a memorandum of satisfaction be entered on the Register, and shall, if required, furnish the company with a copy thereof" (Section 156).

The penalties for default are heavy. Under Section 107 the company, and any director, manager, or other officer who knowingly and wilfully authorises or permits any default as to registration of a mortgage or charge, is (without prejudice to any other liability) liable on summary conviction to a fine not exceeding two hundred and fifty dollars. There is also a penalty of five hundred dollars on any person knowingly and wilfully authorising or permitting the issue of any debenture or certificate of debenture stock requiring registration without a copy of the Registrar's certificate of registration being endorsed thereon.

It is not yet fully decided whether registration is notice to all the world of the existence of the debentures or charge. It is well established that any person dealing with a company is deemed to have notice of the contents of its Memorandum and Articles of Association (see page 37).

[1]S. Abrahams & Sons, [1902] 1 Ch. 695.

CHAPTER IX.

MINING COMPANIES WITHOUT PERSONAL LIABILITY.

WE now come to speak of a class of company distinguished from others in that no personal liability attaches to its shares. The holders of shares in the companies dealt with in the preceding pages incur personal liability to pay the full par value thereof. The provisions authorising the incorporation of mining companies without personal liability are contained in Part V. of the Act. Those companies only are entitled to the benefit of the provisions of Part V. whose objects as set out in the Memorandum of Association are restricted to acquiring, managing, developing, working and selling mines (including coal mines), mineral claims and mining properties and petroleum claims, and the winning, getting, treating, refining and marketing of mineral, coal or oil therefrom.

Section 131, Sub-section 2, sets out the powers which any such company, whose objects are restricted as above, shall be deemed to have.

The advantage of incorporation under this part is clearly set forth in Section 135, as follows:—

> "No shareholder or subscriber for shares in any company, the objects whereof are restricted as aforesaid, shall be personally liable for non-payment of any calls made upon its shares, nor shall such shareholder or subscriber be personally liable for any debt contracted by the company, or for any sum payable by the company."

If a share in one of these mining companies is subject to call in the event of non-payment by the holder, no action can be taken against him personally; but if he fail to pay the amount of such call for a period of sixty days after notice, the directors may declare the shares to be in default, and they may afterwards be sold by sale at public auction. The provisions regarding enforcement of payment by forfeiture and sale are contained in Section 134.

A large number of mining companies are incorporated year by year under Part V. of the Act, and the practice is now well established of selling shares at a discount, that is to say, if the par value of the share is one dollar, the share is sold by the company as fully paid and non-assessable for the sum of twenty-five or thirty-five cents as the case may be. There is, however, no authority in the Act for this practice, as it is contrary to the fundamental rule of company law, that shares must not be issued at a discount. To abrogate this rule, there must be express authority in the Act, and this authority cannot be found. A misconstruction of the terms of Section 132 appears to be responsible for this practice. This section deals with the issue of shares as either assessable or non-assessable. The inference has apparently been drawn that the section gives to directors the right of issuing shares as assessable or non-assessable as they please. It is submitted, however, that this is quite wrong, and that the directors may only issue a share in one of these companies as non-assessable when it is paid for in cash or by other good consideration. Reference has already been made to shares being paid for other than by payment in cash (pages 140, *supra*). If a share is not fully paid for in this way it must be issued as assessable and subject to further calls and forfeiture, in the event of default, under Section 134. If it is the intention of the Legislature that mining companies should be permitted to sell their shares

at a discount, words plainly showing such intention must be imported into the Act. The corresponding Act in Ontario expressly authorises the issuing of shares at a discount. The word "discount" is not used at all in Part V. of the British Columbia Act except in Section 136, which is a section giving relief to the holders of certain shares against liability thereon. The section provides that where shares have been issued by a company prior to the 8th day of May, 1897, as fully paid up shares, either at a discount or in payment for any mine, mineral claim, or mining property purchased or acquired by such ocmpany, such shares, except as to any debts contracted by the company before the 8th day of May, 1897, shall be deemed and held to be fully paid up, and the holder is not to be subject to any personal liability thereon.

Sections 132 and 133 are both important sections, and must be carefully observed by officials of mining companies incorporated under Part V. of the Act. The former section provides that the words "Issued under Section 131, respecting mining companies, of the 'Companies Act'" must be distinctly written or printed in red ink after the name of the company on every certificate of shares, and in addition the word "assessable" if the shares are sold subject to further assessment and the word "non-assessable" if the share are not sold subject to further assessment.

Section 133 provides that the words "Non-Personal Liability" shall be the last words of the company's name on its seal, charter, prospectuses, stock certificates, bonds, contracts, agreements, notices, advertisements and other official publications, and in all bills of exchange, promissory notes, endorsements, cheques and orders for money or goods purporting to be signed by or on behalf of the company, and in all bills of parcels, invoices, receipts and letter-heads of the company. These words must appear immediately after or under the name of such company.

Section 138 contains provisions by which a company originally incorporated as a mining company, with non-personal liability can discard its non-personal liability and obtain re-incorporation and registration as an ordinary company under the Companies Act. This procedure is seldom resorted to, inasmuch as in most cases it is found more advantageous, although a little more expensive, to form a new company, and sell the assets of the old mining company to it.

CHAPTER X.

SPECIAL LEGISLATION FOR TRUST COMPANIES.

IN the session of 1911 the first Legislation in this Province dealing specially with Trust Companies was passed. The purpose of this Act is shortly stated in its title as follows:—

"An Act to Provide for the Regulation and Inspection of Trust Companies and the Protection of Trust Moneys and Trust Investments."

A Trust Company is defined by Section 2 of the Act as follows:—

" 'Trust Company' means any body corporate carrying on business in the Province, and having under its charter and regulations any power of undertaking, accepting, and executing trusts, or of acting as trustee, executor, or administrator, or of receiving deposits of money and other personal property for investment, and loaning such money on real or personal security, or receiving deposits of money and other personal property and issuing its obligations therefor, and every mortgage company, and every loan company, and every company issuing shares, debentures, bonds, or other evidences of investment or indebtedness, the repayment whereof, with profits or with interest, is intended to be procured by the investments of the funds of the company at interest upon real or personal securities."

Every Trust Company defined as above is subject to the provisions of the Act.

Section 4 of the Act requires Trust Companies to render a quarterly report verified by statutory declaration to the Minister of Finance and Agriculture. The section requires the first report rendered by a Trust Company to contain the following information:—

(*a*) All the assets and liabilities of the Trust Company;

(*b*) The amounts loaned upon real securities, specifying the first and second mortgages, and showing the districts in the Province in which the lands are situated;

(*c*) The amounts loaned upon personal securities, including chattels real, with a statement and description of the securities held as collateral for each such loan;

(*d*) The amount invested in real estate, giving the cost of the same, the assessed value thereof, and the average income thereof, and a description of such of the lands as are situate in the Province;

(*e*) The amount of cash on hand, and the amount of money deposited in banks or trust companies, and the amount deposited in each;

(*f*) A special statement regarding any security held by the company upon which at least three months' interest has been in default for more than thirty days prior to the date of such report.

Subsequent quarterly reports must contain such further details, particulars, description, and information as shall be necessary and sufficient to keep the original report up to date and to fully, fairly, and honestly disclose to the Minister the exact financial position of the Trust Company as at the date of the report. All such reports are treated as confidential and are not made public (Section 6).

The Act authorises the Minister of Finance and Agriculture to appoint an Inspector of Trust Companies, and Trust Companies must give to the Inspector all means of access and all opportunities and facilities necessary or expedient in order to enable such Inspector to fully and completely and effectually investigate, audit, and report to the Minister upon the business and affairs of the Trust Company.

Section 11 of the Act authorises the Attorney-General to appoint a receiver of any Trust Company which the Minister of Finance reports to be insolvent or to be unable to pay its debts or meet its obligations due or accruing due.

Any breach of the provisions of the Act by a Trust Company or its officers is constituted an offence under the Act, for which severe penalties are provided.

CHAPTER XI

SPECIAL LEGISLATION FOR FIRE INSURANCE COMPANIES.

In 1910 a Government Commission was appointed to examine *inter alia* into certain alleged wrongs that on the one hand the tariff fire insurance companies were suffering from by illegal and indiscriminate competition from foreign and non-tariff insurance companies, and on the other hand that the public were suffering from at the hands of the tariff companies by excessive and unnecessarily high charges. The outcome of the Commission's examination was the B.C. Fire Insurance Act.

Under this Act a new branch of the Provincial Civil Service was created, known as the Department of Insurance, the chief officer of which is called the Superintendent of Insurance, the Department being attached to the portfolio of the Minister of Finance. For the better regulation of all fire insurance companies transacting business in the Province, the Department is given power to examine closely the status and financial position of all such companies, to grant licences, and to investigate fire losses. The Act does not apply to any company incorporated under the "Mutual Fire Insurance Companies Act, 1902," or to any mutual company incorporated under any private Act of British Columbia, while as to Dominion companies only such sections apply as are within the jurisdiction of the local legislature.

A company includes any corporation, or any society, association, or partnership, or any underwriter or group of underwriters that effects or offers to effect any contract of indemnity against fire, or a fire insurance contract of any

kind, and the words "offer to undertake any contract" includes the setting up of a sign, distribution of circulars, cards, advertisements, printed forms or like documents in the name of the company, or any written or oral solicitation (Section 2).

Every company seeking to do fire insurance business in the Province must obtain a licence (Section 4), but companies having licences from the Dominion are entitled to a licence under the Act (Section 7). Before obtaining a licence a company must first file with the Superintendent the following documents (Section 10):—

(*a*) Certified copy of charter;

(*b*) Statutory declaration of existence of the company;

(*c*) A certified copy of the last balance sheet and auditor's report thereon;

(*d*) Notice of the place where the head office is situate;

(*e*) Notice of the place where the head office of the company in the Province is situate;

(*f*) A statement of the amount of the capital of the company and the number of shares into which it is divided, and the number of shares subscribed and the amount paid up thereon;

(*g*) A Power of Attorney to its chief agent providing for a number of things set out particularly in the Act;

(*h*) In the case of companies not licenced under the "Insurance Act" of Canada, a statement in such form as may be required by the superintendent of the conditions and affairs of the company on the 31st day of December then next preceding, or up to the usual balancing day of the company, or as the superintendent shall require.

The Power of Attorney must state at what place in the Province the head office of the company or of

the attorney is to be established, and shall expressly authorise him to receive process in all actions, and shall declare that the service of process on any adult person in the employ of the company at the said office shall be legal and binding on the company (Section 11). Whenever a company licensed under this Act changes its attorney or head office, the company shall file a power of attorney containing a declaration as to this change (Section 12). Every company licensed under this Act must have printed or stamped in plain letters across the face of every policy, receipt or document covering fire loss in the Province the words, "Licensed under the 'British Columbia Fire Insurance Act'" (Section 13).

Every company has to make a deposit either in cash or approved securities of not less than $20,000, accompanied by an affidavit of two principal officers of the company that the securities are absolutely the property of the company, and free from liens and incumbrances of any nature whatsoever. The Department may, however, accept a satisfactory bond of a guarantee company, approved by the Lieutenant-Governor in Council, in lieu of the deposit of securities (Section 14). The securities so deposited may be used by the Department for the purpose of re-insuring all or any part of the risks of the company outstanding in the Province (Section 20). The company is entitled to receive the interest on such securities so long as there are no judgments against them and the deposit is unimpaired (Section 23).

Where a company fails to make the deposits under this Act, or where written notice has been served on the superintendent of an undisputed claim arising from an insurance loss being unpaid in the Province for sixty days or of a disputed claim remaining unpaid after judgment, so that the amount of the securities is liable to be reduced by
that the amount of Securities is liable to be reduced by

sale under execution, the licence of the company shall be, *ipso facto,* null and void and shall be deemed to be cancelled; but the licence may be renewed and the company may again transact business if within six months after such event the claims are satisfied, and the company shows to the superintendent that its deposit is not likely to be impaired from actions aforesaid (Section 24).

If from its annual statement or from an examination of the affairs of the company it appears that the re-insurance value of the company's risks outstanding in the Province, together with any other liabilities in the Province, exceeds the company's assets in British Columbia, including the deposit in the hands of the Minister, the company shall be called upon by the Minister to make good the deficiency, and on failure, its licence shall be cancelled (Section 22).

When a company has ceased to transact business in the Province, it shall re-insure all its outstanding contracts with some company licensed to do business in the Province, or obtain a discharge of such contracts; and its securities shall not be delivered up until it proves this to the satisfaction of the superintendent (Section 31).

Even if a company has ceased to transact business in the Province it shall pay losses arising from policies not re-insured or surrendered in the same way as if the licence had not been withdrawn (Section 32).

Upon making an application for delivery of its securities, the company shall file with the superintendent a list of all contracts which have not been re-insured, and shall publish in the *Gazette* and in such newspaper as the Superintendent may direct a notice that it has applied to the Minister for the release of its securities on a certain day, not less than three months after date of the notice, and calling upon all claimants to file their opposition to the company's release with

the superintendent before the day named, and after such date, if the Minister is satisfied that the company has ample assets to meet its liabilities, all the securities may be released to the company by an order of the Lieutenant-Governor in Council, or a sufficient amount of them may be retained to cover the claims filed, and the remainder may be released; and thereafter from time to time as the opposing claims lapse or are satisfied, further releases may be made (Section 33).

If the Superintendent, after a careful examination into the affairs of the company or from the annual or other statements furnished by the company to the Minister, or for any other cause, deems it necessary and expedient to make a further examination, the Minister may, in his discretion, instruct the superintendent to visit the head office or chief agency of such company and to thoroughly inspect and examine all its affairs, and to make all such further enquiries as are necessary to ascertain the condition of the company and its ability to meet its engagements, and as to whether it has complied with all the provisions of the Act (Section 34 (5)).

The officers of the company are bound to cause their books to be open for inspection by the superintendent, and to facilitate the examination so far as it is in their power. For the purpose of the enquiry the Superintendent may examine under oath the officers or agents of the company (Section 34 (6, 7)).

If it appears to the Superintendent that the assets of any company are insufficient to justify its continuance in business, or that it is unsafe for the public to effect insurance with it, he shall make a special report to the Minister, and the Lieutenant-Governor in Council may, if he also agrees in such opinion, suspend or cancel the licence of such company and prohibit the company

from doing any further business, and from that time it shall be unlawful for the company to do any further business in the Province until the suspension is removed. In case of such suspension notice shall be published in the *Gazette,* and thereafter any person transacting any business on behalf of the company, except for winding up its affairs, shall be liable to a penalty (Section 36).

The suspension or cancellation or non-renewal of the licence of any company under the Dominion Act, 1910, shall *ipso facto* operate as a suspension of the provincial licence without notice from the Minister, provided that if the companies licensed shall be revived under the Dominion Act, the Minister shall, on proof of such revival and payment of the proper fees, grant the company a new provincial licence. During such suspension the company is an unauthorised company and cannot do any business, but the Minister may give a conditional or modified licence if necessary for the protection of the policy holders (Section 36).

With reference to unlicensed companies, any person may insure any property which is situate in the Province or any property in transit to or from the Province with any British or foreign unlicensed insurance company or underwriters and may also insure with persons who reciprocally insure for protection and not for profit. Provided that such insurance is effected outside of the Province and without any solicitation whatsoever directly or indirectly on the part of the company by which the insurance is made:

No such company can advertise its business in the Province in any newspaper or publication or by circular, nor maintain an office or agency in the Province for the receipt of applications or the transaction of any business.

Every person insuring in an unlicensed company shall make a return to the superintendent giving the location and description of the property insured, the amount of the insurance, and whether insured in Lloyd's or other similar associations, or in mutual, reciprocal or other class of insurers.

Such insurer or its representative shall obtain a licence from the superintendent to have such risks inspected or adjusted, subject to such rules and regulations as may be imposed by the Lieutenant-Governor in Council.

An annual tax of two per cent. of the amount of premiums is exigible, and in the case of insurance premiums being paid to unlicensed companies, the tax is paid by the person obtaining the insurance.

In the case of premiums paid to companies licensed under the Act, the tax is payable by the company receiving the premium (Section 42).

An annual statement has to be made by the president, vice-president, managing director, secretary, or manager of the company and the treasurer, when the secretary is not also the treasurer, exhibiting the assets, liabilities, receipts, and expenditure in such form and with such items and details as shall be required by the superintendent and such statement shall be deposited in the office of the superintendent, and shall be accompanied by a statutory declaration according to the form in the Act (Section 43).

The following are the fees payable to the superintendent:

(1) For recording in the office of the superintendent the documents required by the Act, prior to the issuance of a licence, the sum of one dollar for each document.

(2) For a licence to do business, $250, provided that any company which prior to 1st March, 1911, held a licence under the "Companies Act" shall be entitled to a licence under this Act, without the payment of any

further fee. (The superintendent may also issue a temporary licence with the approval of the Minister, to any company, which shall empower such company to continue its business without being subject to the penalties of the Act, for such period of time as the superintendent shall deem necessary in order to enable the company to obtain a licence under this Act.)

(3) For an annual licence for foreign inspection, $10.

(4) For a licence for each foreign adjustment, $10.

(5) For modified licence for protecting policy holders of a company whose licence is suspended or cancelled, such sum as the Minister may direct.

(6) For filing any other document, $1 (Section 50).

CHAPTER XII.

EXTRA-PROVINCIAL COMPANIES.

An extra-provincial company is defined by the Act as being any duly incorporated company other than a company incorporated under the laws of the Province or the former Colonies of British Columbia and Vancouver Island (Section 2). The Act requires every such extra-provincial company, having gain for its purpose or object within the scope of the Act, to be either licensed or registered.

The provisions relating to extra-provincial companies are set out in Sections 139 to 173, which form Part VI. of the Companies Act, R.S.B.C., 1911, Chapter 39.

History of Provincial Legislature Regarding Extra-Provincial Companies.

Prior to the 8th of May, 1897, an extra-provincial company could be registered as "a foreign company" under the Companies Act then in force. On that date the Companies Act, 1897, came into force containing provisions somewhat similar to those in the present Act. That Act required extra-provincial companies incorporated in the United Kingdom or in Canada to be licensed and every other extra-provincial company to be registered; and the term "foreign company" was no longer used. In the following year an Amending Act was passed requiring companies which were registered as foreign companies to be licensed or registered under the 1897 Act, and this is reproduced in Section 139 of the present Act. Section 123 of the Act of 1897 prohibited unlicensed or unregistered companies from carrying on business in the Province and imposed a penalty for so doing of fifty dollars a day, but did not expressly render such a company incapable of main-

taining an action in Provincial Courts. In the case of North-Western Construction Company *v.* Young (13 B.C.R. 297) it was held by the full Court, however, that a contract which was prohibited by Section 123 was not enforceable in Provincial Courts, overruling a previous decision to the contrary in De Laval Separator Company *v.* Walworth (13 B.C.R. 74). The incapacity of an unlicensed or unregistered company to maintain an action arising out of business done in the Province was again decided judicially inWaterous Engine Works Company *v.* Okanagan Lumber Company (14 B.C.R. 238). The plaintiff in that case was a company incorporated under the Dominion Companies Act, but had not taken out a license to do business in British Columbia. Morrison, J., held that Section 123 was not in conflict with the Dominion Companies Act, and that the latter gives to a company the capacity or status to carry on business in the various provinces of the Dominion consistently with the laws thereof, and in British Columbia a prerequisite to do business is the securing of a licence.

When the Companies Acts were revised in 1910 and replaced by the Companies Act, 1910 (now known as Companies Act, R.S.B.C., 1911, Chap. 39), some changes were made in the law regarding extra-provincial companies. Section 123 of the Act of 1897 was substantially reproduced in Section 139 and Section 167 of the present Act, but a section was added (Section 168 of the present Act) expressly rendering an unlicensed or unregistered extra-provincial company incapable of maintaining an action in Provincial Courts where the cause of action arises out of business done in the Province; thus making part of the Act the judicial decisions quoted above.

By Section 139 every extra-provincial company, having gain for its purpose and object within the scope of the Act, is required to be licensed or registered.

A company not having gain for its purpose and object is not within the section, and can therefore transact its business in British Columbia without complying with the formalities of Part VI. Religious or philanthropic incorporated bodies, for instance, do not require to be licensed or registered here.

So long as any extra-provincial company remains unlicensed or unregistered, it is not capable of maintaining any action, suit or other proceeding in any Court in the Province in respect of any contract made in whole or in part within the Province in the course of or in connection with its business contrary to the requirements of Part VI. of the Act (Section 168).

Upon the granting or restoration of the licence, or the issuance or restoration of the certificate of registration, or the removal or suspension of either the licence or the certificate, any action, suit, or other proceeding may be maintained as if such licence or certificate had been granted or restored, or such suspension removed, before the institution of any such action, suit, or other proceeding (Section 168).[1]

The validity of this section has been upheld by the Provincial Courts in the case of John Deere Plow Company *v.* Agnew. The plaintiff company sued the defendant on two notes, aggregating $5,000, given by the defendant for agricultural machinery and implements which the plaintiff company were selling in the Province of British Columbia. The plaintiff company was not licensed to do business in the Province, and Murphy, J., held it could not maintain its action and collect the notes.

[1]This Section is not retroactive and a Company which entered into and executed a contract without having obtained the licence required by the Companies Act, 1897, cannot maintain an action on such contract by virtue of a licence obtained under the Act of 1897 before bringing action. Per Court of Appeal in Kominick v. B.C. Pressed Brick Co, III.W.W.R. 308.

This section does not preclude an extra-provincial company which is neither licensed nor registered from using Provincial Courts as an ordinary suitor, provided the cause of action does not arise out of any contract made in whole or in part in British Columbia. For example, it could sue on a judgment obtained in foreign court.[1]

An unlicensed and unregistered extra-provincial company is incapable of acquiring or holding lands, or any interest therein, in the Province, or registering any title thereto under the "Land Registry Act," but upon the granting of a licence or certificate of registration, the disability is removed (Section 169).

Severe penalties are imposed for any infringement of the provisions of this part of the Act. Any extra-provinciol company which carries on any part of its business in the Province without being licenced or registered, is liable to a penalty of fifty dollars per day (Section 167). The penalty in the case of an extra-provincial insurance company is two hundred and fifty dollars per day (Section 165). If any company, firm, broker, or other person acts as the agent or representative of an extra-provincial company which is not licensed or registered, a liability of twenty dollars per day is incurred (Section 170). If a promoter, organizer, office bearer, manager, director, officer, collector, agent, broker, employee, or any other person undertakes or effects any contract of insurance for any extra-provincial insurance company, which has not taken out a licence or become registered, it is liable to a fine of fifty dollars per day and in default of payment, a term of imprisonment (Section 166).

Section 172 provides that the foregoing penalties can only be recovered by action at the suit of or brought with

[1]Lilly *v.* Johnston Fisher Coy. 14, B.C.R., 174.

the written consent of the Attorney-General, and must be taken within six months after the liability for such penalty has been incurred.

Certain extra-provincial companies only are entitled to a licence—others are only allowed to register under the Act. The distinction will be referred to later.

LICENSING OF EXTRA-PROVINCIAL COMPANIES

Any extra-provincial company duly incorporated under the laws of:—

(*a*) The United Kingdom;

(*b*) The Dominion of Canada;

(*c*) The former Province of Canada;

(*d*) Any of the Provinces of Canada;

(*e*) Any insurance company to which this Act applies;

if duly authorised by its charter and regulations to carry out or effect any of the purposes or objects to which the legislative authority of the Legislature of British Columbia extends, may obtain a licence from the Registrar of Companies, authorising it to carry on business. The name of the company must be free from any of the objections referred to on page 14, *supra*.

Before a licence can be issued the company has to file with the Registrar of Joint Stock Companies:—

1. A true copy of the charter and regulations of the company verified in manner satisfactory to the Registrar and showing that the company by its charter has authority to carry on business in the Province of British Columbia.

2. An affidavit that the company is still in existence and legally authorised to transact business under its charter.

3. In the case of an insurance company a copy of its last Balance Sheet and the Auditor's Report thereon.

4. A duly executed Power of Attorney under its common seal empowering some person therein named and residing in the city or place where the Head Office of the company in the Province is situate to act as its attorney and to sue and be sued, plead or be impleaded, in any Court, and generally on behalf of the company and within the Province to accept service of process and to receive all lawful notices, to issue and transfer shares or stock and to do all acts and execute all deeds relating to matters within the scope of the Power of Attorney and of the company to give to its Attorney. The Registrar may, however, dispense with the inclusion of the words "to issue and transfer shares or stock" in the Power of Attorney upon its being proved to his satisfaction that the company is not a public company, the shares whereof are upon the market, or that, although the company is a public company and the shares and stocks thereof are upon the market, yet, either owing to the small quantity of the shares or stocks of the company held in the Province, and to the fact that the company does not propose to place any of the shares or stock upon the market in the Province, or to the fact that the consent of the holders of shares or stock within the Province has been obtained, the preponderance of convenience is in favour of exempting the company from empowering their Attorney as above mentioned. In such case, the license must specifically state that the Attorney is not authorised to issue or transfer

shares (Section 13 of Amendment Act, 1913). In the case of an extra-provincial company not satisfying the Registrar as aforesaid, such company shall provide and keep, in the form and manner provided by Section 33 of the Act, a register of all shares issued at such head office or chief place of business, and of all transfers made within the Province (Section 143). The company may from time to time by a new Power of Attorney duly executed and filed appoint another Attorney to supersede its former one. If the Power of Attorney becomes invalid or ineffectual, the Court or Judge may order substitutional service of process by publication in a newspaper (Section 156).

5. Notice of the place where the Head Office outside the Province is situate and of the place within the Province where the Head Office is proposed to be situate.

6. The amount of the capital of the company and the number of shares into which it is divided.

A marked cheque for the fees must be sent to the Registrar with the foregoing documents. The scale of fees is set out in Table B of the First Schedule of the Companies Act. These fees are the same as those payable for incorporating a new company, but in the case of an extra-provincial company having a nominal capital exceeding $450,000, which proves to the satisfaction of the Registrar that it is actually carrying on an established business beyond the Province, in which at least fifty per cent. of its subscribed capital is invested, a fee of two hundred and fifty dollars only is payable. Proof of the investment of at least fifty per cent. of the subscribed capital outside of the province is usually made by the Secretary, or other

officer of the company, by affidavit or statutory declaration. The bare statement will not be accepted by the Registrar. Details showing the nature and value of the investments outside of the Province must be given. The fee payable by an extra-provincial insurance company is two hundred and fifty dollars (Section 164, Sub-section 2). In addition to the licensing fees, the *Gazette* charges for advertising the licence must be paid by the company (Section 154). Upon the statutory requirements being complied with, the Registrar issues[1] a licence in the form prescribed by Section 154, and this licence is conclusive evidence of compliance with all the requirements of the Act.

REGISTRATION OF EXTRA-PROVINCIAL COMPANIES.

Any extra-provincial company not entitled to a licence, as above mentioned, and if duly authorised by its charter and regulations to carry out and effect any of the purposes or objects to which the legislative authority of the Legislature extends, may register under the Act. To illustrate what companies may take out a licence or certificate of registration respectively, companies incorporated in Ontario, or in England or Scotland, or an insurance company (not doing fire business only) formed anywhere are entitled to the former, while a company incorporated in New Zealand, or California, or France is only entitled to the latter. A Chinese or Japanese company may not be registered under the Act (Section 148). A company seeking registration must do so by Petition under its corporate seal and must file with such petition the same documents as are required in the case of a company seeking a licence (see page 231). If the Attorney is not authorised to issue and transfer shares and stock, the certificate of registration must specifically state this fact (Section 13 of the Amendment Act, 1913).

[1] See page 238 regarding Extra-provincial Trust Companies.

The same fees are payable by an extra-provincial company as are payable in the case of a company seeking a licence (see page 233, *supra*). Upon compliance with the requirements of the Act, the Registrar issues[1] a certificate of registration in the form prescribed by Section 160.

Every extra-provincial company (except an insurance company) which increases its capital after it has taken out a licence or certificate of registration, must register such increase and pay additional fees thereon (Table B (3), First Schedule to Act).

Any extra-provincial company licensed or registered under the present, or some former Act, may sue or be sued in its corporate name, and if authorised so to do by its charter and regulations, may acquire and hold lands as fully and freely as private individuals, and may sell, lease, mortgage or otherwise alienate the same.

As regards the duties which licenced or registered extra-provincial companies must observe, it is somewhat difficult to enumerate these precisely. Section 150 requires every extra-provincial company, whether licensed or registered, to comply with the requirements contained in Sections 102 to 110 regarding the registration in the office of the Registrar of Companies of mortgages or charges created by the company (see page 204, *supra*) Section 150).

With the exception of this duty, which is imposed on both registered and licenced companies alike, the Act draws a distinction between registered and licensed companies.

A registered extra-provincial company must observe, carry out and perform, save as is otherwise provided in the Act, every act, matter, obligation and duty imposed upon companies incorporated under the Act, or upon the directors, officers and members thereof (Section 142).

[1] See page 238 regarding Extra Provincial Trust Companies.

The Act specially excuses such companies from observing the provisions of Section 72 (Annual General Meeting), Section 73 (First Statutory Meeting), Section 96 (Commencement of Business), and section 97 (Return of Accounts), unless as regards this last section the company is not relieved from the provisions of Section 143.

With these exceptions a registered extra-provincial company must observe all the duties imposed on local companies. Such a company must, therefore, pay special attention to the following requirements in the Companies Act:—

Section 34 (*b*)—Making annual returns to Registrar of shareholders, etc.

Section 51—Notice of increase of capital.

Section 70—Keep a registered office in the Province.

Section 71—Publish name and place where business carried on, etc.

Section 83—Keep a register of Directors and make returns thereof to the Registrar.

Until the Companies Act Amendment Act of 1913 was passed, a licenced extra-provincial company would appear to have been exempted from any special duties. Section 11 of that Act, however, provided that such a company must file with the Registrar any amendment to its charter or regulations, and also comply with the following provisions of the Companies Act:—

Section 51—Notice of increase of capital.

Section 70—Keep a registered office in the Province.

Section 71—Publish name and place where business carried on, etc.

Section 78—Register copies of special and extraordinary resolutions.

Section 83—Keep a register of Directors and make returns thereof to Registrar.

Section 89—File prospectus.

Section 90—Prospectus to contain certain information.

Section 163 provides that any act, matter or thing affecting the corporate rights and property of a registered extra-provincial company, although valid by the laws of the country or state under which said company is incorporated, or permissible under its original corporate powers, shall only have force and effect and be enforceable in this Province if such act, matter, disposition or thing be valid and permissible by the laws of the Province.

If an extra-provincial company commences any suit or proceeding in a Court in this Province, it must furnish security for costs if demanded (Section 147).

In the event of an extra-provincial company having its objects restricted in the manner prescribed in Section 131 regarding mining companies, then the licence or certificate of registration to such extra-provincial company may contain the provision that the company is specially limited, as provided in Section 131, in which event, all the sections in Part V. of the Act will apply to such extra-provincial company.[1]

An extra-provincial company incorporated under the laws of the United Kingdom, or of the Dominion, or of the late Province of Canada, or of any of the Provinces of Canada, and registered prior to the 8th day of May, 1897, as a foreign company in this Province, is entitled under Section 144 on surrendering its certificate of registration to obtain a licence under the present Companies Act (Section 144).

A license or certificate of registration granted to any company may be suspended or revoked, and made null and void, by the Lieutenant-Governor in Council, if it refuses or fails to keep a duly ap-

[1]Officials of such Companies should pay special attention to Sections 132 and 133

pointed attorney in the Province, or to comply with any of the provisions of Part VI. of the Act, or for other good cause, and notwithstanding such suspension or revocation, the rights of creditors of the company shall remain as at the time of such suspension or revocation (Section 149).

By Sections 16 and 18 of the Companies Act Amendment Act, 1913, the Registrar may refuse to license or to issue a Certificate of Registration to any extra-provincial Company which is authorised by its Charter to exercise all or any of the powers of a trust company as defined by the "Trust Companies Regulation Act." In case of any such refusal the applicant may apply to the Lieutenant-Governor in Council who may approve and direct the issue of a licence or Certificate of Registration as the case may be.

If an extra-provincial company is unlicensed or unregistered, but has nevertheless done, entered into or made any act, matter, contract or disposition giving to any person or company a right of action in any Court in this Province, it may nevertheless be sued in the Provincial Courts. Part VII. of the Act (Sections 174 to 178) contains provisions whereby service of process in any such suit can be effected.

PART II.

MANAGEMENT AND CONDUCT OF THE BUSINESS OF THE COMPANY

CHAPTER XIII.

MANAGEMENT OF THE COMPANY.

DIRECTORS.

THE control of companies in this country is almost universally placed in the hands of "Directors," which indicates that their duties are rather to direct than to manage the business of the company, the latter function being performed by the managers or managing directors.

The Act does not define the status of directors, nor is it easy to lay down their precise position. In some sense they may be called managing partners, or agents or trustees for the company, and yet they are not, in the full sense, any one of those three things.[1] "It is a fallacy to say that the relation is that of simple principal and agent. The person who is managing is managing for himself as well as others. . . . . I do not think it true to say that the directors are agents. I think it is more nearly true to say that they are in the position of managing partners, appointed to fill that post by a mutual arrangement between all the shareholders."[2] When they hold shares (as in most cases they are obliged to do) they are, in a sense, partners; but they have

[1]See Faure Electric Accumulator Co., [1889] 40 Ch. D. 141.
[2]*Per* Cozens-Hardy, L. J., Automatic Self-Cleansing Co. *v.* Cunningham, [1906] 2 Ch. 34.

not all the powers and liabilities which the managing partners of a firm have, for their powers are strictly limited by any restrictions contained in the Articles of Association, of which all persons dealing with the company are deemed to have notice, and their liabilities, except in the case of misconduct, are restricted to the amount unpaid upon their shares. Moreover, one director has not power to bind the other directors or the company, unless specially authorised to do so.

Again, they have some of the attributes of trustees, at least as regards any assets which come into their hands,[1] and, unless expressly empowered by the Articles, they cannot enter into contracts with the company, or make any profit out of the company beyond the remuneration to which they are entitled in pursuance of the regulations and the dividends which they receive upon their shares;[2] and if they misapply the company's property, even by paying it in dividends to the shareholders, they are liable to make the amount good to the company. But directors are not trustees. "To my mind," says James, L. J., "the distinction between a director and a trustee is an essential distinction founded on the very nature of things. A trustee is a man who is the owner of the property and deals with it as a principal, as owner, and as master, subject only to an equitable obligation to account to some person to whom he stands in the relation of trustee, and who are his *cestuis que trust*. . . The office of director is that of a paid servant of the company. The director never enters into a contract for himself, but he enters into contracts for his principal, that is for the company of whom he is a director and for whom he is acting. He cannot sue on such contracts nor be sued on them unless he

[1]Aberdeen Railway Co. *v.* Blaikie, [1870] MacQ. 461; Imperial Mercantile Credit Association *v.* Coleman, [1873] L. R. 6 H. L. 189.

[2]Forest of Dean Coal Co., [1879] 10 Ch. D. 450; Lands Allotment Co., 1894] 1 Ch. 631 638.

exceeds his authority."[1] The property of the company is not vested in him, and the company can alone deal with it or take proceedings for its protection.

Directors are agents of the company, and when they contract they do so on behalf of the company, without taking any liability upon themselves beyond what may result from their being shareholders, unless they act outside their powers. As in the case of agents, they have only power to act within the scope of their authority, which is prescribed by the Memorandum and Articles; and if they exceed their powers, their principal (the company) can ratify their conduct to any extent within its own powers. But their powers are fuller than those usually accorded to agents, and, from the nature of the case, they are subject to but little control by their principal, for the shareholders have not much opportunity of knowing what the directors are doing, and any action they may wish to take must be slow and greatly encumbered by dealing with large numbers of persons. Moreover, to remove a director, or to control the management in the hands of the existing board by giving it orders how to act, a special resolution is generally required,[2] unless the Articles contain a clause giving the company power thus to control the acts of the directors otherwise than by special resolution.

The company is bound by contracts made by directors acting within the scope of their authority, even if they are influenced by some improper motive or intention to derive a profit for themselves,[3] but the company is not responsible for wrongs done to third parties by their agents if the act,

[1]Smith *v.* Anderson, [1880] 15 Ch. D. at page 275.

[2]Automatic Self-Cleansing Co. *v.* Cunningham, [1906] 2 Ch. 34; Salmon *v.* Quin & Axtens, [1909] App. Ca. 442.

[3]Hambro *v.* Burnand, [1904] 2 K. B. 10; Bryant *v.* Quebec Bank, [1893] App. Ca. 170.

although within the general scope of their authority, is done for the private ends of the agent (see page 277).

To sum up, the directors, subject to the limitations of their authority contained in the company's regulations, are the managing agents of the company, with rights of their own similar to those of managing partners, having a duty to the company to carry on its ordinary business, and as such they may do whatever is within the scope of such business (excepting those things which the Act or the Articles declare must be done by the company in general meeting).[1]

This general power may be restricted by the Memorandum or Articles of Association. If the directors purport to do that which is outside their own powers, but within the powers of the company, the shareholders can ratify and make valid such action; but if the action is outside the powers of the company, no acquiescence or ratification by the shareholders will make the act valid.[2] The ratification by the company may be by ordinary resolution or by acquiescence,[3] but if it is desired to give the directors power in future to do acts which under the Articles are outside their powers, a special resolution is necessary, for this is equivalent to an alteration of the Articles.[4] Persons dealing with a company are deemed to have notice of such limitations of the powers of the directors or of the company as are contained in the registered Memorandum and Articles, and accordingly they cannot rely upon their ignorance of these limitations as a ground for enforcing their contracts.[5]

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[1]It is within the powers of directors to compromise an action in the interests of the company, although the action may be ill-founded (Yates *v.* Cyclists' Touring Club, [1908] 24 Times L. R. 581). See also Hovey *v.* Whiting, 14 S. C. R. 515; Merchants Bank *v.* Hancock, 6 O. R. 285; Donley *v.* Holmwood, 30 C. P. 240, 4 A. R. 555.

[2]Hamilton Rly. Co. *v.* Gore Bank, 20 Gr. 190.

[3]Conant *v.* Mail, 17 Gr. 574; Bridgewater Cheese Co. *v.* Murphy, 23 A. R. 66.

[4]Grant *v.* United Kingdom Switchback Railway, [1889] 40 Ch. D. at pages 138 and 139; Irvine *v.* Union Bank of Australia, [1877] 2 App. Ca. 366.

[5]See Ashbury Railway Carriage Co. *v.* Riche, [1875] L. R. 7 H. L. 653; Wenlock *v.* River Dee Co., [1885] 10 App. Ca. 354; Irvine *v.* Union Bank of Australia, [1877] 2 App. Ca. 366; Attorney-General *v.* Great Eastern Railway Co., [1880] 5 App. Ca. 473. Thomas *v.* Walker, 16 O. W. R. 751.

Directors are not necessarily individual persons, and if the Articles allow, another company may be appointed sole director.[1]

Directors are "fiduciary donees of their powers," and as such "are bound to exercise them so as not to give themselves an advantage over other shareholders."[2] They must not make a secret profit out of their office,[3] and, unless the Articles specifically authorise it, cannot make contracts with the company without the sanction of the company in general meeting.[4] A director is precluded from dealing on behalf of the company with himself, and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound by fiduciary duty to protect, and this rule is as applicable to the case of one of several directors as to a managing or sole director."[5] Modern Articles usually do authorise directors to make such contracts on disclosing their interest to their fellow directors, and such a clause is valid; but the disclosure must be full and fair,[6] and must be to directors who are independent, and not to other directors who are equally interested in the contract[7] in question. Directors are usually forbidden to vote as directors on contracts in which they are interested; and when so forbidden they must not be reckoned in estimating whether

[1]Bulawayo Market and Offices Co., [1907] 2 Ch. 458.

[2]*Per* Rigby, L. J. in Alexander *v.* Automatic Telephone Co., [1900] 2 Ch. at page 72.

[3]See pages 267 and 270, *infra*.

[4]Stickney *v.* Bucknell, 6 O. W. R. 751. Ellis *v.* Norwich Broom Co. 8 O. W. R 25. Kuntz *v.* Silver Spring Co., 15 O. W. R. 826.

[5]North-West Transportation Co. *v.* Beatty, [1881] 12 App. Ca. 589 This is a principle of law, and does not depend on any prohibition being found in the Articles. See also Iron Clay Manuf. Co., 19 O. R. at 123. Bank of Toronto *v.* Cobourg Ry., 10 O R. 376.

[6]Costa Rica Railway Co. *v.* Forwood, [1900] 1 Ch. 756, [1901] 1 Ch. 746; Imperial Mercantile Credit Association *v.* Coleman, [1871] L. R. 6 Ch. 558, [1873] 6 H. L. 189; James *v.* Eve, [1873] L. R. 6 H. L. 328; Great Luxembourg Railway Co. *v.* Magnay, [1858] 25 Beav. 586. Stratford Fuel Co. *v.* Mooney, [1910] 21 O. L. R. 426.

[7]Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392; Gluckstein *v.* Barnes, [1900] App. Ca. 240; Erlanger *v.* New Sombrero Phosphate Co. [1879] 3 App. Ca. 1218.

a quorum of directors is present.[1] Such a prohibition, however, will not prevent them from voting as shareholders at general meetings of the company[2] upon contracts in which they are interested. Upon the appointment of a liquidator for a company being wound up the fiduciary relation of directors to the company or its shareholders is at an end and a sale to them by the liquidator is valid (Chatham National Bank *v.* McKeen, 24 S.C.R. 348).

A bargain by a director with the manager that if the latter shall receive a bonus from the company the director is to participate in it is illegal and cannot be enforced.[3]

The directors are not entitled to travelling expenses unless the payment is expressly authorised by the Articles or by the company in general meeting,[4] even though they be entitled to be indemnified against all expenses.[5]

Appointment of Directors.

The Articles usually provide how the directors are to be appointed (see Table A, Clause 68), and in practice the first directors are usually either named in the Articles of Association or directed to be appointed by the subscribers to the Memorandum of Association; while the provisions for the appointment of future directors usually declare that casual vacancies[6] may be filled up by the board of directors, and that a certain proportion of the directors (usually one-third) shall retire at each ordinary general meeting and their places be filled either by their re-election or by the appointment of other directors by the company at such general meeting, and, in addition, the company seems to have

[1]Yuill *v.* Greymouth-Point Elizabeth Railway, [1904] 1 Ch. 32. Wade *v.* Kenrick 37 S. C. R. 58. Nutter Brewing Co., 1 O. W. R. 400.

[2]North-West Transportation Co. *v.* Beatty, [1881] 12 App. Ca. 589; Burland *v.* Earle, [1902] A. C. at page 94.

[3]Laughland *v.* Millar, Laughland & Co., [1904] Court of Sess., 6 F. 413.

[4]Young *v.* Naval and Military Co-operative Society, [1905] 1 K. B. 687.

[5]Marmor, Limited, *v.* Alexander, [1908] S. C. 78 (Court of Sess.).

[6]"Casual vacancies" are, in the absence of any qualifying words, all vacancies which occur by death, resignation, disqualification, the failure of elected directors to accept office, or for any other reason than retirement by rotation, and the power to fill up such vacancies continues, although a general meeting has been held, if the vacancy has not been filled (Munster *v.* Cammell Co., [1882] 21 Ch. D. 188). See also, as to what are casual vacancies, Compagnie de Mayville *v.* Whitley, [1896] 1 Ch. at pages 800 and 810 and see also Sovereen Mitt Co., [1905] 12 O. L. R. 638.

an inherent power to fill vacancies.[1] (See Table A, Clauses 68, 69, and 78 to 85.) Sometimes the Articles provide that all the directors shall retire annually. When the shareholders have the right to appoint, the directors cannot by an agreement with a stranger (*e.g.* another company) give him a power to nominate a director,[2] and equally, if the appointment of directors requires the confirmation of the company at the next general meeting, the directors cannot by appointing a managing director for a fixed period dispense with this confirmation nor give him a right to damages for breach of contract.[3] If the company can only appoint persons recommended by the board, this recommendation must be given by a properly constituted board meeting; it is not enough if a majority of the board are present and assent to the appointment.[4] So if holding a qualification is a condition precedent to appointment, an appointment of an unqualified person is wholly void.[5]

Eve, J., has held that where a notice stated that certain resolutions would be passed "with such amendments as should be determined upon," including a resolution to appoint three named persons, it was competent for the company to add three other persons by way of amendment.[6]

The Act (Section 80) contains certain provisions relating to the necessary preliminaries to the appointment of a director in the case of public companies, which are as follows:—

No person is capable of being appointed a director by the Articles, nor may he be named in a prospectus as a

[1]Munster *v.* Cammell Co., [1882] 21 Ch. D. 188; Isle of Wight Railway *v.* Tahourdin, [1883] 25 Ch. D. pages 333, 335. But note that these cases contain only dicta, and Cotton, L. J., limits the power to the case where there are no directors to act in filling the vacancies. Fry, L. J., extends it to cases where the directors fail to act.

[2]James *v.* Eve, [1873] L. R. 6 H. L. 335.

[3]Bluett *v.* Stucthbury's, Limited, [1908] 24 T. L. R. 469.

[4]Barber's Case, [1877] 5 Ch. D. 963.

[5]Jenner's Case, [1878] 7 Ch. D. 132.

[6]Betts & Co. *v.* Macnaghten, [1910] 1 Ch. 430.

director, unless, before the registration of the Articles or the publication of the prospectus or filing of the statement, as the case may be, he has signed[1] and filed with the Registrar a Consent in writing to act, and either signed the Memorandum of Association for sufficient shares to form his qualification (if any), or signed and filed with the Registrar "a Contract in writing to take from the company and pay for his qualification shares (if any)."

Upon the application for registration of the Memorandum and Articles of Association the applicant must deliver to the Registrar a list of the persons who have consented to be directors of the company[2] (Section 80, Subsection 2).

But neither of the above provisions applies—(1) to a private company; or (2) to a prospectus issued by or on behalf of a company after the expiration of one year from the date at which the company is entitled to commence business (Section 80, Sub-section 3).

The Act does not prevent a director from paying for his qualification shares out of the purchase money coming to him from the sale of a property to the company; and it seems that a director or any other person may now pay for his shares in money or money's worth,[3] and not necessarily in cash. It is not payment, however, if fully paid shares which should be allotted to someone else are issued to the subscriber of the Memorandum or contracting party as nominee of that other person,[4] nor will a merely colourable

[1]This may be done either by himself or by an agent "authorised in writing."

[2]There is a penalty of two hundred and fifty dollars if the list contains the name of any person who has not in fact so consented.

[3]Dent's Case, [1873 8 Ch. 768, 776; Baglan Hall Colliery Co., [1870] 5 Ch. 346, 354.

[4]Forbes and Judd's Case, [1870] 5 Ch. 270; Fraser's Case, [1873] 28 L. T. 158, 42 L. J. Ch. 358; Migotti's Case, [1867] 4 Eq. 238.

payment and repayment by the shareholder to the company and the promoter be sufficient.[1]

The number of directors may be varied indefinitely unless provided for by the Articles, and either a single director or a company[2] may be appointed if the Articles allow. In practice the number of directors is usually settled by the Articles naming a maximum and a minimum number, which must not be passed.

If the appointment of the first directors lies with the signatories of the Memorandum of Association, a majority of the subscribers must act in making the appointment of directors,[3] but the appointment may be made by writing without a meeting.[4]

If there are no directors, any five members of the company can, under Section 75, convene a general meeting to elect directors.[5]

The company must keep a register of the names, addresses, and occupations of its directors or managers, and must with its Annual Summary file with the Registrar a list of the persons who are its directors at the date of the Summary (Section 34). It must also notify the Registrar of any change of its directors or managers.

Directors' Qualification Shares.

The Companies Act does not require a director to be a shareholder, but the Articles almost always require it. Table A, however, fixes only one share as the qualification. A director (unless named in the Articles of Association or in the Prospectus) need not acquire his qualification shares from the company: he may purchase them or receive them

[1]Leeke's Case, [1870] 11 Eq. 100, 6 Ch. 469.
[2]Bulawayo Market and Offices Co., [1907] 2 Ch. 458.
[3]As to this see John Morley Building Co. *v.* Barras, [1891] 2 Ch. 386, and London and Southern Counties Land Co., [1886] 31 Ch. D. 223.
[4]Great Northern Salt Co., [1890] 44 Ch. D. 472.
[5]Brick and Stone Co., [1878] W. N. 140.

from another person.[1] But it is a breach of duty for him to accept them as a gift from the promoter of the company, or from any person having contracts with the company,[2] and if he do so he will be liable to account to the company for the value of the shares.

The provisions of the Act in relation to the obligation of directors to agree to take their qualification shares before the issue of the Prospectus have been dealt with in preceding pages (see page 246 *et seq*). Section 81 further requires the directors of all companies whose regulations prescribe a share qualification to acquire their qualification within two months after appointment, or such shorter time as may be fixed by the regulations, and declares that the office of any director not acquiring his qualification within such time, or ceasing to hold it after such time, shall be vacated, and that the disqualified person shall not be capable of re-appointment as director until he has obtained his qualification. But if after a director has acquired his qualification the amount required to qualify is increased, and he fails to acquire the additional amount, he does not thereby vacate office.[3] If an unqualified person acts as a director after the expiration of the period in question, he is, by Sub-section 3, made liable "to a fine not exceeding twenty-five dollars for every day between the expiration" of the period within which he had to acquire his qualification "and the last day on which it is proved that he acted as a director."

If the Articles provide that no person shall be "eligible" as a director, or "qualified to become" a director, unless he hold so many shares, the holding of the necessary shares is a

[1]Carling's Case, [1876] 1 Ch. D. 115; Brown's Case, [1874] 9 Ch. 102.

[2]Eden *v.* Ridsdale's Railway Lamp Co., [1889] 23 Q. B. D. 368; Hay's Case, [1875] 10 Ch. 593; Weston's Case, [1879] 10 Ch. D. 579.

[3]Molineaux *v.* London, Birmingham and Manchester Co., [1902] 2 K. B. 589.

condition precedent to election, and the appoointment of a person not already holding such shares will be invalid,[1] and the company cannot ratify the appointment without first altering the Articles.[2] But the more usual form is "A director's qualification shall be" so many shares. These words do not render the holding a condition precedent to an appointment, for in many cases where they are used the question of whether the director had subsequently become liable is debated,[3] while if they made a qualification a condition precedent there would be no appointment. The Articles frequently add, "A director may act before acquiring his qualification, but shall acquire the same within" a limited time, generally one or two months. The statutory limit of two months is, however, the utmost that can be allowed.

The duties and liabilities of directors in regard to acquiring their qualification shares vary according to the provisions of the Articles of Association. If the form used is that in Table A, a contract will be imported on the part of every person accepting the office of director to acquire the number of shares required for his qualification within the time specified, or if no time is specified within a reasonable time, this contract being constituted by the fact of his taking office upon the terms of Articles requiring the holding of a qualification.[4] But only the bargain as appearing in the Articles is binding on the director, and if they do not prescribe that he shall take his qualification shares from the company he may purchase or obtain them from any person possessed of shares.[5]

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[1]Barton's Case, [1877] 5 Ch. D. 963; Jenner's Case, [1878] 7 Ch. D. 132.

[2]Boschoek Co. *v.* Fuke, [1906] 1 Ch. 148.

[3]*Re* Issue Co., Hutchinson's Case, [1895] 1 Ch. 234; Brown's Case, [1874] 9 Ch. 102.

[4]*Ex parte* Isaacs, [1892] 2 Ch. 158; *re* Hercynia Copper Co., [1894] 2 Ch. 403.

[5]Brown's Case, [1874] 9 Ch 102; Miller's Case, [1876] 3 Ch. D. 661

If the Articles do not authorise a director to act before acquiring his qualification, it is his duty to qualify (A) before he acts as a director,[1] and (B) within a reasonable time after his appointment, even though he has not acted meantime,[2] and he must in any event acquire his qualification within two months after his appointment (Section 81).

If the Articles authorise a director to act before acquiring his qualification, he may purchase or take the necessary shares at any time during the period named in the Articles (not being more than the two months allowed by Section 81), but is under an obligation to qualify within that time, and if he does not do so his office is vacated, and if he continues to act he is liable to penalties.

A director will be liable if the Articles contain a clause, now not uncommon, declaring that if a director has not otherwise acquired his qualification within a specified period he shall be deemed to have applied for and been allotted the necessary shares. If these or similar words are found in the Articles, the director becomes liable immediately on the expiration of the period named, whether or not the company makes any allotment or puts his name on the Register, and the liquidator may, after a winding up has commenced, place his name on the list of contributories,[3] and this is so if he has accepted office, even though he has not acted as a director.[4] He, however, escapes if he resigns within the period allowed for acquiring his qualification.[5]

Shares held jointly with another person are a sufficient qualification, unless the Articles provide for a sole holding.[6]

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[1] *Re* Issue Co., Hutchinson's Case, [1895] 1 Ch. 234; Molineaux *v.* London, Birmingham and Manchester Co., [1902] 2 K. B. 589, where signing a prospectus issued to the public was held to be acting as a director.

[2] Brown's Case. [1874] 9 Ch. 102; Miller's Case, [1876] 3 Ch. D. 661.

[3] Isaac's Case, [1892] 2 Ch. 158; Salton *v.* New Beeston Cycle Co., [1899] 1 Ch. 7.5.

[4] Hercynia Copper Co., [1894] 2 Ch. 403; Carling's Case, [1876] 1 Ch. D. 115.

[5] Salisbury Jones's Case, [1894] 3 Ch. 356.

[6] Dunster's Case. *Re* Glory Paper Mills, [1894] 3 Ch. 478.

Shares held by executors will be a good qualification where the Articles do not contain the words "in his own right."[1]

Although it is highly improper for a director secretly to accept a gift of shares from a promoter, they will suffice to form his qualification;[2] but shares acquired from third parties after the director has become liable to take them from the company, and has been placed upon the Register of Members, will not relieve him from liability to pay to the company for the shares so allotted as his qualification.[3] When a director has accepted his qualification shares he cannot, if he determines to have nothing more to do with the company, surrender them, and will not be relieved from liability, even though shares having the same numbers are allotted to others, provided the company has sufficient shares unissued to provide the number accepted by the director.[4]

A director acting without acquiring his qualifying shares is entitled to the remuneration prescribed by the Articles.[5]

When the Articles require a director to hold a certain number of shares "in his own right," it appears that this only means that he must not hold them in a representative capacity—*e.g.* as an executor of a deceased shareholder—and does not prevent shares registered in his name as a trustee or mortgagee from being a sufficient qualification.[6] This view, though doubted by a high authority,[7] is now followed.[8] The test is, that the holder "must be a person who holds in such a way that the company can safely deal with him in

[1]Grundy *v.* Briggs, [1910] 1 Ch. 444.
[2]See note 4 on previous page.
[3]Ilfracombe Railway Co. *v.* Nash, 22 L. T. 209; Lord Inchiquin's Case, [1891] 3 Ch. 28; Salton *v.* New Beeston Cycle Co., [1899] 1 Ch. 775.
[4]Lord Wallscourt's Case, [1899] 7 Mans. 235.
[5]International Cable Co, [1892] W. N. 34; Salton *v.* New Beeston Cycle Co., [1899] 1 Ch. 775.
[6]Pulbrook *v.* Richmond Consolidated Mining Co., [1878] 9 Ch. D. 610.
[7]Bainbridge *v.* Smith, *per* Cotton, L. J., [1889] 41 Ch. D. 468.
[8]Cooper *v.* Griffin, [1892] 1 Q. B. 740; Howard *v.* Sadler, [1893] 1 Q. B. 1.

respect of his shares, whatever his interest may be in the shares."[1] Thus, when the company has actually entered in its Register the fact that he is liquidator or executor,[2] the shares will not form a qualification.

The Articles usually provide that the acts of an unqualified director are valid until the defect is discovered; and Sections 79 and 82 make valid acts of *de facto* directors, as, for instance, the summoning of a meeting of the company,[2] notwithstanding any defect which may subsequently be discovered; but the penalty (not exceeding twenty-five dollars a day) imposed by Section 81, Subsection 3, cannot be evaded.

Remuneration of Directors.

Directors are not entitled as of right to any remuneration whether upon a *quantum meruit* or otherwise,[3] but the Articles usually declare that they shall receive remuneration and fix the amount, in which case when earned it becomes a debt for which the directors can sue.[4] If the Articles are silent, the company in general meeting may vote the remuneration, but in such case the remuneration is a gratuity and not a matter of right.[3] So in a going company a general meeting may vote a gratuity beyond the amount prescribed by the Articles,[5] but upon liquidation this cannot be done.[6]

If a director's fees are so much a year, or if a lump sum is payable to the whole of the directors, a director is only

[1]Sutton *v.* English and Colonial Produce Co., [1902] 2 Ch. 502. But the fact that the shares will vest in the trustee is no ground for refusing to pass the transfer (same case).

[2]Boschoek Co. *v.* Fuke, [1906] 1 Ch. 148.

[3]Geo. Newman and Co., [1895] 1 Ch. 674; Dunstan *v.* Imperial Gas Co., [1832] 3 B. & Ad. 125; *ex parte* Cannon, [1885] 1 Ch. D. 626. Earle *v.* Burland, 27 A. R. 540, [1902] A. C. 101. Gardner *v.* Canadian Publg. Co., 31 O. R. 488.

[4]Nell *v.* Atlanta Co., [1894] 11 T. L. R. 407; *ex parte* Beckwith, [1898] 1 Ch. 324; Dover Coalfield, [1908] 1 Ch. 65.

[5]*Re* Lundy Granite Co., [1872] 26 L. T. 673.

[6]Hutton *v.* West Cork Railway Co., [1883] 23 Ch. D. 654; Stroud *v.* Royal Aquarium, [1903] 89 L. T. 343.

entitled to be paid if he serves for a complete year; but it is otherwise if the fees are *at the rate* of so much a year.[1] If remuneration is payable "at such time as the directors may determine," one of the directors cannot sue for fees until the board have fixed a time for payment.[2]

The remuneration may be either a sum to be divided among the directors, or so much for each director, or it may be by way of a commission upon the profits of the company. Except in the last-named case, or unless it is expressly stated that the fees are only to come out of profits, fees prescribed by the Articles are payable whether the company is earning profits or not, being in fact the salary for management, for which the directors can sue the company.[3] The most common form is for an amount to be named by the Articles, which the directors may divide among themselves as they shall determine. Till the directors have determined the proportions, no director can sue for his fees,[4] and the continuing directors may determine that a retiring director shall receive no part of the remuneration.[5] Sometimes, however, a fixed fee is paid for each meeting attended, or the remuneration is proportioned to the number of attendances. A resolution of the directors to forego fees already earned is not binding unless some alteration of the position

[1]Inman *v.* Ackroyd, [1901] 1 K. B. 613; Salton *v.* New Beeston Cycle Co., [1899] 1 Ch. 775; Central de Kaap Gold Mines, [1899] W. N. 216, 235, 69 L. J. Ch. 18, 7 Mans. 82; Gilman *v.* Gulcher Electric Light and Power Co., [1886] 3 T. L. R. 133; Wood's Ships Woodite Co, [1890] 62 L. T. 760. In Swabey *v.* Port Darwin Co., 1 Meg. 385, which is inaccurately reported (see [1901] 1 K. B. 613), the Court of Appeal allowed a proportionate remuneration on the ground that the directors had power to resign, and might be removed. It is not easy to distinguish this case from Inman *v.* Ackroyd.

[2]Caridad Copper Mining Co. *v.* Swallow, [1902] 2 K. B. 44.

[3]*Re* Lundy Granite Co., [1872] 26 L. T. 673; Nell *v.* Atlanta Co., [1894] 11 T. L. R. 407.

[4]Morrell *v.* Oxford Portland Cement Co., [1910] 26 T. L. R. 682.

[5]Gilman *v.* Gulcher Electric Light and Power Co., [1886] 3 T. L. R. 113.

is thereby brought about.[1] But before the fees have become due it is open to the directors, by a resolution postponing or renouncing their remuneration, to make a new contract with the company.[2]

If a director's appointment is not validly made he cannot recover remuneration, either under the Articles or under a *quantum meruit,* although he may have served for a long period,[3] and if it be discovered that fees have been paid for a period after the director had vacated office under the terms of the Articles, the company, in a case where the facts negative the probability of an intention to grant remuneration, can recover the amount paid by mistake.[4]

The remuneration covers travelling expenses, and unless specially authorised by the Articles or by resolution of a general meeting such expenses must not be paid in addition.[5]

When the remuneration is by a percentage of profits, it does not include a share of the profit made on the sale of the whole business of the company.[6]

Directors who are appointed receivers or managers in a debenture holder's action may recover remuneration in both capacities.[7]

It was held by Pearson, J., that when a company is in liquidation the directors' claim for fees must be postponed to the claims of outside creditors, on the ground that the former is made by the directors in the capacity of members;[8]

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[1]Central de Kaap Gold Mines, [1899] W. N. 216, 235, 69 L J. Ch. 18, 7 Mans. 82; Lambert *v.* Northern Railway of Buenos Ayres, [1870] 18 W. R. 180.

[2]Milburn *v.* Chaffers Extended, *Times,* 3rd June, 1899; McConnell's Case, [1901] 1 Ch. 728.

[3]Woolf *v.* East Nigel Gold Mining Co., [1905] 21 T. L. R. 660.

[4]*Re* Bodega Co., [1904] 1 Ch. 276. In this case the director was disqualified for having secretly participated in contracts with the company.

[6]Young *v.* Naval and Military Co-operative Society, [1905] 1 K. B. 687; Marmor, Limited *v.* Alexander, [1908] S. C. 78.

[5]Frames *v.* Bultfontein Mining Co., [1891] 1 Ch. 140.

[7]South Western of Venezuela Railway, [1902] 1 Ch. 701.

[8]*Ex parte* Cannon, [1885] 30 Ch. D. 626.

but more recent decisions have allowed a managing director who was a member of the company,[1] and ordinary directors where the Articles fix their remuneration,[2] to prove for such remuneration in competition with the outside creditors. But it would seem that if the remuneration were merely a gratuity voted by the company, and not payable under the Articles, it would not be provable.[3] Directors who pay themselves in preference to other creditors when the funds are not sufficient to pay all in full,[4] or who take fees in excess of the proper amount,[5] can be made to repay the amount. They must not, when the company is insolvent, pay up the calls due on their own shares and immediately use the money for their fees.[6]

It seems the company cannot ratify the payment by directors of remuneration in excess of that allowed by the Articles without first altering the Articles or passing a special resolution,[7] but it can grant additional sums by way of gratuity payable out of profits or other moneys at the company's disposal, provided this is done at a properly constituted meeting on due notice.[8]

The remuneration paid to directors is the payment for their services, and where a company has provided the qualification shares of directors appointed to represent its interests on the board of another company it has no claim to the fees paid to such directors unless an express bargain has been made that they shall hand over their fees.[9]

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[1] *Re* Dale & Plant, [1890] 43 Ch. D. 255.
[2] *Re* New British Iron Co., *ex parte* Beckwith, [1898] 1 Ch. 324; *re* A 1 Biscuit Co., [1899] W. N. 115.
[3] A 1 Biscuit Co., [1899] W. N. 115; *ex parte* Cannon, [1885] 30 Ch. D. 626.
[4] Gaslight Improvement Co. *v.* Terrell, [1870] 10 Eq. 168.
[5] *Re* Whitehall Court, [1887] 56 L. T. 280.
[6] *Re* Washington Diamond Mining Co., [1893] 3 Ch. 95.
[7] Boschoek Co. *v.* Fuke, [1906] 1 Ch. 148.
[8] Geo. Newman & Co., [1895] 1 Ch. 674.
[9] Dover Coalfield Extension Co., [1908] 1 Ch. 65.

Vacating the Office of Director.

The office of director is usually declared by the Articles to be vacated if he does or suffers certain things, such as becoming bankrupt or insolvent,[1] accepting an office of profit under the company,[2] failing to acquire the qualification within a stated time,[3] or being absent from meetings of directors for a long period (see Table A, Clause 77). If the words used in the Articles are "if he absent himself," this means "voluntarily," and absence through sickness is not a disqualification.[4]

Upon the happening of any of the specified events the office is *ipso facto* vacated,[5] and the other directors cannot waive the disqualification; but if the cause of disqualification is the doing or suffering some act (*e.g.* being declared bankrupt[6] or accepting a place of profit), the outgoing director may be re-elected. On the other hand, if the cause of disqualification is a continuing one (*e.g.* participating in a contract which requires continued consideration by the board), it will again render the office vacant, even if the offender has been in the meantime re-elected.[7]

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[1]But this does not prevent a person who is a bankrupt at the time of his appointment from holding office (Dawson *v.* African Consolidated Co., [1898] 1 Ch. 6). As to the meaning of "insolvent" see Sissons & Co. *v.* Sissons, [1910] 54 Sol. J. 802.

[2]For instance, as paid trustee for debenture holders (Astley *v.* New Tivoli, [1899] 1 Ch. 151).

[3]The Act now makes this a statutory disqualification at the expiration of the time named in the Articles of Association, with a maximum of two months (Section 81). This does not apply where the qualification is increased after the director has acquired the original qualification (Molineaux *v.* London, Birmingham and Manchester Co., [1902] 2 K. B. 589).

[4]Mack's Claim, [1900] W. N. 114; McConnell's Case, [1901] 1 Ch. 728.

[5]Bodega Co., [1904] 1 Ch. 276, which appears inconsistent with Turnbull *v.* West Riding Athletic Club, [1894] 70 L. T. 92, where Kekewich, J., held that a director must be given an opportunity of explaining his conduct.

[6]Dawson *v.* African Consolidated Co., [1898] 1 Ch. 6.

[7]Bodega Co., [1904] 1 Ch. 284. Clause 77 of Table A declares a director's office vacant if he hold any other office or place of profit under the company, or be concerned in the profits of any contract with the company. This is usually varied in special Articles, but it is a most salutary rule.

By special Articles a director is usually allowed to resign. Even in the absence of such a power, unless the Articles contain conditions, he may resign, and his resignation is complete when notice is given to the secretary, and cannot subsequently be withdrawn,[1] even though no acceptance has taken place.

Where directors are appointed to fill office for a specified time and continue to act after the expiration of that time, no others being appointed to take their places, their acts will bind the company.[2]

There is generally a power to remove directors by special resolution. If this be so, an ordinary resolution will not suffice. If there be no power to remove a director, the Articles must first be altered to give such a power before he can be removed,[3] or the company must wait till he retires by rotation, when it can refuse to re-appoint him. The Court, however, will not compel a company to employ a director against its will, notwithstanding it may have contracted under seal to do so: his remedy lies in damages for breach of contract.[4] But the refusal to allow him to act must be that of the company in general meeting, and not that of the board of directors.[5]

Conduct of Business by Directors.

The members of the board when acting by a sufficient quorum (which is usually prescribed by the Articles) need not all be present, and of those present a majority may act.

[1]Maitland's Case, 4 De G. M. & G. 769; Transport, Limited *v.* Schomberg, [1905] 21 Times L. R. 305; Glossop *v.* Glossop, [1907] 2 Ch. 370. The decision of Kekewich, J., in Municipal Freehold Land Co. *v.* Pollington, [1890] 63 L. T. 238, 59 L. J. Ch. 734, cannot now be relied on. *re* Rodney Casket Co., 12 O. L. R. 409.

[2]Muir *v.* Forman's Trustees, [1904] Court of Sess., 5 F. 546.

[3]Imperial Hydropathic Hotel Co *v.* Hampson, [1883] 23 Ch. D. 1. Stephenson *v.* Vokes, 27 O. R. 691.

[4]Bainbridge *v.* Smith, [1889] 41 Ch. D. 462, 476; Harben *v.* Phillips, [1883] 23 Ch. D. 14, 40.

[5]Pulbrook *v.* Richmond Consolidated Co., [1878] 9 Ch. D. 610.

If no quorum be prescribed, a majority of the board is required to form a quorum,[1] but in some cases it has been held that the number to form a quorum can be established by the practice of the board.[2] But if there be a clause in the Articles that the continuing directors may act notwithstanding vacancies, a number less than the minimum number of directors allowed by the Articles is capable of binding the company.[3] Where, however, the number remaining in office is less than a quorum, it is not clear whether they can act.[4] In reckoning a quorum directors not entitled to vote (*e.g.* as being interested in the contract under discussion) must not be counted.[5]

Notice of the meeting must be given to all the directors, for business done at a meeting of which some director had no notice is invalid, and a director has no power to waive his right to notice,[6] but if a director is abroad and out of reach of notices, a meeting held without notice to him is valid.[7] It is not necessary that the notice should state what business is to be transacted.[8] It has been held by Kekewich, J., that where there were only two directors of a company, and one did not attend a meeting duly summoned, but the other, meeting him shortly after in the passage to his office, proposed the election of a third director, and, on objection being made, declared that by his casting vote as chairman he carried the resolution, his action was valid.[9]

[1]York Tramways Co. *v.* Willows, [1874] 8 Q. B. D. 685.
[2]Regent's Canal Ironworks, [1867] W. N. 79; Lyster's Case, [1867] 4 Eq. 233.
[3]Scottish Petroleum Co., ['883] 23 Ch. D. 413.
[4]See Owen and Ashworth's Claim, [1900] 2 Ch. 272, and [1901] 1 Ch. 115; Newhaven Local Board *v.* Newhaven School Board, [1885] 30 Ch. D. 351. Toronto Brewing Co. *v.* Blake, 2 O. R. 175.
[5]Yuill *v.* Greymouth-Point Elizabeth Railway, [1904] 1 Ch. 32.
[6]Portuguese Copper Mines, [1889] 42 Ch. D. 160. Farmers Bank *v.* Sunstrum, 14 O. W. R. 288.
[7]Halifax Sugar Co., [1890] 62 L. T. 564. Windsor Ltd. *v.* Windsor, 17 B. C. R. 105, 1 W. W. R. 224.
[8]La Compagnie de Mayville *v.* Whitley, [1896] 1 Ch. 788.
[9]Smith *v.* Paringa Mines, Limited, [1906] 2 Ch. 193.

If the Articles authorise it, but not otherwise,[1] the board may delegate any of its powers to a committee, which may consist even of a single director.[2] Each director, however, has not alone power to bind the company unless he has had this power specially delegated to him. Nor can a number of the directors, even although they constitute a majority, act at a meeting of which notice has not been given to the whole body,[3] and acts done by a majority of the board not duly convened as a board meeting (*e.g.* on the occasion of a general meeting of the company) are not valid.[4] Pickford, J., held that where a resolution of the directors required bills of exchange to be signed by a director and the secretary, a bill signed by a director only was not binding on the company, even in the hands of a holder who did not know of the restriction.[5]

The Articles often provide that a letter signed by all or a majority of the directors shall have the same effect as a resolution of the board. In the absence of such a provision the directors cannot act without meeting.[6] Fry, L. J., has suggested that without meeting directors cannot think,[7] and a collective opinion certainly appears to be contemplated by the Acts.

The directors must not exclude any of their body from their meetings, and unless the company has by resolution

[1]Howard's Case, [1866] 1 Ch. 561.

[2]Taurine Co., [1884] 25 Ch. D. 118; Harris's Case, [1872] 7 Ch. 587. Compare Horn *v.* Faulder & Co., [1908] 99 L. T. 524.

[3]Portuguese Copper Mines, [1889] 42 Ch. D. 160; Homer Gold Mines, [1888] 39 Ch. D. 546; *re* Bank of Syria, [1900] 2 Ch. 272, [1901] 1 Ch. 118.

[4]Barber's Case, [1877] 5 Ch. D. 963, where the nomination of a person approved by six out of seven directors was held not sufficient.

[5]Premier Industrial Bank *v.* Carlton Manufacturing Co., [1909] 1 K. B. 106.

[6]D'Arcy *v.* Tamar Hill Railway Co., [1867] L. R. 2 Ex. 158; Haycraft Gold Reduction Co., [1900] 2 Ch. 230. On the other hand see Collie's Claim, [1871] 12 Eq. 246, 258, and Southern Counties Deposit Bank *v.* Rider, [1895] 73 L. T. 374.

[7]Portuguese Copper Mines, [1889] 42 Ch. D. 160.

declared that it does not desire a director to act,[1] an excluded director can obtain an injunction restraining his continued exclusion.[2]

The directors are the proper persons to do any act in the name of the company, and in particular to affix the seal of the company to deeds. Thus an action by the company should be commenced only by the directors or in pursuance of a resolution of the company;[3] but where persons believe that they have the support of the majority of members, they may in a case of urgency commence proceedings, and afterwards obtain the sanction of the company;[4] but if it turns out that they have wrongly used the name of the company they may, on an application by the company, be ordered to pay costs as between solicitor and client.[5] A single shareholder may, however, bring an action on behalf of himself and all the other shareholders to restrain the company from doing an illegal or *ultra vires* act,[6] or in cases where the majority, acting in bad faith or oppressively, are doing a wrong to a minority of shareholders.[7] But if an act is only irregular on the part of the directors,

[1]Bainbridge *v.* Smith, [1889] 41 Ch. D. 462, 474; Harben *v.* Phillips, [1883] 23 Ch. D. 14, 40.

[2]Pulbrook *v.* Richmond Consolidated Mining Co., [1878] 9 Ch. D. 610.

[3]La Compagnie de Mayville *v.* Whitley, [1896] 1 Ch. 803. See next note.

[4]Pender *v.* Lushington, [1877] 6 Ch. D. 70; Imperial Hydropathic Hotel Co. *v.* Hampson, [1883] 23 Ch. D. 1. It seems difficult to reconcile these cases with Salmon *v.* Quin & Axtens, [1909] App. Ca. 442, and Automatic Self-Cleansing Filter Co. *v.* Cunninghame, [1906], 2 Ch. 34; but they have been very frequently acted upon.

[5]Newbiggin Gas Co. *v.* Armstrong, [1880] 13 Ch. D. 310; La Compagnie de Mayville *v.* Whitley, [1896] 1 Ch. 788.

[6]Alexander *v.* Automatic Telephone Co., [1900] 2 Ch. 56; Hope *v.* International Financial Society, [1887] 4 Ch. D. 327; Simpson *v.* Westminster Palace Hotel Co., [1860] 8 H. L. C. 712; Clinch *v.* Financial Corporation, [1869] 4 Ch. 117.

[7]Menier *v.* Hooper's Telegraph Co., [1874] 9 Ch. 350; Atwool *v.* Merryweather, [1868] 5 Eq. 464, note. See the exceptions referred to in Foss *v.* Harbottle, [1843] 2 Hare 461, and MacDougall *v.* Gardiner, [1876] 1 Ch. D. 13.

and is such that the company could confirm it, a minority of shareholders cannot obtain the interference of the Court,[1] for the rule is clear that it is only in the cases of acts which are *ultra vires* or illegal or are fraudulent that the Court will interfere in the internal affairs of the company; any other matters are left to the domestic tribunal constituted by the Articles.[2] If the plaintiff has participated in a wrong done he will not be allowed relief in respect of such wrong,[3] but this objection will not prevail if he is claiming an injunction to restrain a future irregular or wrongful act.[4]

Unless the Articles require directors to conform to directions given by the company in general meeting, the company cannot except by special resolution, take the conduct of the business out of the directors' hands, or compel them to adopt a particular line of action, such as sealing a draft deed or effecting a sale of the company's property.[5]

The cases on the question of the effect of an irregularity upon acts affecting shareholders are conflicting. It has been held that, notwithstanding the provisions of Sections 79 and 82, referred to below, if the directors are not properly appointed according to the Articles of Association,[6] or if they

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[1]Burland *v.* Earle, [1902] App. Ca. at page 93; Normandy *v.* Ind Coope & Co., [1908] 1 Ch. 84; Campbell *v.* Australian Mutual Provident Society (Privy Council), [1908] 77 L. J. P. C. 117, 99 L. T. 3; Gray *v.* Lewis, [1873] 8 Ch. 1035; MacDougall *v.* Gardiner, [1875] 1 Ch. D. 13.

[2]Menier *v.* Hooper's Telegraph Co., [1874] 9 Ch. 350; Atwool *v.* Merryweather, [1868] 5 Eq. 464, note. See the exceptions referred to in Foss *v.* Harbottle, [1843] 2 Hare 461, and MacDougall *v.* Gardiner, [1876] 1 Ch. D. 13.

[3]Towers *v.* African Tug Co., [1904] 1 Ch. 558.

[4]Moseley *v.* Koffeyfontein Mines, Limited, [1911] 1 Ch. 72.

[5]Automatic Self-Cleansing Co. *v.* Cunningham, [1906] 2 Ch. 34; Gramophone and Typewriter, Limited *v.* Stanley, [1908] 2 K. B. at page 105 Salmon *v.* Quin & Axtens, [1909] App. Ca. 442.

[6]London and Southern Counties Land Co., [1886] 31 Ch. D. 223; Garden Gully United Quartz Mining Co. *v.* McLister, [1875] 1 App Ca. 39; Howbeach Coal Co. *v.* Teague, [1860] 5 H. & N. 151.

continue to act without re-election,[1] they cannot allot shares, make valid calls, or forfeit shares, these being matters between the company and the shareholders. Equally, if the Articles fix a minimum number of directors, a smaller number cannot act, and anything they purport to do is invalid unless power is given to act notwithstanding vacancies.[2] But, on the other hand, the Court of Appeal in England has held that if the Articles contain provisions that acts shall be valid notwithstanding any irregularity subsequently discovered, shareholders as well as strangers are bound by and may take advantage of such acts;[3] and a meeting of the company ordered to be called by directors not forming a quorum may pass valid resolutions,[4] while a call made by directors appointed at a meeting irregularly summoned is also valid.[5]

If directors not properly appointed, or otherwise acting irregularly, have dealings with strangers who do not know of the irregularity, they will be treated as agents of the company, which will be bound by their acts.[6] In other words, if an act is apparently lawful and within the powers of the directors, a person dealing with them may assume that all necessary steps have been taken and conditions fulfilled, unless he has notice to the contrary, the maxim being *Omnia praesumuntur rite esse acta.*[7] So if directors have power of

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[1]Tyne Mutual Association *v.* Brown, [1896] 74 L. T. 283.

[2]Alma Spinning Co., [1881] 16 Ch. D. 681; Scottish Petroleum Co., [1883] 23 Ch. D. 413. Farmers Bank *v.* Sunstrum 14 O.W.R. 288. In re Nutter Brewery Co. 1.O.W.R. 400.

[3]Dawson *v.* African Consolidated Co., [1898] 1 Ch. 6; followed in British Asbestos Co. *v.* Boyd, [1903] 2 Ch. 439.

[4]Southern Counties Deposit Bank *v.* Rider, [1895] 73 L. T. 374.

[5]Briton Medical Association *v.* Jones, [1889] 61 L. T. 384.

[6]County Life Assurance Co., [1870] 5 Ch. 288; Mahony *v.* East Holyford Mining Co., [1874] L. R. 7 H. L. 869; County of Gloucester Bank *v.* Rodry Merthyr Co., [1895] 1 Ch. 629; *re* Bank of Syria, [1900] 2 Ch. 272, [1901] 1 Ch. 115.

[7]Royal British Bank *v.* Turquand, [1856] 6 E. & B. 327; Clarke *v.* Imperial Gas Light and Coke Co., [1833] 4 B. & Ad. 315; *ex parte* Overend. Gurney & Co., [1869] 4 Ch. 460; Thompson *v.* Brantford Elec. Ry., 25 A.

delegation, a stranger may assume it has been properly exercised.[1] Pickford, J., has, however, made an exception in the case of bills of exchange not executed by the persons authorised by resolution of the directors.[2] Actual[3] or constructive[4] notice of the irregularity, however, deprives the party dealing with the company of this protection. But in the case of other companies a notice will not be binding unless given to an officer in the course of the company's business, or in such circumstances that it was his duty to communicate it to the company.[5] Thus, one of two companies having directors in common will not be taken to have notice of the manner in which the acts of the other are carried out,[6] and the same rule applies in the case of companies having a common secretary.[7] Since persons dealing with a company are deemed to have notice of all matters contained in the Memorandum and Articles, any agreement inconsistent with these will give the party contracting no right of action.[8]

The directors are trustees of the powers reposed in them for the benefit of the company, and in allotting shares, making calls, forfeiting shares, approving transfers, and paying preliminary expenses they must act for the benefit of the company, and not for that of themselves or their

R. 340; Ontario Western Lumber Co. *v.* Citizens' Telephone Co., 32 C. L. J. 237; Bain *v.* Anderson, 27 O. R. 369: Foley *v.* Barber, 14 O. W. R. 699 16 O. W. R. 607.

[1]Totterdell *v.* Fareham Blue Brick Co., [1866] L. R. 1 C. P. 674; Biggerstaff *v.* Rowatt's Wharf, [1896] 2 Ch. 93; National Malleable Co. *v.* Smith's Falls, 14 O. L. R. 22; Sheppard *v.* Bonanza Nickel Co., 25 O. R. 305.

[2]Premier Industrial Bank *v.* Carlton Manufacturing Co., [1909] 1 K. B. 106.

[3]Wandsworth Gas Light Co. *v.* Wright, [1870] 22 L. T. 404.

[4]Irvine *v.* Union Bank of Australia, [1877] 2 App. Ca. 366.

[5]Societe Generale *v.* Walker, [1886] 11 App. Ca. 20; and see cases cited in next two notes.

[6]Hampshire Land Co., [1896] 2 Ch. 743; Marseilles Extension Railway Co., [1872] 7 Ch. 161; Young *v.* David Payne & Co., [1904] 2 Ch. 608.

[7]Fenwick, Stobart & Co., [1902] 1 Ch. 507.

[8]Ernest *v.* Nicholls, [1858] L. R. 6 H. L. 401 to 419; Fountaine *v.* Carmarthen Railway Co., [1868] L. R. 5 Eq. 322.

friends, or for one class of shareholders at the expense of another. They cannot by a contract deprive themselves of power to control a manager so as to confer powers on him to the exclusion of themselves.[1]

Minutes must be kept of all proceedings and resolutions at every meeting of directors (Section 79, Sub-section 1), and such minutes, when signed by the chairman of that or the next succeeding meeting, are evidence of the proceedings (Section 79, Sub-section 2), and, until the contrary is proved, every such meeting is deemed to have been duly held and convened, and all proceedings to have been duly had, and all appointments of directors, managers, or liquidators shall be deemed to be valid (Section 79, Sub-section 3), and the acts of a director or manager are valid notwithstanding any defect which may afterwards be discovered in his appointment or qualification (Section 82: see also Clauses 75 and 94 of Table A).

The adoption of minutes at a subsequent meeting of directors does not make those taking part in such adoption responsible for the acts done at the earlier meeting if such acts were complete before the minutes came up for consideration.[2] (See page 303.)

Unless the Articles stipulate as to the amount of time a director shall devote to the company, there is no way of compelling him to attend to his duties, and a company cannot prevent one of its own directors from becoming a director of a rival institution.[3]

Liability of Directors.

Directors, as agents of the company, are not liable to strangers for the acts or defaults of the company, nor for the performance of the company's contracts. In making bills

[1]Horn *v.* Faulder & Co., [1908] 99 L. T. 524.

[2]Lands Allotment Co., [1894] 1 Ch. at page 634; Burton *v.* Bevan, [1908] 2 Ch. 240; Lucas *v.* Fitzgerald, [1905] 20 T. L. R. 16.

[3]London and Mashonaland Co. *v.* New Mashonaland Co., [1891] W. N. 165.

of exchange, however, they must be careful not to use forms which pledge their personal credit. Thus, "We, the directors of the A. B. Co., do promise to pay," etc., signed by the directors, will make them personally liable, although the company also execute the note.[1] But "I promise to pay," etc., signed "J. H. Smethurst's Laundry, Limited: J. H. Smethurst, Managing Director," was held not to make the director personally liable;[2] while "I promise to pay," etc., signed "For the M. Railway Company, J. S., Secretary,"[3] or "We jointly promise to pay £600 for value received in stock on account of the company," signed by three directors,[4] was held only to bind the company.[5] The liability on bills which do not correctly state the company's name is set forth at page 17.

Directors may, however, be liable to strangers for wrongs done by them, for it is no answer to an action for tort that the wrongdoer was an agent for another.

A director is liable to make good any money the company has entrusted to him for the purpose of being dealt with according to the provisions of the Memorandum and Articles which has not been dealt with in that way, but in some way not authorised, although he has derived no benefit from the money and the payment has been made with no corrupt motive.[6] In other words not only is he liable for a misappropriation, but also for a misapplication of the money of the company, though it has not found its way into his own pocket,[7] and on this ground a director is liable to

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[1]Dutton *v.* Marsh, [1871] 6 Q. B. 361.
[2]Chapman *v.* Smethurst, [1909] 1 K.B. 927.
[3]Alexander *v.* Sizer, [1869] L. R. 4 Ex. 102.
[4]Lindus *v.* Melrose, [1857] 2 H. & N. 293, 3 H. & N. 177.
[5]See the following cases on directors' liability on notes:
Thames Navigation *v.* Reid, 13 A.R. 303; Brown *v.* Howland, 9 O. R. 48. 15 A.R. 750. Walmsley *v.* Rent Guarantee, 29 Gr. 484. Madden *v.* Cox, 5 A.R. 473.
[6]*Ex parte* Pelly, [1882] 21 Ch. D 492, see page 509.
[7]A director has, however, the protection of Section 293, in the case of honest mistake (see page 238 *infra*).

make good money which he has applied for any purpose which is *ultra vires;* but he is not liable "for losses which the company may suffer by reason of mistakes or errors of judgment."[1] Instances of this liability are given in Part III., Chapter 25, under the heading "PROCEEDINGS AGAINST DELINQUENT DIRECTORS, PROMOTERS, AND OFFICERS" (page 479, *infra*). The same acts which create liability for misfeasance under Section 254 render the directors liable to an action at law before a winding up, in which case the company will be the proper plaintiff.

Only those directly implicated in any misapplication of the company's money are responsible, although knowledge and sanction of misconduct are enough to create liability, even in the absence of actual participation in the misconduct;[2] and each director is only liable for money improperly received by himself, or by himself jointly with others.[3] He is not liable for breaches of trust of which he is ignorant, or which occurred before he became a director,[4] nor for the misapplication by others of a cheque which he joined in drawing for a lawful purpose.[5] Mere presence at the meeting at which the minutes setting forth the resolutions relating to the wrongful act were read and signed will not create liability in one who took no part in the wrongful act.[6] But "it should be understood that a director consenting to be a director has assumed a position involving duties

[1] Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 433; Overend, Gurney & Co. *v.* Gibb, [1872] L. R. 5 H. L. 480.

[2] Land Credit Co. *v.* Lord Fermoy, [1870] 5 Ch. 73; Joint Stock Discount Co. *v.* Brown, [1869] 8 Eq. 381; Montrotier Asphalte Co., [1876] 34 L. T. 716.

[3] Parker *v.* McKenna, [1875] 10 Ch. 96; Oxford Benefit Building Society, [1887] 35 Ch. D. 502.

[4] Forest of Dean Coal Co., [1879] 10 Ch. D. 450; Ashurst *v.* Mason, [1875] 20 Eq. 225; Cullerne *v.* London and Suburban Building Society, [1890] 25 Q. B. D. 485.

[5] Montrotier Asphalte Co., [1876] 34 L. T. 716.

[6] Lands Allotment Co., [1894] 1 Ch. 617; Lucas *v.* Fitzgerald, [1905] 20 T. L. R. 16 (Interim Dividend); Burton *v.* Bevan, [1908] 2 Ch. 240.

which cannot be shirked by leaving everything to others."[1]

As agents of the company, any profit which the directors make out of the transactions of the company beyond their proper remuneration belongs to the company. Unfortunately, it is so common for persons in a position of trust to make secret profits that the question is continually before the Courts. A summary of the cases will be found under the heading "SECRET COMMISSIONS," page 270, *infra*.

Directors cannot make presents to themselves or to one of their body out of the funds of the company.[2] Directors may purchase shares from other members, and in such a case are not bound to disclose pending negotiations which if successful will enhance the value of the shares.[3]

When dealing with a fellow-director the board should exercise special care that the company is fairly treated, and if upon a reconstruction special provisions are made for the benefit of directors they must be disclosed, or the sanction of the members to the scheme will be inoperative.[4]

Directors, like other agents, are liable for neglect of their duty, although not for errors of judgment. The amount of negligence required to create such a liability has been discussed in the cases mentioned below.[5] It is said to be something more than ordinary negligence, and is sometimes described as "gross negligence." But what is "gross negligence" is difficult to define. From the cases it appears to be failure to exercise reasonable care, or such care as a prudent man would exercise in his own affairs, and this is surely the

[1]*Per* Byrne, J., in Drincqbier *v.* Wood, [1899] 1 Ch. 406.
[2]*Re* George Newman & Co., [1895] 1 Ch. 674.
[3]Percival *v.* Wright, [1902] 2 Ch. 421.
[4]Kaye *v.* Croydon Tramways, [1898] 1 Ch. 358.
[5]Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch., by Romer, J., at page 418; by Lindley, M. R., at page 435; by Collins, L. J., at page 466. See also Overend, Gurney & Co. *v.* Gibb, [1872] L. R. 5 H. L. 480, and Marzetti's Case, [1880] 28 W. R. 541.

same as "negligence;" yet the Court of Appeal states that "it must be in a business sense culpable or gross."[1] Directors are not liable for losses arising from relying upon trusted officers of the company who have misled them as to the true position of affairs.[2]

Section 293 contains the following provision for protecting directors, which is borrowed from the Trustee and Executors Act:—"If in any proceeding against a director, or person occupying the position of director, of a company for negligence or breach of trust it appears to the Court hearing the case that the director or person is or may be liable in respect of the negligence or breach of trust, but has acted honestly and reasonably, and ought fairly to be excused for the negligence or breach of trust, that Court may relieve him, either wholly or partly, from his liability on such terms as the Court may think proper." This may save directors from liability where acts have been done which have proved to be *ultra vires,* but were done in good faith. Apart from the provision, a director who had paid away money without authority is liable to account for it, however good his intentions and reasonable his belief that he had authority.[3] It is, however, not easy to see in what cases a director guilty of sufficient negligence to render him liable can be said to have acted reasonably. The relief can only be granted when proceedings have actually been commenced, and the Court can impose terms as a condition of granting the relief.

[1]Compare Overend, Gurney & Co. *v.* Gibb, [1872] L. R., 5 H. L. at pages 494 and 495; Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. at pages 435 to 466; National Bank of Wales, [1899] 2 Ch. at page 671; Dovey *v.* Cory, [1901] App. Ca. at page 490; and as to the words "gross negligence" having no meaning beyond omission of reasonable care, Giblin *v.* McMullen, [1869] L. R., 2 P. C. at page 336.

[2]Dovey *v.* Cary, [1901] App. Ca. 477; Prefontaine *v.* Grenier, [1907] App. Ca. 101.

[3]*Ex parte* Pelly, [1882] 21 Ch. D. 492, 508.

In the case of the death of a director his estate remains liable for any breach of trust he may have committed;[1] but not for negligence,[2] or trespass, or deceit,[3] unless his estate has benefited by the fraud.[4]

After the lapse of six years the Statute of Limitations is a bar to proceedings against a director for misfeasance, unless the claim is founded upon any fraud or fraudulent breach of trust, or is to recover trust property or the proceeds thereof still retained by the director, or previously received by him and converted to his own use,[5] and even in the case of a bribe taken by a director and fraudulently concealed, by analogy to the Statute of Limitations, the Courts will require the action to be brought within six years of the company knowing that the bribe had been taken, or that a charge was made against the director to that effect.[6]

Where vendors become directors they frequently enter into agreements to manage for a term of years, and covenant not to trade in competition with the company. If the company wrongfully discharges such a manager, either directly or by going into liquidation, he is freed from his covenant, and may at once commence a competing business.[7]

The question of criminal liability of directors for wrongful acts is considered on page 336.

Extending the Liability of Directors.

A company may, at the time of its registration, make provision in its Memorandum of Association for the liability

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[1]Erlanger *v.* New Sombrero Phosphate Co., [1879] 3 App. Ca. 1218; Ramskill *v.* Edwards, [1886] 31 Ch. D. 100; *re* Sharpe [1892] 1 Ch. 154.
[2]Overend, Gurney & Co. *v.* Gibb, [1872] L. R. 5 H. L. 480.
[3]Phillips *v.* Homfrey, [1883] 24 Ch. D. 439.
[4]Peek *v.* Gurney, [1874] L. R. 6 H. L. 377.
[5]Lands Allotment Co., [1894] 1 Ch. 617.
[6]Metropolitan Bank *v.* Heiron, [1880] 5 Ex. Div. 319; National Company for the Distribution of Electricity, [1902] 2 Ch. 34.
[7]General Billposting Co. *v.* Atkinson, [1909] App. Ca. 118; Measures Brothers *v.* Measures, [1910] 1 Ch. 336; affirmed [1910] W. N. 136.

of its directors, managers, or managing director being unlimited; or it may, after its registration, alter its memorandum so as to make the liability of its directors or managers unlimited by passing and confirming a special resolution, if so authorised by its Articles (Sections 68 and 69). A company thus constituted is very like a limited partnership: the liability of the managing partners (*i.e.* the directors) is unlimited; that of the sleeping partners (*i.e.* the other shareholders) is limited to the amount of their shares.

The directors and managers and the member proposing a person for the office of director where the liability is unlimited must add to their or his proposal a statement that the liability of the person holding the office will be unlimited; and the promoters, manager, and secretary of the company, or one of them, must give the person proposed for election notice in writing, before he accepts office, that his liability will be unlimited. Any director, manager, or other officer of the company, or proposer of a person as director, making default in this respect will be liable to a penalty of five hundred dollars, and will also be liable for any damage which the person elected may incur from such default. The liability of the person elected will, however, not be affected by the default (Section 68, Sub-section 3).

Secret Commissions.

A principal can recover from his agent any profit the latter has made out of a dealing taking place in the course of the agency unless it was with both the knowledge and the consent of the principal.[1] If, therefore, directors or other agents have received shares (*e.g.* from a promoter) secretly the company can claim either the shares themselves, or if they have been sold at a profit the whole profit, or if no

[1] Parker *v.* McKenna, [1874] L. R. 10 Ch. 96.

profit has been made the company may say, "You deprived us of the power of allotting the shares to other persons; therefore, you must pay us the sum we have lost by reason of our being deprived of the right of allotting those shares to others who would have paid them up"—*i.e.,* in cases where allotments have been made to others at par, the nominal value of the shares.[1]

The following statement of the law laid down by Bowen, L. J., in the Boston Deep Sea Fishing Co. *v.* Ansell (1888, 39 Ch. D. 339) should be borne in mind. It applies to directors, managing directors, secretaries, managers, solicitors, and all other officers and servants of a company, but is very frequently forgotten:—

"There can be no question that an agent employed by a principal or master to do business with another, who, unknown to that principal or master, takes from that other person a profit arising out of the business which he is employed to transact, is doing a wrongful act, inconsistent with his duty towards his master and the continuance of confidence between them. He does the wrongful act whether such profit be given to him in return for services which he actually performs for the third party, or whether it be given to him for his supposed influence, or whether it be given to him on any other ground at all. If it is a profit which arises out of the transaction, it belongs to his master, and the agent or servant has no right to take it, or keep it, or bargain for it, or to receive it without bargain, unless his master knows it."

In the case in question it was accordingly held that a company could dismiss without notice a manager who had secretly accepted a commission from shipbuilders executing work for the company.

The company, moreover, can recover the amount of the commission or bribe, not only from the servant or agent in default, but also from the person giving the bribe, and it is no answer for such person to show that the company has already recovered the amount from or made an arrangement

[1]Carling's Case, [1876] 1 Ch. D. 115 to 126. See also Postage Stamp Co., [1892] 3 Ch. 566; Bennett *v.* Havelock, 21 O. L. R. 375.

with the agent.[1] The giver of the commission must himself inform the principal that he is making a payment to the agent, and will not escape liability by alleging that he hoped or believed the agent would make the proper disclosure,[2] and the form of action may be either for money had and received to the use of the plaintiff or for deceit,[2] or, if it be still possible, the employer may elect to rescind the contract in respect of which the commission was paid,[3] and the following propositions have been laid down[4] by Romer, L. J., in the Court of Appeal:—

"First, the Court will not inquire into the donor's motive in giving the bribe, nor allow evidence to be gone into as to motive;[5] secondly, the Court will presume in favour of the principal and as against the briber that the agent was influenced by the bribe, and this presumption is irrebuttable; thirdly, if the agent be a confidential buyer of goods for his principal from the briber the Court will assume as against the briber that the true price of goods as between him and the purchaser must be taken to be less than the price paid to or charged by the vendor by at any rate the amount or value of the bribe.[6] If the purchaser alleges loss or damage beyond this he must prove it."

Moreover, if the agent has received a secret commission from a third party, the employer can, in addition to recovering the amount of such commission, refuse to pay the

[1]Salford Corporation *v.* Lever, [1891] 1 Q. B. 168; Grant *v.* Gold Exploration Syndicate, [1900] 1 Q. B. 232; Hovenden *v.* Millhoff, [1900] 83 L. T. 41.

[2]*Per* Collins, L. J., in Grant *v.* Gold Exploration Syndicate, [1900] 1 Q. B. 248.

[3]Panama Telegraph Co. *v.* India Rubber Telegraph Works, [1875] 10 Ch. 515; Grant *v.* Gold Exploration Syndicate, *ubi supra;* Hovenden *v.* Millhoff, *ubi supra.*

[4]Hovenden *v.* Millhoff, *ubi supra.*

[5]That is to say, it is no answer that the donor acted in good faith, intending no wrong (Grant *v.* Gold Exploration Syndicate, [1900] 1 Q. B 249).

[6]See also Cohen *v.* Kuschke, [1900] 83 L. T. 102.

agent any commission or reward for the services he has rendered in connection with the transaction in question,[1] and no custom to the effect that an agent should receive double commission without the knowledge of each of the parties to the dealing will be held good.[2] But an agent who has received a bribe in one transaction is not disabled from recovering commission in respect of a different transaction.[3]

Where an agent receives a commission secretly, this does not become the property of the company to such an extent that it can follow the investments into which the money is put until a judgment has been obtained for the return of the amount. The relation is that of debtor and creditor, not of trustee and *cestui que trust*.[4]

Where the Articles provide that the directors may participate in the profits of contracts made with the company upon declaring their interest in such profits, this will be a protection;[5] but in such a case a director interested must disclose, not only that he has an interest, but also the nature and amount of his interest.[6] But although the failure to disclose the amount of the interest is misconduct and a ground for setting the contract aside, if that still be possible, the profit made by the director who has disclosed that he is making some profit cannot be recovered as an alternative remedy when rescission has, owing to the change of circumstances, become impossible.[7]

A claim for repayment of a bribe must be brought within six years after the company learns that there is a

[1]Andrews *v.* Ramsay, [1903] 2 K. B. 635.
[2]Bartram *v.* Lloyd, [1903] 88 L. T. 286.
[3]Nitedals Taendstikfabrik *v.* Bruster, [1906] 2 Ch. 671.
[4]Lister & Co. *v.* Stubbs, [1890] 45 Ch. D. 1.
[5]Costa Rica Railway Co. *v.* Forwood, [1901] 1 Ch. 746.
[6]Liquidators of Imperial Mercantile Credit Association *v.* Coleman, [1873] L. R. 6 H. L. 189; Dunne *v.* English, [1874] 18 Eq. 524; Turnbull *v.* West Riding Athletic Club, [1894] W. N. 4.
[7]Lady Forrest (Murchison) Gold Mine, [1901] 1 Ch. 582.

charge of bribery made against the person implicated,[1] for in cases of concealed fraud the Statute of Limitations runs only from the discovery of the fraud.[2]

OFFICERS OF A COMPANY

There are no officers whose functions are defined by the Acts, and a company can appoint what person it pleases to whatever office it considers necessary. The officers must take their orders from the directors, and, as a rule, their functions are also determined by the directors. Unless an officer has a contract with the company fixing the terms of his employment, he can be dismissed by the directors with whatever notice to which he would be entitled if employed by a private person.

A statement in the Articles of Association that a particular man is or shall be the secretary, manager, or other officer is not a contract with him,[3] and each officer should protect himself by seeing that his appointment is duly made by a resolution of the board of directors or by an agreement executed by the company after its incorporation.

The Manager or Managing Director.

A company whose business has many details to be attended to requires a manager with considerable powers. He may either be one of the directors appointed to act as managing director or be actually appointed as the manager, and such powers may be delegated to him as the Articles allow, or, if they are silent, such as in a similar business would usually be entrusted to a manager. His salary may

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[1]Metropolitan Bank *v.* Heiron, [1880] 5 Ex. Div. 319; *Re* Sale Hotel, *ex parte* Hesketh, [1897] 77 L. T. 681; 78 L. T. 368; *Re* Sharpe, [1892] 1 Ch. 154, 172.

[2]Gibbs *v.* Guild, [1882] 9 Q. B. D. 59; North American Land Co. *v.* Watkins, [1904] 1 Ch. 242 and 2 Ch. 233.

[3]Eley *v.* Positive Government Assurance Co., [1876] 1 Ex. D. 20, 88; Browne *v.* La Trinidad, [1888] 37 Ch. D. 1.

be either a fixed amount, or a commission upon profits, or a combination of both. If the clerical work is not large the manager may also discharge the duties of secretary.

The general rule is that the directors cannot appoint one of themselves to an office of profit unless expressly empowered by the Articles or by a resolution of the company. It is, therefore, usual to insert in the Articles power for the directors to appoint one or more of their body to be managing director or directors, and to pay him or them special remuneration, delegating to him or them such powers as are necessary.[1] Such provisions as these are valid, and a person dealing with a company through its manager or managing director may assume that the usual and proper powers for carrying on the business have been delegated to him, and, although it may turn out that there has been no express delegation, the contracts made by him with a stranger will be binding.[2] But unless power is given to directors to delegate their powers they cannot do so, and must themselves do all acts except such as are usually done by servants or agents.

A manager is an agent of the company, and must not accept commissions or presents from persons having dealings with the company. If he do so, he may be dismissed without notice, and be called upon to pay over to the company the amount received.[3]

A managing director is not a clerk or servant within the meaning of Sections 114 and 250 (Preferential Payments in Winding Up), so as to be entitled to payment of salary in preference to other creditors.[4]

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[1]This power is conferred by Clause 72 of Table A.

[2]Biggerstaff *v.* Rowatt's Wharf, [1896] 2 Ch. 93; National Malleable *v.* Smith's Falls, 14 O. L. R. 22; Thomas *v.* Standard Bank, 25 O. W. R. 185, Clarke *v.* Union Fire, 10 P. R. 342; Milne *v.* Ontario Marble, 13 O. W. 1137.

[3]See page 271, *supra.*

[4]Newspaper Proprietary Syndicate, [1900] 2 Ch. 349.

The Secretary.

The secretary of a company is the agent through whom the clerical work of the company is done. He must obey the orders of the directors, and give effect to their resolutions by issuing notices, sending circulars, writing letters, etc. He will also prepare the agenda for directors' meetings and general meetings of the company, and usually write up the minutes either from his own notes or from those of the chairman. He will conduct the ordinary correspondence of the company and answer inquiries, or direct clerks to do so.

Although a secretary must obey orders, he clearly must not do that which he knows to be a wrong to or a fraud upon other persons. If he knowingly take part in the issue of a fraudulent prospectus he will be personally liable.

A secretary will become personally liable if he omits the word "Limited" from the name of the company upon any bill of exchange, promissory note, cheque, or order for money or goods, unless the company pay the amount.[1]

The duty of the secretary includes certifying transfers (see page 162, *supra*) in the ordinary course, and receiving and registering, when necessary, notices on behalf of the company; but where the same man is secretary to two companies knowledge acquired by him for one company is not notice to the other.[2] Nor is notice received by a secretary or other officer not in the course of the company's business, or under such circumstances that it is not his duty to communicate it to the company.[3] It is not part of his duty to answer inquiries about moneys owing from the company to persons with whom it has dealings, or to make representations on behalf of the company in any matters

[1]Penrose *v.* Martyn, [1858] E. B. & E. 499.
[2]Fenwick, Stobart & Co., [1902] 1 Ch. 507.
[3]Societe Generale *v.* Walker, [1885] 14 Q. B. D. 424, [1886] 11 App. Ca. 20.

except those things which fall directly within the scope of the business of the company.

The distinction between what is and what is not the duty of the secretary is important; for any person relying upon a representation made by the secretary within the scope of his duty can look to the company to make good the representation; but when the representation is made by the secretary outside the scope of his duty the company will not be responsible, and only the secretary personally can be sued. This is also the case if the secretary makes a representation which might have been within his duty, but which was in fact made for his own purposes, and neither intended to result nor in fact resulting in benefit to his employer.[1]

The law on this point was a few years ago very fully discussed in the English Court of Appeal,[2] where Collins, M. R., gave judgment as follows:—"The general rule governing the responsibility of a master for the acts of his servant was stated by the late Willes, J., in Barwick *v.* English Joint Stock Bank.[3] The passage has been frequently cited and approved, and runs as follows:—'The master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved.'[4] He then gives instances where this rule has been acted on, and proceeds: 'In all these cases it may be said, as it was said here, that the master had not authorised the

[1]See and compare Bishop *v.* Balkis Consolidated Co., [1890] 25 Q. B. D. 520; Swift *v.* Jewsbury, [1874] L. R. 9 Q. B. 301; British Mutual Banking Co. *v.* Charnwood Forest Railway Co., [1886] 18 Q. B. D. 714; Barnett *v.* South London Tramways Co., [1886] 18 Q. B. D. 815; Barwick *v.* English Joint Stock Bank, [1867] L. R. 2 Ex. 259. As to a case of fraud in certifying transfers see George Whitechurch *v.* Cavanagh, [1902] App. Ca. 117.

[2]Ruben *v.* Great Fingall Consolidated, [1904] 2 K. B. 712 (see particularly page 725); affirmed in the House of Lords, [1906] App. Ca. 439.

[3][1867] L. R. 2 Ex. 259.

[4]This passage was also cited with approval by Lord Davey in the House of Lords, [1906] App. Ca. page 446.

act. It is true he had not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of this master to place him in.' Founding themselves on the principle so stated, the English Court of Appeal in British Mutual Co. *v.* Charnwood Forest Railway Co.[1] held that an action of deceit would not lie against a principal for a fraudulent misstatement made by his servant for his own private purposes in reply to a class of question which it was within his ordinary duty to answer. The fact that it was made, not in the supposed interest of the master, but for his own private purposes, *ipso facto* took it out of the scope of the actual authority. . . . . In Thorn *v.* Heard[2] Kay, L. J., refers to the case in these terms: 'It was deliberately decided that the words *for the master's benefit* are essential, and that where an agent in the course of his employment committed a fraud, not for his principal's benefit, but for the benefit of himself, and the principal did not benefit by such fraud, he could not be made liable for it. It is obvious that the ostensible authority (of the agent) may be larger than the actual, but the question will still remain whether it can ever be large enough to make the master responsible for a fraud or crime committed exclusively for the servant's own purposes, and not utilised in any way for the master.' "

Accordingly the Court held that the Great Fingall Company was not responsible for a share certificate to which the secretary had for his own fraudulent purposes wrongfully affixed the company's seal and forged the directors' signatures. Stirling, L. J., concurred, and called attention to the fact[3] that, although strangers might not be affected by

[1][1886] 18 Q. B. D. 714.
[2][1894] 1 Ch. at page 611.
[3][1904] 2 K. B. at page 729, citing Mahoney *v.* East Holyford Mining Co. [1874] L. R. 7 H. L. 869, and Lord Hatherley's Judgment therein at page 899

irregularities, forgery stood on a different footing, and a forged document is wholly null and void. The House of Lords affirmed this decision, but did not discuss the cases at length.[1] So, where a secretary has forged the names of directors to cheques purporting to be drawn on behalf of the company it can repudiate the cheques and recover from the bank which has paid them.[2]

It is to be noted, however, that an act not wrongful in itself done by an agent within the scope of his authority binds his principal even where the motive was wrongful and with a view to the private advantage of the agent, provided the other party has no knowledge of the wrong and acts in good faith.[3]

A representation as to the credit of a person made by an agent does not render his principal liable, and this protects a company as well as any other principal.[4] An agent making fraudulent and deceitful misrepresentations will of course come under a personal liability for his wrongful acts.

As a servant or agent of the company, the secretary is under the same obligation as any other servant or agent not to accept commissions or bribes from persons having dealings with his employers, and he should carefully avoid accepting presents or bonuses from the promoters. If he do so he can be compelled to account for them to the company.[5]

The Articles of Association frequently prescribe that the secretary shall countersign deeds sealed by the company[6] and

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[1] [1906] App. Ca. 439.

[2] Kepitigalla Rubber Estates *v.* National Bank of India, [1909] 2 K. B. 1010. The fact that the pass book showed the forged cheques is no protection to the bank where the directors did not examine it.

[3] Hambro *v.* Burnand, [1904] 2 K. B. 10; Bryant *v.* Quebec Bank, [1893] App. Ca. 170.

[4] Hirst *v.* West Riding Union Banking Co., [1901] 2 K. B. 560.

[5] McKay's Case, [1876] 2 Ch. D. 1; De Ruvigne's Case, [1877] 5 Ch D. 306. See also page 271, *supra*.

[6] Clause 76 of Table A is to this effect.

cheques drawn on its behalf. Even where not obligatory, this is an advisable course to adopt.

As any contract which if made between private persons would not require to be under seal may be made on behalf of the company by any person acting under the express or implied authority of the company, it will frequently happen that the manager or secretary has power to contract for the company; but whether he has this power or not will be a question of fact in each case. If the Articles direct that any parts of the business must be done by the directors only, it will be obvious that these cannot be delegated; but if delegation is possible, the questions will be—(1) Has any such delegation been expressly made? and (2) if none has been expressly made, Has the course of business been such as to give an implied authority? The answers must depend upon the facts of each case.

The secretary is one of the officers liable to penalties for not making proper Returns of Allotments and for not filing the contracts for the issue of fully paid shares (Section 97). He is named in Section 107, Sub-section 1, as one of those liable to penalties for not registering mortgages or charges required to be registered, and would be included in the words "or other officer" in Section 108, Sub-section 2, and in the words "any person" in Section 107, Sub-section 2. He is also one of the persons who may make a statutory declaration that the prescribed conditions for commencing business have been complied with (Section 96).

The secretary is one of the officers of the company liable to be examined in a winding up, either under Section 220 (private examination) or under Section 221 (public examination), and, if a delinquent, he may be rendered liable under Section 254 (misfeasance).

A secretary may be a "clerk or servant" entitled to the benefit of the Preferential Payments in Winding Up

(Sections 114 and 250); but a secretary who does not give his whole time to the company, but performs his duties by deputy, is not within those sections.[1]

The Solicitor.

Before the incorporation of the company a statutory declaration must be filed "by a solicitor of the Supreme Court, engaged in the formation of the company, or by a person named in the Articles as a director or secretary," of compliance with the requirements of the Act (Section 27, Sub-section 2). This, therefore, is the first appearance of a solicitor; but it will not bind the company to employ or pay him.

A company usually appoints a solicitor, often nominating him in the Articles of Association; but the fact of being so named does not create a contract with the solicitor so as to give him a right to damages if the company refuse to employ him;[2] nor does a statement in the Articles that the company shall pay the preliminary expenses of forming the company give the promoters or solicitors any right to be paid expenses they have incurred or costs which have accrued.[3] It follows, therefore, that if a solicitor wishes to be secure of receiving his costs incurred about the formation of a company, he must either have a retainer from the promoter and get payment from him, or see that a definite contract is made with him by the company after its incorporation.

When a person is appointed solicitor to a company, he naturally acts for the company in most of its affairs; but the company is at liberty to employ any other person or firm for

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[1]Cairney *v.* Back, [1906] 2 K. B. 746.
[2]Eley *v.* Positive Government Assurance Co., [1876] 1 Ex. D. 20, 88; Browne *v.* La Trinidad, [1888] 37 Ch. D. 1.
[3]English & Colonial Produce Co. [1906] 2 Ch. 435; Hereford and South Wales Wagon Co., [1876] 2 Ch. D. 621. See also page 112, *supra*.

any business unless there is an agreement that it will exclusively employ a specified person or firm.

The solicitor advises the company in all matters where his advice is asked, and in large companies he frequently attends board meetings, and is present to advise the directors at general meetings. It must be remembered, however, that the solicitor has no authority, and is only an adviser, whose advice may be accepted or rejected.

In questions as to increasing or reducing the capital, issuing new shares or debentures, forfeiting shares, passing resolutions for winding up, or undertaking any scheme for amalgamation with other companies, it is most desirable that advice should be had before even the preliminary steps are undertaken, as mistakes may easily be made, which almost always involve considerable expense, and which sometimes cannot afterwards be rectified: as, for instance, where a company, having passed resolutions for winding up with a view to reconstruction, found that, although the scheme for reconstruction could not be carried out, the company was in liquidation.[1]

By Section 199 the sanction either of the Court or of the committee of inspection is necessary for the appointment of a solicitor in a compulsory winding up, and must be obtained before the employment, except in cases of urgency. In such cases it must be shown that there was no undue delay in obtaining the sanction. Solicitors should see that this necessary preliminary is complied with, or they will lose their right to costs, and they should note that the liquidator's authority is only to employ a solicitor to take any proceedings or do any business which the liquidator is himself unable to take or to do. In a voluntary winding up these rules do not apply.

[1]Thomson *v.* Henderson's Transvaal Estates, [1908] 1 Ch. 765; *ex parte* Fox, [1871] 6 Ch. 187; Cleve *v.* Financial Corporation, [1874] 16 Eq. 363.

The solicitor's right is only to be paid his costs out of the assets of the company, and the liquidator is not personally liable for the costs of the winding up:[1] but the solicitor will have a lien for his costs on any moneys which may be recovered in the winding up through his instrumentality,[2] and, as the costs of the winding up take priority over other claims, he will be entitled to be paid before the unsecured creditors of the company receive any dividend.

A solicitor is not an officer of the company within Section 254 so as to be liable to the summary process therein provided for the assessment of damages against delinquent directors and officers,[3] unless he is also a promoter of the company, or by reason of the manner of his employment it appears that his position is more than that of solicitor,[4] when he will be liable on this distinct ground.

A person is not a promoter within the meaning of Section 93 (Directors' Liability) by reason of his acting in a professional capacity for persons engaged in the promotion, but he may by doing other acts have become a promoter.[5]

A solicitor's authority to represent the company is determined by its dissolution, and if he continues to act after the dissolution he will be liable to the other party for any costs incurred by reason of his so doing.[6]

The Auditors.

Every company must at each annual general meeting appoint an auditor or auditors to hold office until the next annual general meeting, and if none be appointed the Lieutenant-Governor in Council may, on the application of

[1]*Ex parte* Watkin, [1876] 1 Ch. D. 130.
[2]*Re* Massey, [1870] 9 Eq. 367.
[3]Carter's Case, [1886] 31 Ch. D. 496.
[4]*Re* Liberator Permanent Benefit Building Society, [1894] 71 L. T. 406.
[5]See Section 93 and *re* Turner, [1884] 53 L. J. Ch. 42, 49 L. T. 20, and note [4].
[6]Salton *v.* New Beeston Cycle Co. No. 2, [1900] 1 Ch. 43.

any member of the company, appoint an auditor for the current year and fix his remuneration (Section 119, Sub-sections 1 and 2). The directors may, however, before the statutory meeting appoint the first auditors, to hold office until the first annual general meeting, unless previously removed by a resolution of the shareholders in general meeting, in which case the shareholders at such meeting may appoint auditors (Sub-section 5). The directors may also fill any casual vacancy in the office of auditor; but while the casual vacancy continues the surviving or continuing auditor or auditors (if any) may act (Sub-section 6).

To prevent an auditor who has been inconveniently faithful to his duties being displaced at the next annual meeting without notice to the shareholders, Sub-section 4 of Section 112 provides that no person, other than a retiring auditor, shall be appointed at an annual general meeting unless a shareholder has given notice to the company, not less than fourteen days before the annual general meeting, of his intention to nominate him. The company must send a copy of the notice to the retiring auditor, and give notice to the shareholders, either by advertisement or in any manner allowed by the Articles, not less than seven days before the meeting; but if the meeting is not called until after the notice of intention to nominate a new auditor, the notice to the shareholders may be given with the notice calling the meeting, and it will be no objection that the limits of time above mentioned are not observed.

A director or officer of the company is not capable of being appointed auditor (Sub-section 3).

The remuneration of the auditors must be fixed by the company in general meeting, except that the remuneration of any auditors appointed before the statutory meeting, or to fill any casual vacancy, may be fixed by the directors (Sub-section 7).

The duties of the auditors are stated in Section 120. Every auditor has at all times a right of access to the books and accounts and vouchers of the company, and may require from the directors and officers all necessary information and explanations.

As expressed in Section 120, Sub-section 2, the auditors must make a report to the shareholders on the accounts examined by them, and on every balance sheet laid before the company in general meeting, stating (*a*) whether they have obtained all the information and explanations they have required, and (*b*) whether the balance sheet is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs "according to the best of their information and the explanations given to them, and as shown by the books of the company."

The balance sheet must be signed by two directors, or by the sole director if there is only one, and the auditors' report must be attached thereto, or a reference to it inserted at the foot of the balance sheet. The report must be read before the company in general meeting, and be open to inspection by any shareholder,[1] who is also entitled to be furnished with a copy of the balance sheet and auditors' report at a charge not exceeding ten cents for every hundred words (Section 120, Sub-section 3).

As to other matters affecting the balance sheet see Chapter XVII., page 333.

Holders of preference shares and debentures in companies other than private companies or companies registered before the 1st July, 1910, are by Section 121, given the same right to receive and inspect the balance sheets of the company and the reports of the auditors and other reports as are possessed by holders of ordinary shares of the company.

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[1]This would seem to include preference shareholders of a private company, although Section 121 does not apply to them.

By Sub-section 4 of Section 120, if any copy of a balance sheet is issued, circulated, or published, not having been signed as required by the section, or without either a copy of the auditors' report attached or containing the required reference to such report, the company, and every director, manager, secretary, or other officer of the company knowingly a party to the default, is liable to a fine not exceeding two hundred and fifty dollars. The requirements of the section relate to every balance sheet "laid before the company in general meeting," and, presumably, the penalties will not attach in respect of other balance sheets.

It is not enough, however, for the auditors to report that the balance sheet does *not* exhibit a true view of the accounts. They must report generally on the state of the accounts.[1]

These provisions are general, and apply to all companies. They will therefore supersede any regulations of the company not in accord with them. Any Article or special resolution requiring the auditors not to disclose facts (*e.g.* in relation to a secret reserve fund) which they may consider it their duty to include in their report is unlawful and invalid.[1]

The "statement, in the form of a balance sheet," which every public company is required by Section 34, Sub-section 3, to file is to be "audited and signed by the company's auditors;" but there are no provisions as to the making or filing of any report on such statement by the auditors (see page 335, *infra*).

The auditors are essentially agents of the shareholders, and their duty is to act as a check upon the directors, and to give an assurance to the shareholders that the balance sheet and report are a *bonâ fide* and correct statement of the affairs of the company.

[1]Newton *v.* Birmingham Small Arms Co., [1906] 2 Ch. 378.

Persons who perform the duties of auditors without being regularly appointed may become *de facto* officers of the company, and liable as such to misfeasance proceedings; but this is a question of fact, and the services of an accountant are not necessarily those of an auditor.[1]

Much attention was called in England a few years since to the duties of auditors in connection with the "Liberator group" of companies. In the case of the London and General Bank (one of this group) it was held by the Court of Appeal[2] that in the circumstances of the case the auditor of that company was liable to repay a dividend improperly declared in reliance upon a misleading certificate given by him. The judgment of Lord Lindley contained the following declarations of principle:—"It is no part of an auditor's duty to give advice, either to directors or shareholders, as to what they ought to do. An auditor has nothing to do with the prudence or imprudence of making loans with or without security. It is nothing to him whether the business of a company is conducted prudently or imprudently, profitably or unprofitably. It is nothing to him whether dividends are properly or improperly declared, provided he discharges his own duty to the shareholders. His business is to ascertain and state the true financial position of the company at the time of the audit, and his duty is confined to that. But then comes the question, How is he to ascertain that position? The answer is, By examining the books of the company. But he does not discharge his duty by doing this without inquiry and without taking any trouble to see that the books themselves show the company's true position. He must take reasonable care to ascertain that they do so. Unless he does this his audit will be worse than an idle farce. Assuming the books to be so kept as to show the true

[1]Western Counties Steam Bakeries, [1897] 1 Ch. 617.
[2]London and General Bank, [1895] 2 Ch. 673.

position of the company, the auditor has to frame a balance sheet showing that position according to the books, and to certify that the balance sheet presented is correct in that sense. . . . An auditor, however, is not bound to do more than exercise reasonable care and skill in making inquiries and investigations. He is not an insurer. . . . . What is reasonable care in any particular case must depend upon the circumstances of that case. Where there is nothing to excite suspicion very little inquiry will be reasonably sufficient, and in practice I believe business men select a few cases at haphazard, see that they are right, and assume that others like them are correct also. Where suspicion is aroused more care is obviously necessary."

In the particular case in question it appeared that the auditor himself considered some of the items on the credit side very unsatisfactory, and called the attention of the directors to this fact in a special report, and strongly urged that no dividend should be paid. The directors, however, induced him to omit any reference to this in the certificate annexed to the balance sheet, and at the meeting of shareholders a dividend of seven per cent. was declared. The Court held that the auditor had failed in his duty to the shareholders, and that the declaration of a dividend being the natural result of this failure of duty, the auditor and the directors were jointly and severally liable to repay the amount of the dividend. The dividend for the previous year had also been improperly paid, but it was not proved that the auditor "really knew, or ought then to have known, that the position of the bank was not correctly shown by the books," and he escaped liability in respect of that year. It was also held not to be enough to insert such a vague phrase as "The value of the assets as shown is dependent upon realisation." If a warning is to be given, it must be clear. It is not enough to give the shareholders "means of obtaining

information"; they must be given the necessary information itself.

Lopes, L. J., gives the following definition[1]:—"It is the duty of an auditor to bring to bear on the work he has to perform that skill, care and caution which a reasonably competent, careful, and cautious auditor would use. What is reasonable skill, care, and caution must depend on the particular circumstances of each case. An auditor is not bound to be a detective, or, as was said, to approach his work with suspicion, or with a foregone conclusion that there is something wrong. He is a watchdog, not a bloodhound. He is justified in believing tried servants of the company in whom confidence is placed by the company. He is entitled to assume that they are honest, and to rely upon their representations, provided he takes reasonable care. If there is anything calculated to excite suspicion, he should probe it to the bottom; but in the absence of anything of that kind he is only bound to be reasonably cautious and careful. . . . . It is not the duty of an auditor to take stock; he is not a stock expert; there are many matters in which he must rely on the honesty and accuracy of others. He does not guarantee the discovery of all fraud."

It must not, however, be thought that an auditor may rely upon others for anything which it is part of his duty to examine himself.

The auditors will clearly be bound to ask for any information and explanations they require to form an opinion upon the company's position, and take into account the answers they get before they make their report, and must form their own opinion whether the balance sheet exhibits "a true and correct view of the state of the company's affairs." A balance sheet may contain no mis-statements and yet not come up to the standard.

[1]Kingston Cotton Mill Co. No. 2, [1896] 2 Ch. 288, 289.

Again, the auditors usually know nothing of what allowance ought to be made in respect of bad or doubtful debts. This depends upon the facts of each case, and the credit and responsibility of the debtors, into which auditors usually cannot inquire. But if there are circumstances which bring to the notice of the auditors that the book debts or any other assets ought not to be treated as of their nominal value, they should require that the balance sheet shall estimate such assets at their fair value, or add a note warning the shareholders of the facts.

Again, it is not the duty of the auditors to value the freehold or leasehold property or the stock-in-trade of the company. But if they find that depreciation is not being written off from a wasting property, or that absurd values are placed upon existing property, or, still more, if amounts are being "written on" for supposed enhancement of value, they should require the directors either to have an independent valuation by some competent persons, or to state clearly in the balance sheet how the amounts are arrived at.

The auditors will, of course, see for themselves that all the securities and property represented to belong to the company actually exist, and that the proper documents of title are in the company's possession, and will not be satisfied with being shown a bundle "said to contain the proper securities."

Though it is not the duty of auditors to advise, they usually give the company the advantage of their experience in determining what amounts may be properly carried to capital account, what divided over several years, and what charged to the current year, and they should particularly direct their attention to seeing that dividends are only paid out of profits. If the directors do not accept their opinion, they must protect themselves by attaching a note to the balance sheet or profit and loss account.

It is usual for the report and balance sheet to be submitted to the auditors a sufficiently long time before the general meeting for their report or certificate to be added to the balance sheet before it is sent to the members. The whole report may be a separate document, but it must in any case be read at the general meeting, and a reference to the report must be inserted at the foot of the balance sheet (Section 120, Sub-section 3). When auditors have made a report to the directors they should firmly refuse to allow it to be suppressed or to modify it, unless there is shown to be a mistake in it.

It has been said that the auditors are agents for the shareholders, but this must not be taken to include the doctrine that notice of facts given to the auditors is notice to the shareholders, so as to prevent them from afterwards objecting to any misconduct of the directors or other persons of which the auditors had knowledge.[1]

The duty of the auditors is to investigate the affairs of the company and to report to the shareholders upon them, and if any loss arises to the company from the neglect of this duty the auditors may be held personally liable;[2] but this is not a breach of trust, and after six years the Statute of Limitations will be a good defence.

Sometimes very difficult questions arise as to the proper basis on which a correct balance sheet should be made out, and as to what should properly be carried to capital and what to current account. An auditor, if a case of real difficulty arises, should protect himself by taking the opinion of counsel on the point in doubt.

The following is a form of report which may be used by auditors to comply with the Act:—

We have examined the books and accounts of the company for the year ended 31st December ,1911, and the above balance sheet is, in our

[1]Spackman *v.* Evans, [1868] L. R. 3 H. L. 171.

[2]Leeds Estate Building Society *v.* Shepherd, [1887] 36 Ch. D. 787 *re* London and General Bank, [1895] 2 Ch. 166 and 673.

opinion, a full and fair balance sheet, as at that date, containing the particulars required by the regulations of the company, and is properly drawn up so as to exhibit a true and correct view of the company's affairs according to the best of our information and the explanations given to us, and as shown by the books of the company. We have obtained from the directors and officers of the company all the information and explanations we have required.

If appropriate, there should be added, "and we have inspected the securities held at the head office [for the amount standing as reserve fund]."

If necessary, the auditors should add any special remarks, such as, "The item 'Securities and Investments' includes 1000 ordinary shares of $10 each of the A. B. Company, Limited, which is in liquidation"; or, "Under the heading 'Mortgages and Loans' is included interest accrued and due, some of which is in respect of interest for years prior to 1910"; or, "At present prices the investments of the company are not of the value shown above; but this does not affect the Profit and Loss Account, where only the interest actually received is credited."

The name of the person or firm to be appointed auditor or auditors for the ensuing year, and the amount of the remuneration, should be moved and seconded by non-official shareholders—not by directors or other officers of the company—at the annual general meeting in each year.

CHAPTER XIV.

THE ACTS OF THE COMPANY.

General Meetings.

The ordinary business of the company is transacted by the directors. The company exercises its control and does such acts as are reserved to it by the votes of a majority at general meetings. "Whenever a certain number are incorporated, a major part may do any corporate act; so if all are summoned and part appear, a major part of those that appear may do a corporate act";[1] but if the Articles prescribe a quorum, no less number of members can do business.[2] The assent of every member of a company given separately has not the same effect as a resolution passed at a general meeting.[3]

A single person cannot constitute a meeting[4]—a rule which has considerable importance now that a company may consist of only two persons, of whom one may be absent or ill. If, however, a class of shareholders consists of only one person (*e.g.* where one man holds all the preference shares) clauses in the Memorandum or Articles requiring the consent of a meeting of such class may be satisfied by a resolution in writing signed by that one person.[5]

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[1]*Per* Lord Hardwicke, Attorney-General *v.* Davy, [about 1745] 2 Atk 212. See also *per* Wills, J., Merchants of the Staple *v.* Bank of England, [1888] 21 Q. B. 165.

[2]See page 316.

[3]*Re* George Newman & Co., [1895] 1 Ch. 674.

[4]Sharp *v.* Dawes, [1876] 2 Q. B. D. 26; Sanitary Carbon Co., [1877] W. N. 223.

[5]East *v.* Bennett Bros. [1911] 1 Ch. 163.

The Statutory Meeting.

Section 72 of the Act imposes the obligation to hold a general meeting "once at the least in every calendar year, and not more than fifteen months after the holding of the last preceding general meeting." Section 73 provides in the case of companies registered after the first day of July, 1910, for the holding of a statutory meeting (see *infra*).

Companies must hold what is now formally called their "statutory meeting" within a period of not less that one month nor more than three months from the date at which the company is entitled to commence business" (Section 73, Sub-section 1). This date is fixed by Section 96, in the case of a public company registered after the 14th day of March, 1912, as the date when a statutory declaration has been filed that the minimum subscription has been allotted, and that the directors have paid the application and allotment moneys payable on their shares. The Act contains no provisions for the case of a private company, and such a company is accordingly entitled to commence business as soon as it is incorporated.

It is intended that at the statutory meeting the shareholders shall have an opportunity of learning how the flotation of the company has been effected, and of taking matters to some extent into their own hands. Section 73, Sub-sections 2 to 4, requires the directors of companies other than private companies,[1] at least seven days before the statutory meeting, to forward to every member a report certified by not less than two directors, or, if there are not two directors, by the sole director and manager, stating—

1. The total number of shares allotted, distinguishing those issued as fully or partly paid up otherwise than in cash, and stating the consideration for which they have been allotted.

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[1]Private companies are excluded by Sub-section 10.

2. The total amount of cash received by the company in respect of all the shares allotted, distinguished as aforesaid.
3. An abstract of the receipts of the company on account of its capital, whether from shares or debentures, and of the payments made thereout, up to a date within seven days of the date of the report, exhibiting under distinctive headings the receipts of the company from shares and debentures and other sources, the payments made thereout, and particulars concerning the balance remaining in hand, and an account or estimate of the preliminary expenses of the company.
4. The names, addresses, and descriptions of the directors, auditors (if any), managers (if any), and secretary of the company. (This will show if there has been any change since the issue of the prospectus.)
5. The particulars of any contract the modification of which is to be submitted to the meeting for its approval, together with the particulars of the modification or proposed modification.[1]

The statements referred to in the first three of the preceding paragraphs must be certified by the auditors (if any) to be correct (Sub-section 4).

A copy of the report must be filed with the Registrar of Companies as soon as it is sent to the members (Sub-section 5), but private companies are excluded from this provision (Sub-section 10).

There must also be prepared and produced at the statutory meeting, and be accessible during the whole meet-

[1]A company may not prior to the statutory meeting vary the terms of a contract referred to in the prospectus, or statement in lieu of prospectus, except subject to the approval of the statutory meeting (Section 92).

ing, a list showing the names, descriptions, and addresses of the members of the company, and the number of shares held by them respectively (Sub-section 6).

If default is made in filing the report or holding the statutory meeting, any shareholder may, at the expiration of fourteen days after the last day on which the meeting ought to have been held, petition the Court for the winding up of the company. The Court, on the hearing of the petition, may either direct the company to be wound up, or direct the report to be filed or a meeting to be held, or make such other order as may be just, and may order the persons in default to pay the costs of the petition (Section 187, and Section 73, Sub-section 9).

The amendment passed by the Legislature in the session of 1912 provides that if default is made in complying with the requirements of Section 73 regarding the holding of the first statutory meeting and the sending of the statutory report the company and every director, manager or other officer who knowingly and wilfully authorises or permits the default shall be liable to a penalty of twenty-five dollars per day for each day during which the default continues.

At the meeting a discussion may be raised on "any matter relating to the formation of the company, or arising out of the report, whether previous notice has been given or not," but no resolution may be passed without such notice as the Articles of Association require (Section 73, Sub-section 7). The meeting may adjourn from time to time, and notice may be given in the interval of any resolution, and at the adjourned meeting any resolution may be passed of which notice has been given in accordance with the Articles of Association (Sub-section 8).

The provision for adjournments of meetings usually inserted in the Articles is that "The chairman, with the consent of the meeting, may adjourn," etc., in which case

the meeting cannot compel the chairman to adjourn;[1] but it would seem that the words of the Act in reference to the statutory meeting—viz., "The meeting may adjourn from time to time"—put the power of adjournment into the hands of the majority of the meeting, without regard to the chairman.

Subsequent General Meetings.

The company must hold a general meeting "once at the least in every calendar year, and not more than fifteen months after the holding of the last preceding general meeting"[2] (Section 72), and the company, and every director, manager, secretary, or other officer knowingly a party to default in complying with this regulation is liable to a fine not exceeding two hundred and fifty dollars, while the Court can, on the application of any shareholder when default has been made, call or direct the calling of a general meeting.[3]

This is called the "Annual General Meeting," or the "Ordinary General Meeting," and the time at which it is to be held is usually fixed by the Articles. Under Section 72, Sub-section 3, every general meeting of the company must be held within the province. Table A provides that "at such time (not being more than fifteen months after the holding of the last preceding general meeting) and place as may be prescribed by the company in general meeting, or, in default, at such time in the month following that in which the anniversary of the company's incorporation occurs, and at such place, as the directors shall appoint," and further

[1]Salisbury Gold Mining Co. *v.* Hathorn, [1897] App. Ca. 268.

[2]It would seem that if an extraordinary general meeting has been held the section will be satisfied if the next general meeting is within fifteen months of the extraordinary general meeting, and in the next succeeding calendar year.

[3]Apart from this statutory power the Court has no jurisdiction to direct the holding of a meeting of a company not in liquidation (MacDougall *v.* Gardiner No. 1, [1875] 10 Ch. 606.)

provides that "in default of a general meeting being so held, a general meeting shall be held in the month next following. and may be convened by any two members" (Clause 46). Some companies hold two ordinary general meetings in the year. It is customary to declare in the Articles that all business except such as is there mentioned (*i.e.* receiving the report of the directors, sanctioning a dividend, considering the accounts and balance sheet, and electing directors and auditors)[1] shall be deemed special, and that notice must be given of the general nature of all special business. Without such a provision in the Articles it seems that no business could be transacted of which previous notice had not been given;[2] and where these clauses are included any business not specially mentioned as an exception can only be transacted if notice has been given.

Other general meetings may, however, be held from time to time. These are called "Extraordinary General Meetings," and at them only the special business for which they are convened can be transacted. Extraordinary meetings can be convened by the directors whenever they think proper, and in certain circumstances may be convened by the members themselves, subject to the conditions contained in Section 74, which overrides any special regulations of the company. By this section the directors are bound forthwith to convene an extraordinary general meeting on the requisition of the holders of not less than one tenth[3] of the issued capital of the company upon which all calls or other sums then due have been paid.[4] The requisition (which may consist of several documents) must state the objects of

[1]As to the special requirements when an auditor other than the retiring auditor is proposed see page 284.

[2]*Per* Littledale, J., in Rex *v.* Hill, [1825] 4 B. & C. 444.

[3]Fruit and Vegetable Growers' Association *v.* Kekewich [1912] 2 Ch. 52.

[4]If the Articles allow a smaller number to requisition a meeting, this, being an additional power not inconsistent with the Act, will be effective It seems also that preference shareholders may join in demanding a meeting, even if they are not entitled to vote thereat.

the meeting, and must be signed by the requisitionists and deposited at the office of the company. If joint holders of shares join in the requisition all must sign, unless the Articles specifically authorise one to sign for all: the signature of one on behalf of all is of no avail.[1] If the directors do not proceed to cause a meeting to be held within twenty-one days from the date of the requisition being deposited, the requisitionists, or a majority of them in value, may themselves convene the meeting, but it must be held within three months from the date of the deposit of the requisition.[2] If at any such meeting a resolution requiring confirmation at another meeting is passed, the directors are bound forthwith to convene a further extraordinary general meeting to consider and, if thought fit, to confirm the resolution as a special resolution, and if they fail to do so within seven days of the passing of the first resolution the requisitionists, or a majority of them in value, may convene the meeting. Any meeting convened by requisitionists is to be convened as nearly as possible in the same manner as that in which meetings are to be convened by directors (Section 74, Sub-section 5).

There is no provision in the Act, similar to that usually inserted in Articles, that at a meeting convened by requisitionists no business is to be done other than that mentioned in the requisition; but perhaps this is implied in the provision that the requisition must state the objects of the meeting. In any case due notice must be given of any business to be transacted.

The directors have a duty as well as a right to circularise the members for the purpose of advising them

[1]Patent Wood Keg Syndicate *v.* Pearse, [1906] W. N. 164.

[2]The secretary cannot without the sanction of the board summon the meeting on receipt of the requisition. Whether the requisionists can emplcy him to give the notice after the twenty-one days have elapsed is still an open question (State of Wyoming Syndicate, [1901] 2 Ch. 431).

as to the prudence or propriety of any proposed resolution, and may use the company's money for this purpose or for procuring proxies in their own favour.[1]

Notice of all general meetings must be given to the members in manner prescribed by the company's Articles or by Table A. A company is not "corporately assembled" so as to be able to do business unless the meeting is held upon notice which gives every member the opportunity of being present;[2] but it is thought that a provision in the Articles that non-receipt by any member of notice, or the accidental omission to give any member notice, shall not invalidate proceedings, is effective (see Table A, Clause 49).

Under Table A, seven days' notice at the least must be given to each member. Seven days' notice, if not qualified, means seven *clear* days—*i.e.* exclusive of the day of giving the notice and the day of the meeting.[3] By Clause 49 it is declared that the seven days shall be exclusive of the day on which the notice is served, but inclusive of the day for which the notice is given, and by Clause 110 the day of service is the day when the notice would be delivered in the ordinary course of post. With such a provision, or when these provisions are omitted, notices should be posted fourteen or fifteen days before the meeting, as they may not be delivered to some members at least till three or four days after posting. But if the notice may be given by advertisement it will be sufficient if it appear seven clear days before the meeting, and it is not necessary to show that it reached all

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[1] Peel *v.* London and North Western Railway, [1907] 1 Ch. 5; Campbell *v* Australian Mutual Society, [1909] 77 L. J. P. C. 117, 99 L. T. 3, 24 T. L. R. 623.

[2] Smyth *v.* Darley, (1849) 2 H. L C. 789; Merchants of the Staple *v.* Bank of England, [1888] 21 Q. B. D. 165.

[3] See Railway Sleepers Supply Co., [1885] 29 Ch. D. 234, and cases there cited.

the members on that day.[1] In general, no notice is required to be given of adjourned meetings, if held within the limits prescribed by the Articles of Association, as they are merely continuations of the previous meetings, at which, if notice was properly given, all the members have had the opportunity of being present, and those who were present have agreed to the time and place of adjournment. But under Clause 55 of Table A, if the adjournment is for ten days or more, fresh notice is required.

When notice has been duly given of a meeting, the meeting cannot be postponed by a subsequent notice;[2] the proper course is for the meeting to be held and adjourned.

In the absence of some special provisions in the Articles, it is not necessary to give notice to the representatives of deceased persons unless such representatives have become members by formal registration.[3] Clause 114 of Table A does require notice to representative shareholders.

A notice, to be good, must be given by persons authorised to summon the meeting, and resolutions passed at a meeting convened by the secretary without the authority of the board are invalid, nor will the consent of directors separately given suffice.[4] But if the notice purports to be issued by the authority of the directors and is subsequently ratified by them at a board meeting it will be valid,[5] and Warrington, J., has held that a notice given by a person believing himself to be a director, and subsequently adopted by another director, was valid under an Article rendering valid acts done by persons acting as directors, although an irregularity

[1]Sneath *v.* Valley Gold Co., [1893] 1 Ch 477.

[2]Smith *v.* Paringa Mines, Limited, [1906] 2 Ch. 193.

[3]Allen *v.* Gold Reefs of West Africa, [1900] 1 Ch. 656.

[4]Haycraft Gold Reduction Co., [1900] 2 Ch. 230; State of Wyoming Syndicate, [1901] 2 Ch. 431.

[5]Hooper *v.* Kerr Stuart & Co., [1900] 83 L. T. 729.

be subsequently discovered,[1] and Swinfen Eady, J., that the resolutions of a general meeting convened by *de facto* directors are not invalidated by any irregularity in the constitution of the board.[2]

If there are no directors, and no special provisions in the Articles to meet the case, any five members can convene a meeting under Section 75.[3]

If directors fail to convene the annual meeting, the proper proportion of the members can requisition an extraordinary general meeting (see page 299, *supra*); but this does not always meet the case, for certain business (*e.g.* the appointment of auditors under Section 119, and also the submission of a balance sheet under the common form of Articles) has to be done at the annual general meeting, and to procure the holding of such meeting any member may, under Section 72, apply to the Court to call or direct the calling of a meeting, or the member may enforce penalties under that section. Clause 46 of Table A, however, allows any two members to summon the annual general meeting if the directors fail to do so.

Only members of the company are entitled to be present, and a member cannot insist on his solicitor or other agent being allowed to accompany or represent him, the Articles almost invariably requiring that a proxy shall himself be a member of the company. Section 76, however, gives any company which is a member of another company power by minute of the directors to authorize any of its officials or any other person to act as its representative at meetings, and such representative has, on behalf of the company appointing him, the right to exercise the same functions as if he were an individual shareholder.

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[1]Transport, Limited, *v.* Schomberg, [1905] 21 Times L. R. 305.
[2]Boschoek Co. *v.* Fuke, [1906] 1 Ch 148.
[3]Brick and Stone Co., [1878] W. N. 140.

Minutes of Business Done at Meetings.

Every company must cause minutes of all proceedings of general meetings, and of its directors or managers, to be entered in books provided for the purpose, and such minutes, if purporting to be signed by the chairman of the meeting or of the next succeeding meeting, shall be evidence of the proceedings, and until the contrary is proved every meeting of the company, or of the directors or managers, of which minutes have been so made is to be deemed duly held and convened, and all proceedings thereat duly had, and all appointments of directors, managers, or liquidators are to be deemed to be valid[1] (Section 79, and see Table A, Clause 75).

The usual course is for the secretary to prepare the agenda, or heads of the business to be transacted at the meeting, and to lay them before the chairman, who brings the various items before the meeting for consideration.

The secretary takes notes of the proceedings of each meeting, whether a general or board meeting, and afterwards enters them in the minute books, and reads the entries at the next general or board meeting, as the case may be. The chairman then puts them to the vote, and signs them if approved; or if any amendment is required, that is first made and initialled by him, and the minutes are then signed. In the minutes of this meeting a note should be made that "the minutes of the preceding meeting were read and signed as correct." It is not proper to say "the minutes were confirmed," as this might lead to an inference that the business recorded was reconsidered and confirmed, which is not the case. Directors present when the minutes of a previous meeting are read and signed

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[1]This must, of course, mean in regard to matters properly entered in the minutes, and the evidence will only be that such and such proceedings were had, and not that the statements of fact contained are true.

are not thereby made responsible for the resolutions passed at the previous meeting, although they thus are fixed with notice of what has been done (see page 264, *supra*). If any matter is debated afresh, this should be the subject of a separate minute. It is improper to remove a page from the minute book. If it requires re-writing, a line should be drawn through it, leaving the page in its place. The mutilation of any book gives rise to suspicion of bad faith. The minutes are constantly referred to in legal proceedings, and it is of the utmost importance that they should be full and accurate. The absence of any reference to a matter in the minutes is treated as evidence that it was not brought before the board, but express evidence may be given to prove that this is not the case.

It is advisable to have separate minute books for general and board meetings. The former may fairly be open to the inspection of members; but the directors' minute book, containing as it does a record of the private affairs of the company, should not be accessible to any but the directors, secretary, and auditors, who will be entitled to see it for purposes of the audit.

Business of General Meetings.

It is only at general meetings that the shareholders can exercise any control over the affairs of the company. The Articles almost invariably require the directors to lay before the meeting a report on the company's affairs and a balance sheet. The Act requires that the auditors' report on any balance sheet shall be read before the company in general meeting and be open to inspection by any shareholder (Section 120). The president of the company, or, if there be no such president, the person elected by the meeting, takes the chair. It is his duty to preserve order, conduct proceedings regularly, and take care that the sense of the meeting is properly ascertained with

regard to any question before it.[1] It is customary for the chairman to introduce the report of the directors in a speech, in which he explains the position of the company, and gives as much information about its affairs as he thinks fit. He concludes by moving that the report be adopted, in which he is seconded by another of the directors. The shareholders then comment upon or criticise the report and the chairman's speech, and ask for any further information they desire; but the chairman and directors are not bound to give any information beyond the report, and if they consider it undesirable to answer any questions they may refuse to do so. If the shareholders are dissatisfied, they may oppose the motion that the report be accepted; but even if the opposition be successful, it has no effect, for it is not necessary that the report should be accepted by the meeting. Such a rejection of the report, however, is considered a vote of censure upon the board of directors. If the dissatisfied shareholders succeed in rejecting the report, they usually move to appoint a committee of inspection, but whether this be as an amendment or by way of original resolution it would seem to require notice, for this is a matter of great moment upon which all the shareholders should have an opportunity of voting. Even if notice be given, and the resolution passed, the committee will have very small powers, unless it be a committee of inspection appointed under Section 117, for which purpose a special resolution must be carried by a three-fourths majority at a meeting whereof notice has been given specifying the intention to propose the resolution, and confirmed by a subsequent meeting (Section 77). If the special resolution is not carried the dissatisfied shareholders may apply, under the provisions of Section 116, to the Lieutenant-Governor in

[1] *Per* Chitty, J., in National Dwellings Society *v.* Sykes, [1894] 3 Ch. 159.

Council to appoint inspectors. It must, however, be understood that the company cannot take the control of its affairs out of the hands of the directors, and give powers to a committee, except in the manner specified in the Articles; and accordingly, if there be no power to remove directors, the company will have to wait until the Articles are altered or the obnoxious directors retire in due course.[1] If the power to remove directors or to control their action be by special resolution, an ordinary resolution will not suffice. Often, however, when directors find the meeting hostile they assent to the appointment of a committee to report to the general meeting which is adjourned.

Upon the report being carried, one of the directors will move the payment of a dividend in accordance with the report. The Articles usually provide that the shareholders may reduce, but not increase, the dividend recommended by the directors.

The re-election of retiring directors and the filling up of vacancies will follow, and the auditors will afterwards be elected and their remuneration fixed. This is a matter in which the directors should take no part, and which should be left entirely in the hands of the shareholders.

If there is no special business, the meeting should then terminate. If, however, there is special business, the business of which notice has been given should be proceeded with. It was usual at one time to transact special business only at an extraordinary general meeting, which was often called to follow the ordinary meeting; but this is necessary unless the Articles expressly require it, there being no reason why special business should not be transacted at an ordinary meeting.

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[1]Automatic Self-Cleansing Co. *v.* Cunningham, [1906] 2 Ch. 34, and Salmon *v.* Quin & Axtens, [1909] App. Ca. 442.

The chairman, with the sanction of the majority, can stop the discussion, or in modern phrase "the closure may be adopted," after resolutions have been reasonably debated.[1]

The chairman can, with the sanction of the majority, adjourn the meeting, but he cannot, by leaving the chair before the business is completed, bring the meeting to a close; if he purport to do so, the meeting may appoint another chairman and proceed with the business.[2] If the Articles provide that "the chairman, with the consent of the meeting, may adjourn," the majority cannot compel the chairman to adjourn the meeting if he thinks it ought to proceed.[3] But Table A (Clause 55) requires the chairman to adjourn the meeting if so directed by the meeting, further providing (by Clause 59) that a poll demanded on the question of adjournment shall be taken forthwith.

A meeting, if duly called, cannot be postponed by a subsequent notice issued before the meeting.[4] It can, however, be adjourned before any business is done.

The taking of a poll will be considered under the head of "VOTES AT GENERAL MEETINGS" (page 309, *infra*).

As has been seen, the minutes must be taken; but there is no obligation upon the company to publish a report of the proceedings at general meetings, although with large companies it is customary to have one prepared and printed, and circulated among the shareholders.

MOTIONS AT GENERAL MEETINGS.

The Articles usually provide that notice must be given of the general nature of any special business to be transacted,[5] and by Section 77 notice must be given of the intention to propose a special resolution. In the absence of provisions in

[1]Wall *v.* London and Northern Assets Corporation, [1898] 2 Ch. 469.
[2]National Dwellings Society *v.* Sykes, [1894] 3 Ch. 159.
[3]Salisbury Gold Mining Co. *v* Hathorn, [1897] App. Ca. 268.
[4]Smith *v.* Paringa Mines, Limited, [1906] 2 Ch 193.
[5]Table A has this provision Clause 49.

the Articles of Association, and if Table A be excluded, no business can be brought on without notice (see page 38, *supra*). The notice must "give at any rate a fair, candid, and reasonable explanation" of the business proposed, and if something is wrapped up and kept back it will invalidate the proceedings.[1] Thus, Kekewich, J., held that a notice of a meeting to adopt new Articles which might be seen at the company's office was not sufficient where the new Articles increased the directors' remuneration and borrowing power, and made other important changes.[2]

If notice is required, and has not been given, or if insufficient notice has been given, the chairman should refuse to put the motion to the meeting; but an amendment of which notice has not been given may be proposed to a motion properly moved, so long as it is within the scope of the notice originally given;[3] and if the notice of meeting is accompanied by the directors' report, stating that certain business will be proposed, this is a sufficient notice.[4] It has been held that where the notice was of a resolution to appoint as directors three persons named in the notice it was competent for the company to add three others by way of amendment.[5]

Sometimes several amendments are proposed to one motion, in which case the chairman will require to exercise his discretion very carefully in allowing them and in arranging their order. He should get them all put into

[1]Kaye *v.* Croydon Tramways, [1898] 1 Ch. 358. Marsh *v.* Huron College, 27, Gr. 606.

[2]Normandy *v.* Ind, Coope & Co., [1908] 1 Ch. 84.,

[3]Torbock *v.* Lord Westbury, [1902] 2 Ch. 871; Henderson *v.* Bank of Australasia, [1890] 45 Ch. D. 330. The latter case also decided that an amendment need not be submitted in writing, but is good if its effect be made reasonably clear to the meeting orally.

[4]Irvine *v.* Union Bank of Australia, [1877] 2 App. Ca. 375; Boschoek Co. *v.* Fuke, [1906] 1 Ch. 148.

[5]Betts & Co. *v.* Macnaghten, [1910] 1 Ch. 430.

writing, and see how far they are consistent one with another. *Primâ facie*, they ought to be put in the order in which they are proposed, but the nature of them will often make it more desirable to arrange them so that they may not clash. After any motion or amendment has been accepted by the meeting, no amendment inconsistent with it should be submitted, as the acceptance of the prior proposal negatives the inconsistent amendment. The amendments should be disposed of before the original motion.

If the chairman improperly refuses to submit an amendment to the meeting, the resolution actually carried will be invalidated.[1] A reasonable amendment may be proposed and made to a special resolution at the first meeting,[2] but not at the confirmatory meeting, when the resolution as passed at the first meeting must be accepted or rejected as it stands.[3]

Where notice has been given of several resolutions, each resolution must be put separately,[4] although, if the meeting is unanimously in favour of all the resolutions, it may be this would not be material. The fact that some of the resolutions submitted are *ultra vires* will not affect the validity of others even if all were part of one scheme, *e.g.* for the purpose of reconstruction.[5]

VOTES AT GENERAL MEETINGS.

The Articles of Association usually provide how many votes each shareholder shall have.

Table A, Clause 60, provides for one vote for every share, which is in accordance with Section 75, Sub-section (*d*) of the Act. The Register of Members should be in

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[1]Henderson *v*. Bank of Australasia, [1890] 45 Ch. D. 330.

[2]Torbock *v*. Lord Westbury, [1902] 2 Ch. 871.

[3]Wall *v*. London and Northern Assets Corporation, [1898] 2 Ch. 469.

[4]Patent Wood Keg Syndicate *v*. Pearce, [1906] W. N. 164; Thomson *v*. Henderson's Estates, Limited, [1905] 1 Ch. at page 776.

[5]Thomson *v*. Henderson's Estates, Limited, [1908] 1 Ch. 765.

readiness at the meeting to refer to for the number of shares held by each member, and the consequent number of votes to which he is entitled on a poll. In case of an equality of votes the chairman has an additional or casting vote.[1]

Where there is a mode of voting known to the community, that mode should be followed unless a binding rule is found in the Articles to the contrary, and in like manner any Common Law rule as to voting will prevail unless inconsistent with the Articles.[2] Thus, votes in the first instance are taken by a show of hands, each shareholder having a single vote for himself, but none for any persons whose proxies he holds.[3] But if a sufficient number of shareholders are dissatisfied with the result of the count of hands, they can demand a poll, in order that the number of votes to which members are entitled may be ascertained and proxies used. If the company is governed by Table A of the Companies Act, 1911 (Clause 56), three members may demand a poll. Upon a special or extraordinary resolution Section 77 allows a poll to be demanded by three persons entitled to vote, unless the Articles require some other number not exceeding five. Under Table A the poll "shall be taken in such manner as the chairman directs, and the result of such poll shall be deemed to be the resolution of the company in general meeting."[4] Both the demand for a poll and the method of taking it must of course be in accordance with the provisions of the Articles.[5]

[1]Toronto Brewing Co *v.* Blake, 2, O.R 184.

[2]*Per* Jessel, M. R., Horbury Bridge Coal Co., [1879] 11 Ch. D. pages 113 and 115.

[3]Ernest *v.* Loma Gold Mines, [1897] 1 Ch. 1. overruling *re* Bidwell Brothers, [1893] 1 Ch. 603; but if a person not a member is allowed to be a proxy, it seems he can vote on a show of hands (see [1897] 1 Ch. page 8).

[4]As to a poll on a special resolution see next page.

[5]It has been said that a proxy to vote does not include authority to demand a poll (*per* Bacon, V. C., Haven Gold Mining Co., [1882] 20 Ch. D. 151; Reg. *v.* Government Stock Co., [1878] 3 Q. B. D. 443), but in unreported cases Judges have expressed doubt as to this.

The chairman must decide whether a poll is properly demanded, having regard to the Articles, which sometimes impose a limit of time for the demand, and require that a certain proportion of the capital of the company shall be represented as well as a certain number of shares. The chairman has generally also to determine how the poll is to be taken (*e.g.* Table A. Clause 57). If there is a question of much importance to be decided, he may fix a future day, and notice should be given to all the shareholders of the appointed place and time. If the matter is not of great importance, or if there is a representative gathering of shareholders present, the poll may be taken at once.[1] In any case the votes should be taken in writing, and an entry made of how many votes each shareholder is entitled to give and actually does give. Each shareholder should sign his name as a guarantee that there is no personation. The chairman must declare the result of the poll, but it is most desirable that there should be scrutineers present on each side at the counting. Proxies may be used in the poll, if allowed by the regulations of the company. If there are several resolutions, the poll must be taken on each separately. If it be taken on a number of resolutions together, they cannot be validly passed.[2]

Under the common form of Articles or under Table A a poll cannot be taken by sending voting papers to the members to be returned by post. They or their proxies must attend and give the votes personally.[3]

With regard to extraordinary and special resolutions, Section 77 provides that at any meeting at which an extraordinary or special resolution is submitted a poll may be

[1]Chillington Iron Co., [1886] 32 Ch. D. 159.
[2]Patent Wood Keg Syndicate *v.* Pearse, [1906] W. N. 164.
[3]McMillan *v.* Le Roi Mining Co., [1906] 1 Ch. 331.

demanded by three persons for the time being entitled according to the Articles to vote, unless the Articles require a demand by such number of persons, not exceeding five, as may be specified in the Articles. This seems to mean that if the Articles are silent, or specify that more than five persons are required for the demand of a poll, the provisions of the Act will apply, and any three persons entitled to vote may demand a poll. If, however, the Articles specify that five or less persons may demand a poll, these provisions of the Articles will prevail, and a poll may be demanded by the number specified in the Articles, but not by fewer persons, and, unless the poll is demanded by the proper number of persons, the chairman's declaration of the result of the voting on the special or extraordinary resolution will be conclusive.

Table A (Clause 56) extends this effect of the chairman's declaration, if accompanied by an entry in the minute book, to other resolutions. This will prevent the question being re-opened in legal proceedings, even if evidence is tendered that the chairman's declaration was wrong,[1] unless an error appears on the face of the declaration of the chairman: *e.g.* where he states the number of votes given and they are insufficient.[2] Where the Articles of Association declared that if votes were not disallowed at the meeting they should be good for all purposes, it was held that, in the absence of fraud or bad faith, the resolution could not be impeached on the ground that votes were improperly received.[3] Eve, J., has held that, notwithstanding a declaration by the chairman, the notice of meeting may be looked at to see if the resolution is in order.[4]

[1]Arnot *v.* United African Lands, [1901] 1 Ch. 518 C. A.; Hadleigh Castle Gold Mines, [1900] 2 Ch. 419, not agreeing with Kekewich, J., in Young *v.* South African Development Syndicate, [1896] 2 Ch. 268.

[2]Caratal (New) Mines, Limited, [1902] 2 Ch. 498.

[3]Wall *v.* London and Northern Assets Corporation No. 2, [1899] 1 Ch. 550.

[4]Betts & Co. *v.* Macnaghten, [1910] 1 Ch. 430.

The bearers of share warrants only have votes if the regulations of the company give them;[1] and when the Articles give this privilege, they usually contain special terms upon which the power of voting is to be exercised: *e.g.* on depositing the warrants with the company.

The holders of all classes of shares have equal rights of voting unless restrictions are specifically imposed. But a provision in the Articles that holders of any class of shares shall not have votes in respect of those shares is good; and resolutions passed by those having votes are binding even when they affect the interests of all classes.[2] One class of shareholders, however, may not vote away the rights of another: *e.g.* the ordinary shareholders cannot deprive the holders of preference shares of their priority if they are held under a contract,[3] and a majority cannot divide the assets among themselves to the exclusion of the remainder of the shareholders.[4]

Every shareholder is entitled to vote in accordance with his own interests, although they may be different from those of the company at large: for instance, a shareholder may, if acting without fraud, vote in favor of property being purchased from himself, and the resolution will be binding even though turned by the votes of such shareholder.[5] The Court will restrain the passing of a resolution by means of votes in respect of shares issued by

[1]Section 45, Sub-section 4: "The bearer of a share warrant may, if the Articles of the company so provide, be deemed to be a member of the company . . . . . either to the full extent or for any purposes defined in the Articles."

[2]Barrow Haematite Steel Co., [1888] 39 Ch. D. 582.

[3]*Per* Rigby, L. J, in James *v.* Buena Ventura Sydicate, [1896] 1 Ch. 466. But see Allen *v.* Gold Reefs of West Africa, [1900] 2 Ch. 56.

[4]Menier *v.* Hooper's Telegraph Co., [1874] 9 Ch. 350.

[5]North-West Transportation Co. *v.* Beatty, [1881] 12 App. Ca. 589; Pender *v.* Lushington, [1877] 6 Ch. D. 70; Burland *v.* Earle [1902] A. C. at page 94.

the directors to themselves or their friends for the purpose of obtaining control of the voting power;[1] and an agreement by a vendor of shares with the purchaser that until they are transferred he will vote in a particular way will be enforced by the Court,[2] although it seems the company could not take notice of the fact that a vote was given in breach of such an agreement.

Sometimes the holders of debentures are by the Articles of Association given votes, and accordingly have a voice in the management of the company, but such votes could not be counted upon a special or extraordinary resolution, for the Statute specifies that such resolution must be passed by a majority of three fourths *of the members* entitled to vote.

If by transferring his shares into other names a member can increase his voting power, he is entitled to do so.[3]

The Articles generally provide how joint holders of shares are to vote. Of course only one of such holders can vote, and the right is usually (as in Table A, Clause 61) given to the one first named in the Register; and under Articles in the usual form it would seem that the joint holder to whom the vote is given can also give a proxy without the concurrence of the other joint holders.

Occasionally the Articles provide that preference or deferred shareholders shall not have the right to attend general meetings. This, however, appears to be contrary to the intention of the Statute, and there can be hardly any doubt that all shareholders have the right to be present at all general meetings of a company: otherwise a meeting cannot be a "general" one.

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[1]Punt *v.* Symonds & Co., [1903] 2 Ch. 506.

[2]Greenwell *v.* Porter, [1902] 1 Ch. 530.

[3]Pender *v.* Lushington, [1877] 6 Ch. D. 70; Moffatt *v.* Farquhar 1878] 7 Ch. D. 591.

PROXIES AT GENERAL MEETINGS.

When a company is governed by the regulations of Table A, "votes may be given either personally or by proxy" (Clause 64). Special Articles of Association also almost universally have a similar provision. In the absence of this provision there is no legal right of a member to have his vote by proxy accepted.[1] Table A, Clause 66, requires the instrument of proxy to be deposited at the registered office not less than forty-eight hours, before the meeting at which it is to be used; but special Articles frequently reduce the time to twenty-four hours.

Usually only members of the company entitled to vote are allowed to act as proxies (Clause 65 of Table **A**, which, however, allows a corporation to vote by a proxy who is not a member); but Section 76 gives a company which holds shares in another company an absolute right to appoint any person as its representative (see page 302). It is sufficient if the proxy becomes a member before he is called upon to act, whether he was or was not a member at the time of his appointment.[2] A form of instrument of proxy is given in Table A.

A proxy may in the first instance be given with a blank left for the name of the person entitled to vote if there is an authority to some person to fill in the blank.[3] Where a member had notice that a requisition had been lodged to summon a meeting, and gave authority to another member to fill up a proxy for him, but the requisition was withdrawn and another lodged, the authority was held to extend to the meeting called on the later requisition.[4] The proxy need not be actually named if he is sufficiently described to be identified.[5]

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[1]Harben *v.* Phillips, [1883] 23 Ch. D. 14. No such right exists at Common Law: *per* Bowen, L. J., at page 35.

[2]Bombay Burmah Trading Co. *v.* Shroff, [1905] App. Ca. 213.

[3]*Re* Lancaster, [1877] 5 Ch. D. 911.

[4]Sadgrove *v.* Bryden, [1907] 1 Ch. 318.

[5]Vide note 2 *supra*

Sometimes the form of proxy authorises "the chairman of the meeting" to vote for the absent shareholder; but that is very unadvisable.

It is the duty of the secretary to examine the instruments of proxy that may be sent in, and to report any irregularity to the directors.

"The right of a shareholder to vote by proxy depends on the contract between himself and his co-shareholders . . . . and all the requisitions of the contract as to the exercise of the right must be followed."[1] Accordingly, proxies which are not in accordance with the regulations of the company must be rejected as invalid: *e.g.* if the Articles of Association require an instrument of proxy to be witnessed, it is invalid if not so witnessed.[2] It is for the chairman of the meeting to receive or reject proxies, and his decision is binding, unless it is proved to the Court to be wrong.[3]

Unless the Articles of Association or other document governing the meeting so require, it is not essential that the proxies should be produced at the meeting, and if duly lodged at the place required by the regulations the result of the proxies may be communicated by telegram or letter.[4]

QUORUM.

No business can be done at a meeting unless a quorum is present.[5] Under Table A, Clause 51, three members personally present form a quorum. A single member cannot be a meeting.[6] It is doubtful whether when only one member is present proxies can be relied upon even where the Articles fix the quorum at so many "present personally or by proxy."

[1]*Per* Cotton, L. J., Harben *v.* Phillips, [1883] 23 Ch. D. 32.
[2]Harben *v.* Phillips, [1883] 23 Ch. D. 14.
[3]Indian Zoedone Co., [1884] 26 Ch. D. 70.
[4]English, Scottish, and Australian Bank, [1893] 3 Ch. 385.
[5]Howbeach Coal Co. *v.* Teague, [1860] 5 H. & N. 151; Romford Canal Co., [1883] 24 Ch. D. 85.
[6]Sharp *v.* Dawes, [1876] 2 Q. B. D. 26; Sanitary Carbon Co., [1877] W. N. 223.

CHAPTER XV.

ACTS OUTSIDE THE POWERS OF THE COMPANY OR OF ITS DIRECTORS.

THE acts which a company or its directors do or purport to do may be void upon several grounds, which may be summarised as follows:—(1) They may be contrary to public policy generally, as, for instance, an agreement for compounding a felony; (2) They may be forbidden by Statute, as, for instance, the holding of lotteries; (3) They may be contrary to the policy of some particular Statutes, as, for instance, a reduction of the capital of a joint stock company not carried out in accordance with the provisions of the Companies Acts; (4) They may be beyond the powers of the company, or, as it is usually expressed, *ultra vires*.

Of these the first three are illegal, and on that account void; but the last is void, not because illegal, but because, there being no power to do the act, the forms gone through which purported to perform it were inoperative, and the act, if done at all, was not done by the company, but by the person whose hand actually did it, and therefore neither brings the company under any liability nor gives it any rights.

The doctrine, now well established, with regard to acts done *ultra vires* first took a definite shape in cases upon acts purporting or proposed to be done by railway and other companies formed under special Acts of Parliament. With regard to these it was held that the companies had no existence independent of the Acts which created them,[1] and

[1]Shrewsbury &c. Railway Co. *v.* London and North Western Railway Co., [1853] 22 L. J. Ch. 682.

that the application of their capital to any other purposes than those specified must be unlawful. No majority of shareholders, however large, could sanction the misapplication of a portion of the capital. Indeed, even unanimity would not make such a deed lawful.[1] It was also declared that "a Parliamentry corporation is a corporation merely for the purposes for which it is incorporated, and it has no existence for any other purpose;"[2] and, in the House of Lords, "It must, therefore, be now considered a well-settled doctrine that a company incorporated by Act of Parliament for a special purpose cannot devote any part of its funds to objects unauthorised by the terms of its incorporation, however desirable such an application may appear."[3]

The same principles apply also to companies registered under the Companies Acts;[4] for such companies are in fact created by those Statutes for the purposes which are set out in the Memorandum of Association, and have no existence except for those purposes. Accordingly, in the Ashbury Railway Carriage Co. *v.* Riche (1875, L. R. 7 H. L. 794), Lord Selborne said: "I only repeat what Lord Cranworth, in Hawkes *v.* Eastern Counties Railway,[3] stated to be settled law, when I say that a statutory corporation, created by Act of Parliament for a particular purpose, is limited as to all its powers by the purposes of its incorporation as defined in that Act. The present and all other companies incorporated by virtue of the Companies Act of 1862 appear to me to be statutory corporations within this principle. The Memorandum of Association is, under the Act, their

[1]Bagshaw *v.* Eastern Union Railway Co., [1849] 7 Hare 114. Charlebois *v.* Delap, 26, S.C.R., 221 Adams *v.* Bank of Montreal, 32, S.C.R., 719

[2]National Manure Co. *v.* Donald, [1859] 28 L. J. Ex. 185.

[3]Hawkes *v.* Eastern Counties Railway, [1855] 5 H. L. C. 348.

[4]The principle does not apply to a chartered company, which has all the powers of a private person. If it acts in excess of its charter the proper proceeding is to apply by *scire facias* for a revocation of the charter (British South Africa Co. *v.* De Beers Mines, [1910] 1 Ch. 354).

fundamental and (except in certain specified particulars) their unalterable law, and they are only incorporated for the objects and purposes expressed in that Memorandum."[1]

It is, therefore, now settled law that any act which is outside the powers of a company as defined by its Memorandum is void; and a person with whom the company has contracted *ultra vires* obtains no rights, but, on the contrary, the company may recover any moneys paid under such a contract,[2] and a judgment obtained by consent in respect of a contract made *ultra vires* may be set aside.[3] Directors are personally liable to repay any moneys expended by them otherwise than in accordance with the company's powers.[4]

Since the Memorandum and Articles are registered, persons dealing with a company are deemed to have notice of the limitations upon the company's powers, and enter into dealings with them at their own peril if they do not ascertain what those limitations are.[5] But this difference must be observed, that if the act which is done or contract which is made might have been done or made in a certain manner, a person who is not aware that it was not done or made in that maner is justified in assuming that all has been rightly done and all necessary conditions performed, and will accordingly be entitled to the benefit of the contract, even though, in fact, some of the conditions have not been performed.[6] It is further to be noted that, although an act outside the powers given by the Memorandum cannot be ratified, an act which

[1]See also Wenlock *v.* River Dee Co., [1885] 10 App. Ca. 354.

[2]Great Eastern Railway Co. *v.* Turner, [1873] 8 Ch. 149; Coltman *v.* Coltman, [1882] 19 Ch. D. 65.

[3]Great North-West Central Railway *v.* Charlebois, [1899] App. Ca. 114.

[4]*Re* Sharpe, [1892] 1 Ch. 165; Cullerne *v.* London and Suburban Building Society, [1890] 25 Q. B. D. 485, 490.

[5]See page 37, note. Thomas *v.* Walker, 16, O.W.R. 751.

[6]Royal British Bank *v.* Turquand, [1856] 6 E. & B. 327; Smith *v.* Hull Gas Co., [1852] 11 C. B. 897; *ex parte* Overend, Gurney & Co., [1869] 4 Ch. 460.

the company has, but the directors have not, power to do is capable of being ratified by the company[1] by ordinary resolution, although authority to the directors to do future acts forbidden by the Articles, or the ratification of acts which the company is prohibited by the Articles from doing, can only be given by special resolution altering the Articles of Association.[2] It seems, moreover, that if a special resolution is required as a condition to doing an act, the fact that no such resolution is filed is notice that there is no power to do the act.[3]

In construing the Memorandum, it must be remembered that where wide general powers are given in addition to specific powers the former will only be read as ancillary to the latter and not as independent objects,[4] even though the Memorandum states that each paragraph is to be read separately and without limitation.[5] But the Memorandum must be read as a whole, and it may appear that the later clauses are really intended to include powers far beyond those contained in the earlier clauses.[6]

If the Memorandum authorizes an act to a limited extent, this by implication forbids any act outside the limit, *e.g.* a power to borrow up to $100,000 renders unlawful any greater borrowing.[7]

Provisions which are not required by the Acts to be inserted in the Memorandum, but are in fact found there,

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[1]Brotherhood's Case, [1862] 31 Beav. 365; Evans *v.* Smallcombe, 1868] L. R. 3 H. L. 249; Phosphate of Lime Co. *v.* Green, [1871] L. R. 7 C. P. 43; Campbell's Case, [1874] 9 Ch. 1; Irvine *v.* Union Bank of Australia, [1877] 2 App. Ca. 366.

[2]Grant *v.* United Kingdom Switchback Co., [1889] 40 Ch. D. 139; Boschoek Co. *v.* Fuke, [1906] 1 Ch. 148.

[3]Irvine *v.* Union Bank of Australia, [1877] 2 App. Ca., at page 379.

[4]German Date Coffee Co., [1882] 20 Ch. D. 169.

[5]Stephens *v.* Mysore Reefs (Kangundy) Mining Co., [1902] 1 Ch. 745.

[6]Butler *v.* Northern Territories Mines of Australia, [1907] 96 L. T. 41.

[7]Wenlock *v.* River Dee Co., [1885] 10 App. Ca. 354.

are unalterable,[1] unless the Memorandum itself gives the power of altering such provisions,[2] and the Articles cannot vary the Memorandum by giving powers inconsistent with it.[3] Nor can the Memorandum be in any way altered in respect of matters which the Acts require to be stated there,[4] except in the manner specially authorised by the Acts (as to which see page 35, *supra*), although if the Memorandum is ambiguous or silent, contemporary Articles may explain it. Thus, it was held that where the Memorandum of Association did not make any reference to the division of the capital into preference and ordinary shares, the original Articles of Association might sanction such an arrangement, and a power to borrow or lend money not found expressly in the Memorandum was held to be established by the Articles.[5] But Buckley, J., has said: "The purposes for which the Articles can be read to explain or supplement the Memorandum cannot extend to explaining or supplementing the Memorandum in respect of a matter which, under The Companies Act, must be contained in the Memorandum of Association."[6]

It must not, however, be assumed that everything is *ultra vires* which is not included in so many words in the

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[1]Ashbury *v.* Watson, [1885] 30 Ch. D. 376.

[2]Welsbach Incandescent Gas Co., [1904] 1 Ch. 87.

[3]Guinness *v.* Land Corporation of Ireland, [1883] 22 Ch. D. 349.

[4]Ashbury Railway Carriage Co. *v.* Riche, [1875] L. R. 7 H. L. 653.

[5]Harrison *v.* Mexican Railway Co., [1875] 19 Eq. 358; South Durham Brewery Co., [1886] 31 Ch. D. 261; Anderson's Case, [1878] 7 Ch. D. 75; Phoenix Bessemer Steel Co., [1875] 32 L. T. 854, 44 L. J. Ch. 673 (division of capital); Hume *v.* Drachenfels Banket Gold Mining Syndicate, [1895] 2 Mans. 146 (borrowing power). This canon of interpretation is not affected by the fact that the occasion for it is removed by Andrews *v.* Gas Meter Co., [1897] 1 Ch. D. 361. It has since been followed in Fisher *v.* Black and White Publishing Co., [1901] 1 Ch. 173; and Rainford *v.* James Keith Blackman & Co., [1905] 2 Ch. 147 (power to lend money); see also Sime *v.* Coats, [1908] S. C. 751.

[6]Southern Brazilian Rio Grande do Sul Railway, [1905] 2 Ch. at page 84. This is hardly consistent with Rainford *v.* James Keith Blackman & Co., [1905] 2 Ch. 147, where a power to lend money was inferred from a clause in the Articles.

Memorandum Whatever may fairly be regarded as incidental to or consequential upon the objects specified ought not, unless expressly prohibited, to be treated as *ultra vires*,[1] even where the Memorandum does not, as it usually does, contain a clause authorising such acts as are incidental or conducive to the other objects of the company.

The clause last referred to has been treated on several occasions as extending the powers of the company,[2] but it must not be taken as giving powers much in excess of those expressly given or implied by law, as it has been laid down by Bacon, V. C., that such a clause "did not, nor could, nor was meant to authorise the company to do any other things than those which had been previously declared to be the 'objects' for which the company was established, but to prevent failure in accomplishing those objects;"[3] and, further, any very general words in the Memorandum, such as "to undertake any business which may appear profitable to the company," must be rejected as being repugnant to the Act, which enacts that the Memorandum must contain "the objects of the company."

The position is laid down by Buckley, L. J.,[4] as follows:—"To ascertain whether any particular act is *ultra vires* or not, the main purpose must first be ascertained; then the special powers for effectuating that purpose must be looked for; and then, if the act is not within either the main purpose or the special powers expressly given by the Statute, the inquiry remains whether the act is incidental to or consequential upon the main purpose, and is a thing reasonably

[1]Attorney-General *v*. Great Eastern Railway Co., [1880] 5 App. Ca. 473; Small *v*. Smith, [1885] 10 App. Ca. 129.

[2]*Re* Baglan Hall Colliery Co., [1870] 5 Ch. 356; Simpson *v*. Westminster Palace Hotel Co., [1860] 8 H. L. C. 712; Taunton *v*. Royal Insurance Co., [1864] 2 H. & M. 135: *re* Peruvian RailwaysCo. [1867] L. R. 2 Ch. 617.

[3]London Financial Association *v*. Kelk, [1884] 26 Ch. D. 138.

[4]Attorney-General *v*. Mersey Railway, [1907] 1 Ch. at page 99. This case was overruled in the House of Lords, [1907] W. N. 173, 76 L. T. Ch. 568; but this passage was not dissented from.

to be done for effectuating it." Then, taking the case of an hotel company, his lordship says, "In a large number of cases the maintenance of a garden and pleasure grounds would be *intra vires.* The legitimate extent of these would depend upon circumstances. The maintenance of tennis lawns or of a bowling green would, in many circumstances, be legitimate. All these and the like will, without express mention, be within the company's powers. Then I may instance other acts as to which it would be a question of fact, in the case of the particular hotel, whether it was such an act as was reasonably indicental or consequential. If, for instance, the hotel was at Bundoran, in the County Donegal, it might be *intra vires* to lay out and maintain in good order a golf links, or to acquire rights of fishing, and to own boats and supply gillies. . . . . If the hotel in question were in the Strand, the proposition would cease to be true. So, again, if the hotel were situate in a place inaccessible unless special means of communication were provided, ... it might be *intra vires* for that hotel to run a steam launch or a motor car to bring its guests to their destination. It would, in such a case, be analogous to the omnibus which the hotel in a country town sends to the railway station. The question is in each case a question of fact." The question is not, however, "whether the business can be conveniently or advantageously conducted with the principal business authorised, but whether it is by necessary implication incidental or accessory to it."[1]

Even apart from special circumstances it is not easy to say what implied powers a company has, for they will vary with every company according to its main objects. A trading company has an implied power to borrow,[2] but not

[1]Attorney-General *v.* London County Council, [1901] 1 Ch. 781; Attorney-General *v.* Manchester Corporation, [1906] 1 Ch. 643.
[2]General Auction Estate Co. *v.* Smith, [1891] 3 Ch. 432.

a building society.[1] All companies have implied power to compromise disputes,[2] and trading companies having power to deal with their property have power to mortgage it.[3] A company formed to work a patent may purchase it.[4] An hotel company not requiring the whole of its premises may let off part,[5] and a colliery company may sell its surplus lands.[6] Again, a company which has provided ferry boats in accordance with express powers may also let them on hire for excursions; and a railway company possessing weighing machines for its own purposes may allow the public to use them for hire.[7] A trading company may give to its employés a bonus beyond their wages;[8] and a trading company may grant a pension to a retiring officer or servant[9] or award a pension to the widow of a deceased manager.[10] These acts of generiosity may benefit the company by securing for it better service from other persons employed, but after liquidation similar acts cannot advantage the company, and are therefore *ultra vires;*[11] although a clause in a contract for sale of the property of the company that the directors shall be recompensed for loss of office is not illegal if the company assent to it after full notice.[12]

But the following acts have been held to be *ultra vires*: viz.—A railway company spending money on obtaining an

[1]Blackburn Benefit Building Society *v.* Brooks, [1882] 22 Ch. D. 61.
[2]Bath's Case, [1878] 8 Ch. D. 334. Fuckes *v.* Hamilton Tribune, 10, O.R., 497.
[3]*Re* Patent File Co., [1871] L. R. 6 Ch. 83.
[4]Leifchild's Case, [1865] 1 Eq. 231.
[5]Simpson *v.* Westminster Palace Hotel Co., [1860] 8 H. L. C. 712.
[6]Kingsbury Collieries and Moore's Contract, [1907] 2 Ch. 259.
[7]Forrest *v.* Manchester Railway Co., [1862] 30 Beav. 40; London and North Western Railway Co. *v.* Price, [1883] 11 Q. B. D. 485.
[8]Hampton *v.* Price's Patent Candle Co., [1876] 45 L. J. Ch. 437.
[9]Normandy *v.* Ind Coope & Co., [1908] 1 Ch. at page 104; Cyclists' Touring Club *v.* Hopkinson, [1910] 1 Ch. 179.
[10]Henderson *v.* Bank of Australasia, [1889] 40 Ch. D. 170.
[11]Hutton *v.* West Cork Railway, [1883] 23 Ch. D. 654.
[12]Kaye *v.* Croydon Tramways, [1898] 1 Ch. 573, see also the following cases, Monarch Life *v.* Brophy, 14, O.L.R., 1. McDonald *v.* Upper Canada Mining Co., 15, Gr., 179. Struthers *v.* McKenzie, 28, O.R., 381. Bickford *v.* Gd. Junction Rly., 1, S.C.R., 696.

Act to authorise it to improve the navigation of a river, or guaranteeing the profits of a steamboat company,[1] or working coal mines for profit,[2] or subscribing to the Imperial Institute,[3] or carrying on an omnibus service not strictly incidental and ancillary to the railway.[4] A company having power to subscribe for shares may not purchase them.[5] A company may apply its money in defending an action against the editor for a libel in a newspaper published by the company[6] or paying the costs of proceedings against a person who had libelled the directors and the company, but not if the libel is on the directors alone.[7]

It was held at one time that it was unlawful to send out proxies with the directors' names inserted,[8] but this has now been overruled.[9]

It has been held *ultra vires* for a company to apply capital in the payment of dividends,[10] or to purchase its own shares,[11] or to make presents out of capital to directors,[12] or to issue shares at a discount, whether done directly[13] or indirectly under the form of a repayment to the applicant,[14] or to amalgamate or take over the business

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[1] Munt *v.* Shrewsbury &c. Railway Co., [1851] 13 Beav. 1, 20 L. J. Ch. 169; Colman *v.* Eastern Counties Railway Co., [1846] 10 Beav. 1.

[2] Attorney-General *v.* Great Northern Railway Co. [1860] 1 Dr.& Sm. 154.

[3] Tomkinson *v.* South-Eastern Railway Co., [1887] 56 L. T. 813.

[4] Attorney-General *v.* Mersey Railway Co., [1907] App. Ca. 173, the House of Lords reversing the decision of the C. A. [1907] 1 Ch. 81.

[5] Whitwam *v.* Watkin, [1898] 78 L. T. 188.

[6] Breay *v.* Royal British Nurses Association, [1897] 2 Ch. 272.

[7] Studdert *v.* Grosvenor, [1886] 33 Ch. D. 528; Pickering *v.* Stevenson, [1872] 14 Eq. 322.

[8] Studdert *v.* Grosvenor, [1886] 33 Ch. D. 528.

[9] Peel *v.* London and North Western Railway, [1907] 1 Ch. 5.

[10] Guinness *v.* Land Corporation of Ireland, [1883] 22 Ch. D. 542; Flitcroft's Case, [1882] 21 Ch D. 519; Bennett's Case, [1892] 1 Ch. 154.

[11] Trevor *v.* Whitworth, [1888] 12 App. Ca. 409.

[12] *Re* George Newman & Co., [1895] 1 Ch. 674.

[13] Ooregum Gold Mining Co. *v.* Roper, [1892] App. Ca. 125; Welton *v.* Saffery, [1897] App. Ca. 299. North West Electric *v.* Walsh, 29, S.C.R., 33.

[14] Hirsche *v.* Sims, [1894] App Ca. 654.

of another company unless expressly authorised by its Memorandum of Association.[1]

Paying dividends out of capital (except in the special circumstances authorised in the Act), issuing shares at a discount, and purchasing the shares of the company are acts which cannot be authorised by the Memorandum, being illegal reductions of capital, and therefore at all times *ultra vires.*

The directors of a company are its agents, and (according to the general law governing agents) if they purport to make contracts on behalf of the company they must be considered to warrant that they have authority. If it turns out that in fact they had no such authority, they are personally liable to the persons with whom they have professed to contract on behalf of the company,[2] unless those persons had notice of the limits of the directors' powers. Acts contrary to the Statutes are held to be know by all persons to be illegal, and as the Memorandum and Articles are registered, all persons contracting with a company are deemed to know the contents of those documents,[3] and if the contract is in itself necessary contrary to the Statutes or to the regulations of the company no complaint can be sustained. But if the regulations of a company give power to borrow up to a certain amount, and the directors continue borrowing after that amount is reached, the lender, who does not know what loans are outstanding, may recover from the directors the amount lent.[4] The same rule is applied where debenture stock is issued after the power is exhausted.[5] It has not yet

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[1]British Nation Life Association, [1878] 8 Ch. D. 679, 704; Ernest *v.* Nicholls, [1878] L. R. 6 H. L. C. 401.

[2]Godwin *v.* Francis, [1870] 5 L. R. C. P. 295; Ferguson *v.* Wilson, [1867] 2 Ch. 77.

[3]See page 37.

[4]Weeks *v.* Propert, [1873] L. R. 8 C. P. 427; Chapleo *v.* Brunswick Building Society, [1881] 6 Q. B. D. 696.

[5]Firbank's Executors *v.* Humphreys, [1887] 18 Q. B. D. 54.

been decided whether strangers are to be deemed to have notice of the contents of the Register of Mortgages kept by the Registrar of Companies (see page 207, *supra*).

If directors pay dividends to shareholders out of capital, they are liable to replace the whole amount which they have caused to be paid to the shareholders;[1] and if directors apply the funds of the company in buying the company's shares, they may be compelled to make good the money so expended.[2] Indeed, if they apply money of the company in any manner which is *ultra vires,* and it cannot be recovered, they are liable to the company for the loss resulting from their act, although the Court has power to relieve them in cases where they have acted reasonably and in good faith (see page 268).

[1] See "Dividends," page 337, *infra*.

[2] Evans *v.* Coventry, [1857] 8 De G. M. & G. 835; Trevor *v.* Whitworth, [1888] 12 App. Ca. 409.

CHAPTER XVI.

SPECIAL AND EXTRAORDINARY RESOLUTIONS.

Special Resolutions.

For certain acts of the company an Ordinary Resolution does not suffice, and a "Special Resolution" must be passed and confirmed, as to which the requirements of Section 77 must be carefully followed, as any departure from the procedure there laid down will render the resolution void.

A resolution is a "Special Resolution" when it has been "passed in manner required for the passing of an Extraordinary Resolution, and confirmed by a majority" (*i.e.* bare majority) "of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at a subsequent general meeting, or which notice has been duly given, and held after an interval of not less than fourteen days, nor more than one month, from the date of the first meeting."

An Extraordinary Resolution is one passed by a majority of not less than three fourths of such members of the company entitled to vote as are present in person or by proxy (where proxies are allowed) at a general meeting, "of which notice specifying the intention to propose the resolution as an Extraordinary Resolution has been duly given" (Section 77). The chairman's declaration in regard to a Special or Extraordinary Resolution that it has been carried is conclusive unless a poll is demanded, and the section enacts that a poll may be demanded by three persons entitled according to the Articles to vote, unless the Articles require a demand by such number of such persons, not exceeding five, as may be specified in the Articles (see page 310).

The notice of meeting required by the Articles of Association must be given. Directors and secretaries are sometimes not sufficiently careful on this point, in particular forgetting that seven days' notice means seven *clear* days, whereby it follows that the resolutions are void and everything done under them invalid. Equally the fourteen days' interval must be fourteen *clear* days, and a resolution passed on the first day of the month cannot be confirmed *earlier* than the sixteenth, and it would seem a resolution passed on the last day of one month can be confirmed on the first day of the next month but one afterwards, but not later, the "interval" in either case being the time between the two meetings.[1] In giving the notice there is authority for saying that it is sufficient to state the general nature of the business,[2] but if important changes are to be made in Articles (as increasing the directors' remuneration and borrowing powers) it has been held that a general notice of intention to submit new Articles for adoption which may be seen at the office is not enough.[3] It is advisable to set out when possible the exact words to be proposed, and to intimate that the resolution will be submitted to be passed with or without modification, and that if passed it will subsequently be submitted for confirmation as a special resolution. A fresh notice should be given of the confirmatory meeting, setting out the words of the resolution to be submitted for confirmation. The resolution need not be carried in the first instance exactly in the form set out in the notice: *e.g.* a resolution to pay directors as remuneration forty per cent. of the profits may be amended so as to read thirty per cent.,[4] but the confirmation at the second meeting

[1] See Railway Sleepers Supply Co., [1885] 29 Ch. D. 204.
[2] Young *v.* South African Development Syndicate, [1896] 2 Ch. 268.
[3] Normandy *v.* Ind Coope & Co., [1908] 1 Ch. 84.
[4] Torbock *v.* Lord Westbury, [1902] 2 Ch. 871.

must be without amendment, and in the same form as passed at the first meeting.[1] A conditional notice (*e.g.* "if the resolution is passed a confirmatory meeting will be held on the day of ") is not sufficient,[2] but a positive notice of the second meeting, even if followed by a statement that if the resolution is not passed at the first meeting notice will be given that the second meeting will not be held, is good,[3] and the company may by its Articles declare that a conditional notice shall be good, in which case such a notice will suffice.[4] Of course to constitute a meeting the prescribed quorum of members must be present on each occasion.

As to the requisite majority, it will be observed that there must be in favor of the resolution not less than three fourths of those present and entitled to vote, and, accordingly any member present but not voting must be counted as voting against the resolution. At the confirmatory meeting only a bare majority is necessary; but in this case also it must be a majority of those present, whether they vote or not.

Within fifteen days after its confirmation, a copy of every special and extraordinary resolution must be filed with the Registrar of Companies, under a penalty of ten dollars per day for default (Section 78). The Registrar requires that the copy shall contain particulars of the times and place or places of passing and confirming the same, and be authenticated by the signature of the chairman, a director, or the secretary of the company.

A copy of every special resolution must be annexed to or embodied in every copy of the Articles of Association issued after the confirmation of the resolution; and every member

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[1]Wall *v.* London and Northern Assets Corporation No. 1, [1898] 2 Ch. 469

[2]Alexander *v.* Simpson, [1890] 43 Ch. D. 139.

[3]Espuela Land and Cattle Co., [1900] W. N. 139, 48 W. R. 684.

[4]North of England Steamship Co., [1905] 2 Ch. 15.

of the company is entitled to a copy of the same upon request and payment of a sum not exceeding twenty-five cents. Any company not complying with this provision of the Act is liable to a penalty of five dollars for each copy in respect of which default has been made, and every director or manager is alike liable (Section 78).

Any kind of business may be declared by the Articles of Association to require a special resolution; but for the following a special resolution is required by law:—

1. Changing the name of the company (Section 18, Sub-section 3).
2. Altering the objects of the Memorandum of Association (Section 19).
3. Altering, modifying, rescinding, or adding to the Articles of Association or any existing special resolutions (Section 23).[1]
4. Distributing accumulated profits in reduction of paid-up capital (Section 47).
5. Subdividing shares into shares of smaller amount (Section 48).
6. Reducing or cancelling capital (Section 53).
7. Declaring that a portion of the unpaid capital shall only be capable of being called up in case of a winding up (Section 67).
8. Extending the liability of directors (Section 69).
9. Appointing inspectors to examine into the affairs of the company (Section 117).
10. Procuring the company to be wound up by the Court (Section 187).
11. Winding up voluntarily (Section 226). (See also "EXTRAORDINARY RESOLUTIONS," *infra.*)

[1]The Court will not rectify Articles adopted by mistake, as the company has this power (Evans *v.* Chapman, [1902] W. N. 78, 86 L. T. 381)

12. Where a company is proposed to be or is in the course of being wound up voluntarily, sanctioning a sale by the liquidator to another company in consideration of shares, policies, or other like interests (Section 236).

EXTRAORDINARY RESOLUTIONS.

An "Extraordinary Resolution" is one passed in the manner described on page 328.

As a rule an extraordinary resolution is resorted to in cases where a company is insolvent and wishes to go into voluntary liquidation at once (Section 226, Sub-section 3). In such cases the resolution must declare that the company cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up. Extraordinary resolutions may also be used in a voluntary winding up to delegate the power of appointing liquidators to the company's creditors (Section 234), or for sanctioning arrangements with creditors (Section 235), or compromises with creditors, debtors, or contributories (Section 253). A notice of an intended special resolution is not sufficient notice upon which to propose an extraordinary resolution.[1]

A copy of every extraordinary resolution must be forwarded to the Registrar within fifteen days after its passing, under a penalty not exceeding ten dollars a day for default (Section 78, Sub-section 1).

[1]Section 77, Sub-section 1. See Bridport Old Brewery Co., [1867] 2 Ch. 191.

CHAPTER XVII.

THE ACCOUNTS OF A COMPANY.

THE Act does not deal with the accounts and balance sheets of a company, although, as has been stated, the matter of audit is regulated by the Act; but the Articles almost invariably deal with them, or the provisions of Table A apply unless excluded. Clause 103 of Table A, requires the directors to cause true accounts to be kept—

Of the sums of money received and expended by the company, and the matters in respect of which such receipts and expenditure take place; and

Of the assets and liabilities of the company.

Table A prescribes that the books of account shall be kept at the registered office of the company, or at such other place or places as the Directors think fit, and shall always be open to the inspection of the Directors. Table A and almost all special Articles provide that shareholders shall only have the right of seeing the accounts to the extent prescribed by the directors.

The Act does not require the preparation or submission to the members of any balance sheet, profit and loss account, or report, although Section 120, Sub-section 2 and 3, prescribes that the auditors shall make a report upon every balance sheet laid before the company in general meeting, and that such balance sheet shall be signed by two directors, or by the sole director if there is only one; and Section 34, Sub-section 3, requires that every company (not being a private company) shall file with its annual summary a statement in the form of a balance sheet made up as directed by the section (see page 335, *infra*). The Articles almost invariably require a balance sheet to be laid before

the company in general meeting. Table A (Clauses 106 to 108) requires a profit and loss account, balance sheet, and report to be laid before the company in general meeting once in every year, but does not specify the particulars to be set out. It requires that a copy of the balance sheet, and the report, shall be sent to the members seven days before the meeting. In private companies, where it is often desired to avoid any chance disclosure of the affairs of the company to strangers, it has often been provided that the report and balance sheet shall only be produced at the general meeting, although sometimes a right is given to members to inspect it at the offices of the company during seven days before the meeting. Section 120, Sub-section 3, gives every shareholder a right to inspect and have copies of the balance sheet and auditors' report, and Section 121, in the case of all except private companies and companies registered before the 1st July, 1910, gives similar rights to debenture holders.

The balance sheet must contain a statement of the commission paid on the issue of any shares or debentures or the discount allowed on any debentures so far as the same has not been written off, and this must be repeated until the whole amount is written off (Section 99).

The balance sheet does not pretend to show absolutely the exact position of the company. Many matters are necessarily the subject of estimates, and frequently the balance sheet shows that assets are included on some arbitrary basis (*e.g.* "at cost"), and not at their selling value. In regard to an undisclosed reserve, Buckley, J., has said, "The result" (of omitting this item) "will be to show the financial position of the company to be not so good as in fact it is. If the balance sheet is so worded as to show that there is an undisclosed asset whose existence makes the financial position better than that shown, such a balance

sheet will not, in my judgment, be necessarily inconsistent with the Act of Parliament. Assets are often, by reason of prudence, estimated, and stated to be estimated, at less than their probable real value. The purposes of the balance sheet is primarily to show that the financial position of the company is at least as good as there stated, not to show that it is not and may not be better."[1]

Every company (not being a private company) having a share capital must now send to the Registrar, as part of the Annual Summary, "a statement, made up to such date as may be specified in the statement, in the form of a balance sheet, audited and signed[1] by the company's auditors, and containing a summary of its share capital, its liabilities, and its assets, giving such particulars as will disclose the general nature of those liabilities and assets, and how the values of the fixed assets[2] have been arrived at, but the balance sheet need not include a statement of profit and loss" (Section 34, Sub-section 3). The date of the statement need not be the same as that of the balance sheet laid before the company, and companies which are desirous of not disclosing the amount of their profits may select a date following the time fixed for the payment of dividend, so that the year's profits will have been divided before the balance is struck, and will therefore not appear. It is somewhat curoius that there is not a date fixed as the earliest to which the statement is to be made up. It may be that some companies will select a period several months back for the date of the statement, and it would be well if future legislation altered this. The Act does not require a fresh valuation to be made of the assets, nor require their division into various classes of assets; but the statement must show how the values are arrived at. It is presumed that such a statement as "Free-

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[1]Newton *v.* Birmingham Small Arms Co., [1906] 2 Ch. at page 387.
[2]Galloway *v.* Schell [1912] 2 K. B. 354

holds at cost price," "Stock-in-trade as valued by the managing director," "Shares and securities at their par value," or "at cost," or "at Stock Exchange prices," will be a sufficient indication. No profit and loss account is required, but any balances of undivided profit will necessarily be shown, and the prosperity of the company or its misfortunes will be guessed with fair accuracy by any person accustomed to figures.

Section 413 of the Criminal Code, R.S.C., 1906, chap. 146, deals with the destruction or falsifying of books as follows:—

> Every one is guilty of an indictable offence and liable to seven years' imprisonment who, being a director, manager, public officer or member of any body corporate or public with intent to defraud:
>
> (*a*) Destroys, alters, mutilates, or falsifies any book, paper, writing, or valuable security belonging to the body corporate or public company; or
>
> (*b*) Makes, or concurs in making, any false entry, or omits or concurs in omitting, to enter any material particular, in any book of account or other document.

It will be observed that it is an essential element of the offence under this section that there is an intent to defraud. It has been held in England that when a director, manager, or public officer of a body corporate or public company makes or publishes false statement of accounts, knowing them to be false, and intending them to be acted upon by those whom they reach, he is presumed in law to have done so with intent to defraud.[1]

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[1]R. *v* Birt, 63, J.P , 328.

Section 414 of the Criminal Code, R.S.C., 1906, chap. 146, deals with the criminal liability of directors and promoters for false prospectus, statement or account, as follows—

> Every one is guilty of an indictable offence and liable to five years' imprisonment who, being a promotor, director, public officer, or manager of any body corporate or public company, either existing or intended to be formed, makes, circulates, or publishes or concurs in making, circulating, or publishing any prospectus, statement, or account which he knows to be false in any material particular, with intent to induce persons, whether ascertained or not, to become shareholders or partners, or with intent to deceive or defraud the members, shareholders, or creditors, or any of them, whether ascertained or not, of such body corporate or public company, or with intent to induce any person to entrust or advance any property to such body corporate or public company or to enter into any security for the benefit thereof.

DIVIDENDS.

The manner in which the profits of the company are divided between the holders of shares must be determined in accordance with the Memorandum of Association, or, if that is silent, with the Articles; and a member can enforce against the company that payment shall be made only in the manner prescribed, although if only prescribed by the Articles it may be varied by special resolution.[1] It must be noted, however, that dividends must be paid only out of

[1]Oakbank Oil Co. *v.* Crum, [1883] 8 App. Ca. 65.

profits, and cannot be paid out of capital even if the Memorandum[1] or Articles of Association[2] authorise such a payment, as it would be in fact a reduction of capital not authorised by the Acts.[3] A company cannot agree to pay interest on its shares irrespective of whether there are profits or not, nor can it guarantee a specific dividend.[4] With the sanction of the Lieutenant-Governor in Council, however, in certain special circumstances such interest may be paid (see page 339, *infra*).

Directors who wilfully pay dividends out of capital are personally liable to make good the amount.[5] They are not, however, responsible if the payment was made relying on a *bonâ fide* valuation of assets, although such valuation subsequently proves to be an over-estimate,[6] and credits, if believed to be good, may be included, although the amount is not actually received,[7] unless the Articles declare the dividends payable only out of "realized profits," which means "profits tangible for the purposes of division," and does not include estimated profits,[8] and directors may trust the officers of the company unless they have reasonable ground for suspicion.[9] A director, moreover, is not liable for an interim dividend declared at

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[1]Verner *v.* General Investment Trust, [1894] 2 Ch. 264.

[2]*Re* Sharpe, [1892[1 Ch. 154.

[3]See Guinness *v.* Land Corporation of Ireland, [1883] 22 Ch. D. 349; Trevor *v.* Whitworth, [1888] 12 App. Ca. 409; McDougall *v.* Jersey Hotel Co., [1864] 2 H. & M. 528; Flitcroft's Case, [1882] 21 Ch. D. 519.

[4]Long *v.* Guelph Lumber Co., 31, C.P., 129; Petrie *v.* Guelph Lumber Co., 11, S.C.R. 450

[5]Oxford Benefit Building Society, [1887] 35 Ch. D. 502; and see *re* Sharpe, [1892] 1 Ch. 154; Salisbury *v.* Metropolitan Railway Co., [1870] 22 L. T. N. S. 839; *re* London and General Bank, [1895] 2 Ch. 673; Kingston Cotton Mill No. 2. [1896] 1 Ch. 331.

[6]Stringer's Case, [1869] 4 Ch. 475; Rance's Case, [1871] 6 Ch. 104.

[7]*Per* Lord Shand in City of Glasgow Bank *v.* Mackinnon, [1882] 9 Court Sess. Ca., 4th series, 602.

[8]Oxford Benefit Building Society, [1887] 35 Ch. D. 502.

[9]Kingston Cotton Mill No. 2, [1896] 2 Ch. 288; National Bank of Wales, [1899] 2 Ch. 629; affirmed on this point in House of Lords *sub nom.* Dovey *v.* Cory, [1901] App. Ca. 477.

a meeting of directors at which he was not present, although he was present when the minutes of that meeting were confirmed.[1] Shareholders who receive dividends knowing that they are paid out of capital may be ordered to indemnify the directors to the extent of the amounts they have so received,[2] and a shareholder who with knowledge of the facts has received and still retains a dividend out of capital will fail in an action brought "on behalf of himself and all other shareholders" to compel the directors to make immediate restitution,[3] but the liquidator would not be precluded from taking proceedings.

By Section 100, where any shares of a company are issued for the purpose of raising money to defray the expenses of the construction of any works or buildings, or the provision of any plant which cannot be made profitable for a lengthened period, the company may pay interest and charge it to capital as part of the cost of construction, but subject to stringent restrictions, which are as follows.—

1. The payment can only be made if authorised by the Articles or by special resolution, and sanctioned by the Lieutenant-Governor in Council.
2. The payment must only be for the period determined by the Lieutenant-Governor in Council, not extending beyond the half-year succeeding that in which the works are completed or the plant provided.
3. The rate of interest must be that agreed upon, and if there is no such agreement, it shall be the rate provided by Statute in cases where interest is by law payable and the rate is not agreed upon.

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[1]Lucas *v.* Fitzgerald, [1905] 20 T. L. R. 16. As to restraining payment of dividends on the ground that the Company's reports are misleading, see Montreal Street Rly. *v* Ritchie, 16, S.C.R., 622.

[2]Moxham *v.* Grant, [1900] 1 Q. B. 88.

[3]Towers *v.* African Tug Co., [1904] 1 Ch. 558.

4. The accounts of the company must show the capital on which, and the rate at which, interest is paid during the period to which the accounts relate.

There is a provision (Sub-section 6) making it clear that this payment of interest is not to operate as if it were a return of capital to the shareholders, and another (Sub-section 3) allowing the Lieutenant-Governor in Council to direct an inquiry, at the expense of the company, into the circumstances of the case.

These provisions should be of great advantage to companies undertaking the construction of large works; but probably small companies will not find it worth while to make the application to the Lieutenant-Governor in Council.

Profits may exist although assets representing them have not been turned into cash, and even though no value has been put upon them in the balance sheet.[1]

It is not always easy to decide what are the profits which may be legitimately employed in paying dividends. As a general rule the excess of the earnings of a company, after deducting the expenses of making those earnings, is the measure of the profits; but it is clear that some expenses may properly be charged to capital account—as, for instance, permanent improvements to the freehold of the company; while others may be divided over a number of years—as, for instance, substantial repairs to property, which may fairly be expected to last for some years, or the expense of an issue of debentures; and, equally, on some occasions part of the profits ought to be set aside in each year to provide for wasting property—as, for instance, to replace leaseholds, to form an insurance fund against loss (a provision frequently made by shipping companies), or to provide for the renewal

[1]Spanish Prospecting Co., [1911] 1 Ch. 92.

of plant which periodically becomes worn out and worthless.[1] "Before arriving at the amount of profits 'available for dividend' it is only right and honest that provision should be made for the depreciation of wasting assets . . . . . although it is still doubtful whether they can be compelled to do so."[2]

Before the decision of Dovey *v.* Cory in the House of Lords[3] the authority in the Court of Appeal was strongly in favour of the proposition that fixed capital lost in one year need not be made good in subsequent years before a dividend was declared out of the profits (*i.e* the excess of current receipts over current expenditure) of such subsequent years,[4] and further showed that in some cases, at least, it was not essential to make provision for replacing wasting property; Lindley, L. J., giving as an instance that although £25,000 might have been spent in starting a newspaper without anything tangible to show for the expense, yet if the current business showed an annual profit dividends might be paid.[5] But these cases laid down a contrary rule where floating capital (*i.e.* capital which was used up in the business, such as stock-in-trade or raw material) was depreciated or lost;[6] such depreciation in value being treated as a loss on current account and not on capital account. In

[1] As between preference and ordinary shareholders it has been held that this is necessary (Dent *v.* London Tramways Co., [1881] 16 Ch. D. 344.)

[2] *Per* Romer, L. J., in Bagot Pneumatic Tyre Co. *v.* Clipper Pneumatic Tyre Co., [1902] 1 Ch. at page 159.

[3] [1901] App. Ca. 477.

[4] Lee *v.* Neuchatel Asphalte Co., [1889] 41 Ch. D. 1; Verner *v.* General Investment Trust, 2 [1894] 2 Ch. 93.

[5] Lee *v.* Neuchatel Asphalte Co., [1889] 41 Ch. D. 1.

[6] "Perhaps the shortest way of expressing the distinction is to say that fixed capital may be sunk and lost, and yet that the excess of current receipts over current payments may be divided; but that floating or circulating capital must be kept up, as otherwise it will enter into and form part of such excess, in which case to divide such excess without first deducting the capital which forms part of it will be contrary to law" (Verner *v.* General Investment Trust, [1894] 2 Ch. 239, *per* Lindley, L. J., at page 266.)

the case of the National Bank of Wales[1] the Court of Appeal went further, and held that when once capital had been lost in any manner it could not be that dividends paid in future years were paid out of the lost capital, and it was therefore not necessary to make the loss good before declaring dividends out of current profits. To this proposition the House of Lords did not accede,[2] and further threw doubt upon the proposition that if fixed capital only had been lost dividends might still be paid; but, holding that it was not necessary for the decision before them, they laid down no clear rule. Farwell, J., having Dovey *v.* Cory for his guidance, however, shortly afterwards decided that a realised loss arising from a surrender of leases and the pulling down of cottages, and also a general depreciation of assets appearing upon a new valuation, must be made good before any dividend could be paid out of the profits of later years,[3] and threw doubt upon the proposition that it is not necessary to provide a fund for replacing wasting assets.

Without further guidance from the Courts it is impossible to state any general propositions upon this point with certainty, but the following rules are suggested for the guidance of directors:—

(*a*) Every company should, as far as possible, provide for unexpected losses by creating a reserve fund.

(*b*) Provision should be made out of profits for replacing depreciation or wasting property, such provision being measured by the length of time during which the property may reasonably be expected to last; and in like manner sums should be set aside to allow for debts proving bad.

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[1] [1899] 2 Ch. 629.
[2] Dovey *v.* Cory, [1901] App. Ca. 477.
[3] Bond *v.* Barrow Haematite Steel Co., [1902] 1 Ch. 358.

(*c*) Accidents such as ordinarily occur should be made the subject of insurance, the premiums being paid out of profits.

(*d*) If a loss occurs and the provision made in previous years is not sufficient to make good the amount, it is not safe to pay dividends until the loss is made good.

(*e*) If the loss is large, so that it cannot be made good out of profits within a reasonable period, the capital should be reduced with the sanction of the Court.

There are several cases in regard to the payment of dividends which will require reconsideration in view of Dovey *v.* Cory.[1]

It has been suggested that the proper method of ascertaining the profits of the year is to value the assets of the company and its liabilities, including the liability to the shareholders for capital subscribed, and that the excess of assets over liabilities is the measure of the profits.[2] This rule is convenient in some cases, and where it applies is a very safe method; but it certainly is not the essential test, as will be seen from the cases cited above.[3] The fact is that in most cases capital account and revenue account are distinct, and that, although a certain number of cross entries are necessary, the two accounts should be kept quite separate.[4] This will avoid a difficulty which is almost insuperable

[1]For example, Wilmer *v.* McNamara, [1895] 2 Ch. 245, where the property was revalued and showed a loss; Bosanquet *v.* St. John del Rey Co., [1897] 77 L. T. 206 where capital had been used to pay interest on debentures: in each case the payment of dividends was held lawful.

[2]There is a full discussion of what are profits in Spanish Prospecting Co., [1911] 1 Ch. 92, where the methods of valuation and the practice of companies in this respect are considered.

[3]See also Mills *v.* Northern Railway of Buenos Ayres, [1870] 5 Ch 621, 631.

[4]Bolton *v.* Natal Land Co. [1892] 2 Ch. 124; Verner *v.* General Investment Trust, [1894] 2 Ch. 239.

when the two accounts are mixed—viz., the valuation of the assets in which the capital is invested. Suppose a company has a portion of its capital invested permanently in factories, warehouses, and office buildings: the value of these may rise or fall according to the condition of the real estate market, the price of materials, or the comparative popularity of the sites they occupy. But it would be very inconvenient if each year valuers had to determine the figure to represent these assets, and if when real estate was rising in value a profit was shown, and when falling a loss declared. Or, again, when a life insurance office has, perhaps, several millions of dollars invested in marketable securities, it would be disastrous if the time of valuing them fell at a moment of depression on the Stock Exchange, a great loss accordingly having to be declared in comparing the value of the assets with their value in the previous year.

With regard to trust companies, it was decided in England that where the company's business is to hold investments, the directors may divide any surplus income after paying expenses, even though the capital value of the investments is greatly reduced; but where the business is to deal in and turn over stocks, shares, etc., the fall in value of those in the company's name is part of the loss on the year's trading, and must be allowed for before a dividend is declared.[1] This is in fact the distinction between fixed and floating capital referred to above; but if the loss is irretrievable (*e.g.* some of the investments have been sold at less than cost) it is no longer safe to rely upon the authority. If a company sells its business for more than its whole nominal capital,it may treat the surplus as profit, and divide it by way of dividends or bonus among its members;[2] and if a company has made

[1] Verner *v.* General Investment Trust, [1894] 2 Ch. 239.

[2] Lubbock *v.* British Bank of South America, [1892] 2 Ch. 198, in which case the principles of keeping accounts are discussed.

good the depreciation of its capital out of profits it may, on the capital rising in value, restore the amount taken from income.[1] But a realised accretion to the value of one item of the capital assets cannot be deemed to be profit without reference to the result of the whole account fairly taken.[2]

If the Articles are silent as to the distribution of profit, or declare that it shall be divided among the shareholders "in proportion to their shares," the division must be made, not according to the amount paid up on the shares, but to the nominal amount of the shares, so that a shareholder whose shares are fully paid up gets no more per share than one whose shares are only partly paid up.[3] But if one series of shares were nominally $50, and another nominally $10, the holders of the former would be entitled to five times as much as the holders of the latter, whatever amount might be paid up on them respectively. Table A (Clause 98), and most special Articles, however, provide for dividends being paid in proportion to the amount paid up, and in such a case the above rule does not apply.

As between the holders of preference and of ordinary shares, the Articles ought carefully to prescribe the rights of each class, for it is entirely a matter of agreement how far the former are to be preferred. In particular, it is most important to state whether the preference dividend is to be "cumulative." If there are no words to restrict the rights of preference shareholders to the current year, they are entitled to have deficiencies of previous years made up subsequently.[4] But if the words are, "The profits of *each* year shall be applied, first, in paying a dividend on the preference shares;

[1]Bishop *v.* Smyrna and Cassaba Railway, [1895] 2 Ch. 596.

[2]Foster *v.* New Trinidad Lake Asphalt Co., [1901] 1 Ch. 208.

[3]Oakbank Oil Co. *v.* Crum, [1883] 8 App. Ca. 65.

[4]Webb *v.* Earle, [1875] 20 Eq. 556; Foster *v.* Coles and M. B. Foster & Sons, [1906] W. N. 107; Henry *v.* Great Northern Railway, [1857] 1 De G. & J. 606; and see page 23, *supra*.

secondly, the balance shall be applied in paying to the ordinary shareholders," etc., or "The yearly profits shall be applied first in payment of the preference dividend, and, subject thereto, shall be distributed among the holders of ordinary shares," the preference shares, if not paid in full in any year, would have no claim in subsequent years.[1]

Where the dividends on the preference shares depend on the profits of each year, the question as to what expenses should be treated as payable out of income becomes of great importance. Amounts necessary for renewing or replacing wasting property ought to be spread over a series of years, and not all charged to revenue account in one year; but they should not fall on capital.[2] An excessive quantity of stores should not be purchased out of revenue in one year; but it does not follow that any excess of stores at the end of the year over stock at the beginning of the year should be treated as profit and divided.[3] Interest paid on borrowed moneys during the construction of permanent works may be treated as part of the cost of construction and debited to capital.[4] The business must be carried on fairly, with regard to the interests of all parties, and not manipulated for the benefit of any one class.[5]

The holders of preference shares cannot prevent the company setting aside profits earned in any year to make good losses in previous years if good faith is observed. Their right to dividend is, in the absence of express bargain to the contrary, subject to the directors' right to carry sums to

[1]Staples *v.* Eastman Co., [1896] 2 Ch. 303; Adair *v.* Old Bushmills Distillery, [1908] W. N. 24.

[2]Dent *v.* London Tramways Co., [1881] 16 Ch. D. 344.

[3]Jamaica Railway Co. *v.* Administrator-General of Jamaica, [1893] App. Ca. 127.

[4]Hinds *v.* Buenos Ayres Grand National Tramways, [1906] 2 Ch. 654.

[5]See last two notes.

reserve.[1] But where debentures are issued with interest payable only out of profits the whole of the profits must be applied for this purpose.[2]

The Articles frequently declare that "the profits available for dividends" shall be applied in a certain order. These words mean the profits after making proper reserves and applying for other purposes such sums as the directors may properly so apply, and the holders of preference shares cannot compel a full division of the profits earned without regard to the proper provision of reserves and writing off for depreciation.[3]

The Court will not compel a company to divide its profits up to the hilt. It is both lawful and proper to carry forward a portion of the year's profits or place them in a reserve fund, even though the Articles contain no provision for so doing.[4]

Table A, and most special Articles, empower the directors to declare an interim dividend. Before doing this it is their duty to satisfy themselves that the profits are sufficient to justify the payment.

As soon as a dividend is properly declared, it is a debt payable to the members, and if not paid within the period limited by the Statute of Limitations is irrecoverable;[5] but as money payable under the Articles of Association is a specialty debt, the period of limitation is twenty years from

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[1]Bond *v.* Barrow Haematite Steel Co., [1902] 1 Ch. 358, where Farwell, J., also said the Court would be very reluctant to compel directors to divide more than they thought proper. But the directors must act fairly in the interests of all classes (Henry *v.* Great Northern Railway, [1857] 1 De G. & J. at page 638)

[2]Heslop *v.* Central Paraguay Co., [1910] 54 Sol. J. 234.

[3]Fisher *v.* Black and White Publishing Co., [1901] 1 Ch. 175; and compare Crichton's Oil Co., [1901] 2 Ch. 184, [1902] 2 Ch. 86.

[4]Burland *v.* Earle, [1902] App. Ca. 95.

[5]Severn and Wye Railway, [1896] 1 Ch. 559. Until declared, however, it cannot be enforced.

the declaration of the dividend.[1] In a liquidation such a debt, however, does not rank in competition with the amount due to other creditors (Section 182, Sub-section 1 (*g*); but the declaration of an interim dividend does not necessarily create a debt, and the directors' resolution to pay it may be rescinded.[2]

Dividends can only be paid in cash, unless there are words authorising payment by the issue of shares in the company fully or partly paid up, or the distribution among the members of assets (as, for instance, shares in other companies) in specie.[3]

Dividends are payable at the date when they are declared to be payable. Upon a sale of shares the dividend declared after the date of the contract for sale belongs to the purchaser of the shares, unless the contract otherwise provides, as by the sale being made "*ex div.*"[4]

It is not infrequent to provide by the contract with the vendor, or the contractor executing works for the company, that during construction he shall pay interest upon the capital of the company. It has never been held that this is illegal, but it is not an advisable course, as it is clear that the contractor can only afford to make this repayment by originally making an overcharge in the contract price, so that the transaction really amounts to the company handing the contractor a portion of its capital to be repaid by him to the shareholders in the form of dividends, an arrangement which differs but little, if at all, from paying dividends out of capital.

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[1]Artisans' Land and Mortgage Corporation, [1904] 1 Ch. 796; Drogheda Steam Packet Co., [1903] Ir. R. 512.

[2]Lagunas Nitrate Co. *v.* Schroeder, [1901] 85 L. T. 22.

[3]Wood *v.* Odessa Waterworks Co., [1889] 42 Ch. D. 645; Hoole *v.* Great Western Railway Co., [1868] 3 Ch. 262.

[4]Black *v.* Homersham, [1879] 4 Ex. D. 24.

Where, however, the vendor of a going concern, in order to show his confidence in it, guarantees a dividend for a certain number of years, there can be no sound objection to such a course. The wording of such a guarantee must, however, be carefully considered. If it is a contract with the company to pay it so much money the amount received goes into the general accounts: if it is a contract to pay to the shareholders so much as will make up the dividend, this dividend may properly be divided among the shareholders, even when the company is earning no profits.

The interest upon debentures or on money paid up in advance of calls is a debt, and must be paid whether there are profits or not.[1]

The Articles usually provide that the company may retain any dividend against debts due from a member entitled to the dividend, and that dividends shall not bear interest as against the company. The latter provision, however, seems unnecessary, as debts do not bear interest unless by agreement. It is also frequently provided that dividends unclaimed for three or five years may be forfeited for the benefit of the company.

RESERVE FUND.

The Articles of Association almost invariably provide that a portion of the profits may be set aside, before any dividend is declared, to form a reserve fund.[2] Sometimes they provide that a fixed proportion shall be set aside, and often give special directions as to how the fund is to be invested. A company may, however, without any special authority contained in its Articles, carry profits to reserve, and either use the reserve in the business or invest it in such securities as the directors may think fit.[3]

[1] Lock *v.* Queensland Investment and Mortgage Co., [1896] App. Ca. 461

[2] See Clause 99 of Table A.

[3] Burland *v.* Earle, [1902] App. Ca. at page 95.

The amount carried to reserve may affect the respective rights of the preference and ordinary shareholders, particularly in cases where the preference dividend is not cumulative. In such case "it will be the duty of the directors to fix the amount of the fund to be retained with reference to the general interest of all classes of shareholders, and not to favour any one class at the expense of the other."[1]

Sums are often set aside to represent depreciation of plant and buildings, and to provide for debts proving bad. This is in the nature of a reserve fund; but it is more usual to write the depreciation off the book value of the plant and buildings, and to keep the reserve for bad debts out of the balance sheet. How far this is legitimate depends on the facts of each case. If done in good faith and to a reasonable extent, the Courts will not interfere, even at the instance of preference shareholders who get less than their full dividend.[2]

It is very desirable that a reserve fund should be built up, a portion of the profits in each year not being distributed. The reserve fund may either be specially invested in stocks or funds, or shares of other companies, or it may be used in the general business of the company. If so used, it will appear in the balance sheet on the debtor side, and the credit side will be increased by the assets which the fund has been used to purchase.

The reserve fund may be divided into various special portions, and when very large profits have been made in one year, it is convenient to make a special reserve for equalising dividends, the intention being to spread the distribution of

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[1]*Per* Lord Cranworth in Henry *v.* Great Northern Railway, [1857] 1 1 DeG. & J. at page 638.

[2]Bond *v.* Barrow Haematite Co., [1902] 1 Ch. 353; Fisher *v.* Black and White Publishing Co., [1901] 1 Ch. 175; Burland *v.* Earle, [1902] App. Ca. 95.

it over several years. Sums may be taken from the reserve fund to make up losses or to pay dividends, even if it consists of premiums received on the issue of shares:[1] in fact, the reserve fund is undivided profit, and may be treated as profit at the disposal of the company, subject only to any restrictions which the Articles of Association may impose.

If a reserve fund comes to be divided, whether while the company is a going concern or in liquidation, it remains "profits," and the members are entitled to share in it in accordance with their rights to the profits.[2] Thus, if the Articles provide that the members shall be entitled to share in the profits in certain proportions, they will have the same rights in the distribution of the reserve fund. Consequently, if there is anything due to the preference shareholders in respect of past dividends their claim must first be satisfied;[3] but if the preference shareholders have received their preferential dividend in full, the reserve fund will belong exclusively to the ordinary shareholders.[4] On the other hand, if their respective rights do not arise till the declaration of a dividend and none has been declared, or till the profits have been made "available for dividend" by some act of the directors which has become impossible owing to the liquidation, it appears that in a winding up any undivided profits will merge in the ordinary assets.[5]

It was held that if the reserve fund is used in the business of the company, and a loss arises on capital account, it must be apportioned rateably between capital and reserve;[6] but the House of Lords has now held that capital may be reduced without proving that it is lost, and the

[1]Hoare & Co., [1904] 2 Ch. 208.
[2]*Re* Atlas Loan Co. 9, O.L.R., 468.
[3]Bishop *v.* Smyrna and Cassaba Railway, [1895] 2 Ch. 265.
[4]Bridgewater Navigation Co., [1891] 1 Ch. 155, 2 Ch. 317.
[5]Crichton's Oil Co., [1901] 2 Ch. 184, [1902] 2 Ch. 86.
[6]Hoare & Co., [1904] 2 Ch. 208.

above rule will no longer apply in cases of reduction of capital.[1]

If a sum is taken from the reserve fund and paid by way of bonus to the shareholders, the company is only concerned to see that the persons whose names are on the Register of Members at the time get the bonus.

Sometimes, with a view to converting the reserve fund into capital, the company resolves to divide it among the members and at the same time increase the capital. The new shares are offered rateably to the members, an amount equal to the reserve fund distributed being called up. This plan works well if the shares stand at a premium; but if they do not, members may be expected to accept the return of reserve fund and to refuse to take up the new shares. There is a danger also that upon subsequent investigation it may turn out that the reserve fund did not really represent profits, and in such a case the shares issued would not be fully paid.[2]

EXAMINATION OF AFFAIRS BY INSPECTORS.

The Lieutenant-Governor in Council may, upon application, appoint inspectors to examine into the affairs of a company (Section 116).

The applicants must be able to furnish the Lieutenant-Governor in Council with such evidence as may be necessary to satisfy it that there is sufficient reason for requiring an examination, and that they are not actuated by any malicious motive in instituting the same. The Lieutenant-Governor in Council may also require the applicants to give security for the payment of all the costs of the examination before appointing inspectors.

An inspector may examine upon oath any officer or agent

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[1]Poole *v.* National Bank of China, [1907] App Ca. 229.

[2]See Eastern and Australian Steamship Co., [1893] 41 W. R. 373.

of the company in relation to its business, and he may require the production of any book or document relating to business of the company, or may put any question relating to the company's affairs. Under Section 116, Sub-section 5, any officer who refuses to produce any book or document, or to answer any question, will be liable to a penalty of twenty-five dollars for each offence.

The company itself may by special resolution appoint inspectors without reference to the Lieutenant-Governor in Council, and those inspectors will have the same powers and duties as those appointed by the Lieutenant-Governor in Council, except that they must report as the company shall direct, instead of to the Lieutenant-Governor in Council (Section 117).

The report of the inspectors is evidence of their opinion in relation to any matter contained in the report (Section 118), but of course it is not evidence of the facts.

CHAPTER XVIII.

ALTERATIONS OF CAPITAL.

A COMPANY may make alterations in its capital in various ways:—

1. It may increase its capital.
2. It may reduce its capital.
3. It may enforce forfeitures of shares, and, under certain conditions, accept surrenders.
4. It may consolidate its shares into shares of larger amount, and convert its paid-up shares into stock, and subsequently reconvert the stock into shares.
5. It may subdivide its shares.

But these alterations can only be made within certain limits, and each transaction will be considered separately.

For the purpose of these considerations the "capital" of the company is the nominal capital authorised by the Memorandum of Association, and must not be confused with the issued capital or the paid-up capital. For instance, to make a further issue of shares already authorised, or to make a call upon the shares already issued, would increase the issued share capital or the paid-up capital respectively, but neither proceeding would be such an increase of capital as to fall within the provisions of the Act as described hereafter.

1. INCREASE OF CAPITAL.

A Company Limited by Shares may, if authorised by its Articles, increase its share capital by the issue of new shares of such amount as it thinks expedient.

Where a company has power in its Articles to increase its capital without a special resolution it is unnecessary to

do more than pass an ordinary resolution, or the company may confer on its directors the power to make the increase;[1] but in any case notice must be given to the Registrar of Companies within fifteen days after the date of passing the resolution or confirming the special resolution for the increase (Section 51). The penalty for neglect is twenty-five dollars for every day during which the neglect continues, and every director or manager is alike liable (Section 51, Sub-section 2). It should be borne in mind that this notice of increase in the nominal capital is to be registered within the time mentioned above—not deferred until the shares are actually taken up. If the company by resolution authorises the directors to increase the capital to a named amount, the fees are payable as at the date of and to the amount specified in the company's resolution, and do not depend on the exercise by the directors of the authority given to them.[2] The return to be made on each allotment (Section 97) is in addition to this notice.

Many irregularities have from time to occurred with regard to the issue of additional capital, and a few remarks are necessary to warn companies against some of the dangers which surround this question.

It has been seen that if the Articles authorise an increase of capital, it may be made without any special formality; but if the original Articles do not authorise such an increase they should be first altered by a special resolution, and then the increase can be made in accordance with the terms of the special resolution,[3] but the operation is not invalid if the two acts are done by a single special resolution.[4] Until a

[1] *Per* Eve, J., Moseley *v.* Koffyfontein Mines, [1911] 1 Ch. 72. But this does not authorise the issue of such shares if other Articles require the sanction of the company in general meeting to such issue (*per* C. A. in same case.)

[2] Attorney-General *v.* Anglo-Argentine Tramways, [1909] 1 K. B. 677.

[3] Patent Invert Sugar Co., [1886] 31 Ch. D. 166.

[4] Campbell's Case, [1874] 9 Ch. 1.

few years ago the decisions of the Courts were to the effect that if the original Memorandum or Articles did not authorise the issue of preference shares the Articles could not be so altered as to make the issue of preference shares possible,[1] and the only manner of enabling such shares to be issued was to obtain the consent of all the holders of the existing shares, or to wind up and reconstruct the company; but doubt was thrown on this view in the House of Lords,[2] and the Court of Appeal has now declared that unless the Memorandum expressly states the rights of various classes of shareholders the company can by special resolution take power to issue preference shares.[3]

For some years when fresh capital was required for a company whose affairs were not in a flourishing condition, it was very common to issue new shares at a discount: that is to say, a share credited as fully paid was issued in consideration of the payment of a less sum than the nominal amount of the share. It has, however, been decided by the House of Lords that this cannot be done, and a shareholder taking shares upon those terms is, in the event of a winding up, liable to pay the balance unpaid, notwithstanding any contract made with the company, and even if the contract has been filed with the Registrar of Companies;[4] and it was decided by the House of Lords (Lord Herschell dissenting) that calls on such shares should be made in a winding up for the benefit of contributories as well as creditors.[5] Under the Act a company is able, on making a public issue of its

[1]Hutton v. Scarborough Cliff Hotel Co., [1865] 2 Dr. & Sm. 514, 6 N. R. 10.

[2]British and American Trustee Corporation v Couper, [1894] App Ca. 416.

[3]Andrews v. Gas Meter Co., [1897] 1 Ch. 361.

[4]Ooregum Gold Mining Co. v. Roper, [1892] App. Ca. 125; *ex parte* Sandys, [1889] 42 Ch. D. 98.

[5]Welton v. Saffery, [1897] App. Ca. 299; Weymouth and Channel Islands Steam Packet Co., [1891] 1 Ch. 66.

shares, to pay a commission if the Articles authorise it; and where a company is in difficulties it can, by fixing this commission at a large amount, say twenty-five or fifty cents in the dollar, produce an effect similar to issuing its shares at a discount.

Except in the case of a commission authorised by the Act, an issue by a company of bonus shares to subscribers or others is equivalent to issuing shares at a discount, and the recipients will be liable to pay the whole amount in cash.[1] So, if bonds are entitled to a bonus or interest only out of profits, it is unlawful when there are no profits to satisfy this bonus or interest by the issue of shares, for there is no valuable consideration for such issue.[2] If on an issue of fully paid shares the consideration given is illusory, or permits an obvious money measure to be made, showing that a discount has been allowed, no contract will protect the holders; but, except in such a case, the Court will not inquire as to what is the real value of the consideration.[3] If vendors or others who have a large number of fully paid shares agree to give them to subscribers for debentures or new shares no objection can be taken unless these shares have in reality been added to the purchase price, and this is only an indirect way of the company paying a commission. If there is a rearrangement of capital, and the vendor surrenders his shares to the company, by whom they are afterwards issued as fully paid bonus shares to the subscribers for other shares, those subscribers will be liable to pay up the amount.[4]

Shares may, however, be offered at a premium, which should be carried to the credit of the reserve fund, although there is no absolute rule that this should be done.

[1] Welton *v.* Saffery, [1897] App. Ca. 299.
[2] Bury *v.* Famatina Corporation, [1910] App. Ca. 439.
[3] *Re* Theatrical Trust, [1895] 1 Ch. 771; *re* E. J. Wragg, [1897] 1 Ch. 799
[4] Ames's Case, [1896] W. N. 79.

It is not uncommon, when an additional issue of shares is made, to secure the success of the issue by getting it "underwritten." This is legal (see pages 106 to 110, *supra*).

When the Articles of Association provide that the new shares shall first be offered to the existing shareholders. this must be done before offering them to the public, and a reasonable time must be allowed for them to accept or reject the offer.

2. REDUCTION OF CAPITAL.

By Section 53 (Sub-section 1) a Company Limited by Shares may, if authorised by its Articles, by special resolution, subject to confirmation of the Court, reduce its share capital "in any way." This section gives also special instances, providing expressly that it may—

(*a*) Extinguish or reduce the liability on any of its shares in respect of share capital not paid up; or

(*b*) Either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets; or

(*c*) Either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the company's wants.[1]

This is in addition to the power under Section 48 to cancel shares which at the date of the passing of the resolution have not been taken or agreed to be taken by any person, and diminish the amount of share capital to that extent, and the power under Section 47 to return accumulated profits to the shareholders in reduction of the paid-up capital, but increasing the unpaid capital to an equal

[1]This includes capital which can only be called up in case of a liquidation (Midland Railway Carriage Co., [1907] W. N. 175).

amount—an operation rarely effected.[1] It requires a special resolution before it is adopted, and if none is passed, or only a retrospective resolution, the payments will be held to be dividends out of profits, and there will be no reduction of capital.[2]

A reduction of capital may, with the sanction of the Court, be effected in any manner, even though it involve doing things which without such sanction are entirely forbidden, such as the purchase of the company's shares by itself or a rearrangement of the rights of the members;[3] and the Act adopts the decision which establishes that, subject to the rights expressly given by the Acts to creditors to object in cases of any diminution of liability in respect of capital or repayment to members, the Court has jurisdiction to sanction any reduction of capital, and will do so if the scheme is fair as between the various classes of shareholders.[4] When the rights of creditors do not intervene "The only questions . . . . to be considered are—(1) Ought the Court to refuse its sanction to the reduction out of regard to the interests of those members of the public who may be induced to take shares in the company? and (2) Is the reduction fair and equitable as between the different classes of shareholders?"[5] The jurisdiction of the Court is not limited to the cases expressly mentioned in the sub-section above quoted, and although the company ought in its petition to show all the facts and circumstances of the

[1]A case occurred in 1910 where, there being some shares fully paid and some partly paid, a portion of the accumulated profits was returned to the fully paid shareholders only so as to make all shares paid up to the same extent. As the company paid large dividends, some of the fully paid shareholders sought an injunction, but failed, Swinfen Eady, J., holding that there was no irregularity and the Court had no control over the transaction (Neale *v.* City of Birmingham Tramways, [1910] W. N. 175).

[2]Whitwham *v.* Piercy, [1907] 1 Ch. 289.

[3]British and American Trustee Corporation *v.* Couper, [1894] App. Ca. 399; Credit Assurance and Guarantee Corporation, [1902] 2 Ch. 601.

[4]Poole *v.* National Bank of China, [1907] App. Ca. 229.

[5]*Per* Lord Macnaughton, [1907] App. Ca. page 239.

case, such as whether or not the capital sought to be written off is lost or is unrepresented by available assets, this is not a necessary condition for obtaining the sanction of the Court, and the reduction may be affirmed even where there is no loss of capital, or there is a reserve fund of undivided profits left subsisting, and available for payment of future dividends.[1] Where there is no unfairness to any class of shareholders it is the policy of the Legislature to entrust the prescribed majority of the shareholders with the decision whether there should be a reduction of capital, and, if so, how it should be carried into effect.[2] A return of capital to the shareholders has been sanctioned, and the capital reduced, although a portion of the amount returned was to be at once borrowed by the company from the shareholders on debentures.[3] But the Court will of course refuse to sanction any reduction which works injustice to either the creditors or a minority of the members, and it is submitted that the company cannot obtain power to do anything otherwise irregular by making it part of a scheme of reduction unless it is in reality in the nature of a reduction of capital. It is sometimes argued that the cases cited in note[3] on the preceding page allow the Court to render valid any alteration of the rights of the members (*e.g.* in regard to dividend or voting); but a comparison of the cases on reduction will show that, except when the variation was only the direct result of reducing capital, the Articles have in every case contained clauses allowing a majority to vary the rights of the

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[1]This was held in (Poole *v.* National Bank of China [1907] App. Ca. 229, overruling Anglo-French Exploration Co., [1902] 2 Ch. 845, and some of the dicta in Barrow Haematite Steel Co., [1900] 2 Ch. 846).

[2]British and American Trustee Corporation *v.* Couper, [1904] App. Ca. 399.

[3]*Re* Nixon's Navigation Co., [1897] 1 Ch. 872. For the most recent case of return of surplus assets see Lees Brook Spinning Co., [1906] 2 Ch. 394.

respective classes of shareholders.[1] However, under Section 129, it seems that a variation of the rights of various classes can, with the sanction of the Court, be effected even when theArticles contain no power for the purpose (see pages 22 and 23), and it is now common to effect reduction of capital to take effect only if other arrangements varying the rights of the various classes of shareholders become operative.[2]

It should be borne in mind that no reduction of capital can be effected except "by special resolution," and that, with the exception of the reduction by repayment of profits under Section 47, the Statutes require that a company before passing such a resolution shall be so authorised by its Articles. Therefore, if the original Articles do not authorise the resolution, there must be, first, a special resolution altering the Articles, and, secondly, another special resolution (which must be subsequent to and not contemporaneous with the resolution altering the Articles) reducing the capital.[3] These conditions must be complied with before an Order of Court confirming a reduction can be obtained.

The special resolutions must of course be registered, and a copy of the Order of Court (where one is required), with a Minute, approved by the Court, giving particulars of the reduced capital, must also be registered before the reduction can be effected (Section 58, Sub-section 1). The Registrar then certifies the registration, and his certificate is conclusive evidence that all the requirements of the Act have been complied with, and that the capital is as stated in the Minute (Sub-section 4). In cases where accumulated profits are returned under Section 47, a Minute giving the required particulars of the reduced capital has also to be registered.

[1]The Dunlop Pneumatic Tyre Co.'s case (unreported) was an exception. The appeal from the decision of Joyce, J., was abandoned.

[2]See for instance *re* Hoare & Co. No. 2, [1910] W. N. 87.

[3]Patent Invert Sugar Co., [1886] 31 Ch. D. 166; Oregon Mortgage C., [1910] S. C. 904, Court of Sess.

The Minute, when registered, is substituted for the corresponding part of the Memorandum of Association, and must be embodied in every copy subsequently issued, under a penalty of five dollars per copy (Section 59).

The reduction takes effect only on the registration of the Minute (Section 58, Sub-section 2), after which the liability of a member is only the difference (if any) between the amount paid or to be deemed as paid, as the case may be, and the amount of the share as fixed by the Minute (Section 60).

Where the capital of the company is divided into preference and ordinary shares, the preference shares are not exempt from reduction equally with the ordinary, although the effect of the reduction will be to give the preference shareholders a lower rate of interest upon the capital they originally brought into the business.[1] If the holders of the preference shares have not a preference in the distribution of the capital of the company, as well as in the dividend, this seems to be the proper course. But if there is a preference as to capital, the proper course appears to be that the reduction shall be made upon the ordinary or deferred shares alone,[2] or the ordinary or deferred shares or founders' shares may be extinguished,[3] leaving the capital of the preference shares intact. This, according to North, J., and Kekewich, J., may also be done where the preference shareholders have no preference as to capital if the ordinary shareholders fully understand and assent to the scheme proposed to them.[3] But Kay, J., was of opinion that such a

[1]Bannatyne *v.* Direct Spanish Telegraph Co., [1887] 34 Ch. D. 287.

[2]Quebrada Copper Co., [1889] 40 Ch. D. 363; Barrow Haematite Steel Co., [1888] 39 Ch. D. 582; Gatling Gun, Limited, [1890] 43 Ch. D. 628; Agricultural Hotel Co , [1891] 1 Ch. 396.

[3]Floating Dock Co. of St. Thomas, [1895] 1 Ch. 691; London and New York Investment Co., [1895] 2 Ch. 860; Poole *v.* National Bank of China, [1907] App. Ca. 229.

reduction is not one which ought to be sanctioned.[1] The matter is usually the subject of a compromise between the interested parties, and an arrangement by which preference shareholders agree by a majority sufficient to comply with the Articles to forego arrears of cumulative dividend is not *ultra vires*.[2] Where the preference shareholders of the company objected, Cozens-Hardy, J., refused to sanction a scheme reducing their capital equally with that of the ordinary shareholders, on the ground that, as the company could pay dividends, notwithstanding loss of fixed capital, no need was shown for the reduction;[3] but the Court of Appeal, while affirming the decision, made it clear that they did not consider the simple fact of the company being able to continue to pay dividends a good reason for refusing to sanction the reduction; nor did the judgment below go so far as that.

If the Articles contain powers for the variation of class rights, a reduction of the capital of a company will be sanctioned in a proper case, although it affects the voting powers of the respective classes of shareholders,[4] or is part of a complete rearrangement of the capital,[5] or otherwise affects the rights of various classes as regards each other,[6] and even when the Articles contain no such powers it seems this will now be possible under Section 129 (see pages 22, 23, and 514).

If the reduction is only by cancellation of shares never taken or agreed to be taken, or is by return of accumulated

[1]Union Plate Glass Co., [1889] 42 Ch. D. 516.

[2]Oban and Aultmore Glenlivat Distillery, [1904] Court of Sess., 5 F. 1141.

[3]Barrow Haematite Steel Co. No. 2, [1900] 2 Ch. 846, and [1901] 2 Ch. 746. The same company had previously reduced its capital partly at the expense of the preference shareholders (see [1888] 39 Ch. D. 582).

[4]*Re* James Colmer, Limited, [1897] 1 Ch. 524.

[5]*Re* National Dwellings Society, [1898] 78 L. T. 144.

[6]Credit Assurance and Guarantee Corporation, [1902] 2 Ch. 601; Allsopp & Sons, [1903] 51 W. R. 644.

profits, it is only necessary to register the special resolution, and in the latter case to register a Minute; but for all other reductions the sanction of the Supreme Court must be obtained on petition (Section 54).

By Section 64 Land Companies, whose principal and main business as expressed in the Memorandum of Association is to acquire tracts of land with the object of sub-dividing the same into lots and selling such lots when sub-divided, are authorised to reduce their capital by the payment of dividends, being the net proceeds of the sale of lands so subdivided, without the necessity of applying to the Court to authorise such reduction. The wording of Sub-section 1 of this Section is not altogether clear and it might possibly be contended that the procedure outlined in this Section regarding the payment of dividends applies to the payment of all dividends although such dividends might not result in a reduction of capital. It is submitted, however, that the first words of this Section qualify the following words and that the whole of this Section must be taken to apply only to the declaration and payment of dividends which actually result in the reduction of capital. Only in this event must the procedure outlined in this Section be followed.

Reduction of capital may be sanctioned or disallowed at the discretion of the Court,[1] and accordingly any scheme which works unfairly as regards the interests of a minority may and will be disapproved;[2] but a fair scheme will be sanctioned even if it effects an alteration of the respective

[1]A return of capital to shareholders who at once re-lent it to the company on debentures was sanctioned in North's Navigation Collieries, [1897] 1 Ch. 872.

[2]Barrow Haematite Steel Co. No. 2, [1900] 2 Ch. 846; affirmed on other grounds, [1901] 2 Ch. 746.

rights of classes.[1] It has been said that a scheme of reduction will not be allowed to pass if it is not for an object contemplated by the Acts, as, for instance, where the company has issued shares at a discount, and seeks to extinguish the remaining liability by writing down the capital;[2] or where the company has ceased to carry on business and the only object is to divide the assets;[3] but this must be reconsidered in the light of the very wide view now taken of the objects of the Acts.[4] For instance, where shares have been redeemed or paid off under circumstances of doubtful validity, the capital may be reduced with the sanction of the Court by cancelling the shares.[5]

A purported reduction, whereby founders' shares were to be extinguished and a greater number of ordinary shares issued in exchange, was held to be unlawful, being in reality an issue of the ordinary shares at a discount.[6] When shares have been reduced they rank in a winding up only at the reduced amount; thus, where ordinary shares were reduced from a pound to a shilling each and there were large surplus assets after repaying the capital, the ordinary shares only took one twentieth as much as the preference shares, which remained at a pound each.[7]

If the reduction of capital involves the repayment of money to the members, this creates a specialty debt, which can be recovered by the members entitled at any time within twenty years.[8]

Issuing shares at a discount and paying dividends out of capital are in fact reductions of capital, and it may be

[1]Credit Assurance and Guarantee Corporation, [1902] 2 Ch. 601.
[2]*Re* New Chile Gold Mining Co., [1888] 38 Ch. D. 475.
[3]*Re* Wallasey Brick Co., [1891] W. N. 20, 63 L. J. Ch. 415, 70 L. T. 870.
[4]Poole *v.* National Bank of China, [1907] App. Ca. 229.
[5]Midland Railway Carriage Co., [1907] W. N 175.
[6]Development Co. of Central and West Africa, [1902] 1 Ch. 547.
[7]Espuela Land and Cattle Co. No. 2, [1909] 2 Ch. 189.
[8]Artisans' Land and Mortgage Corporation, [1904] 1 Ch. 796.

assumed that the Court will never sanction such proceedings. Buying the company's shares with its own capital or profits and forfeiting or accepting surrenders of shares are reductions of capital which in a proper case the Court will sanction.[1]

A reduction of capital cannot be effected under Section 129 unless the proper steps are also taken under Sections 53 to 58.[2]

3. SURRENDER AND FORFEITURE OF SHARES.

This is in fact a reduction of capital, and the rule is that where the Articles do not authorise the surrender and forfeiture of shares, neither the directors nor a majority of the shareholders can without the sanction of the Court make a surrender or forfeiture valid;[3] but where there is a special authority, the directors, acting on behalf of the company, may, so long as they act within the terms of the authority, validly make a forfeiture of the shares,[4] or accept a surrender in cases where the circumstances are such that they would have power to forfeit.[5]

The same rule applies to the shares of persons who have agreed to become shareholders, but are not yet upon the Register.[6] If there is a real dispute whether or not a person has agreed to become a shareholder, the directors may compromise the dispute, and allow the supposed shareholder to give up the shares.[7]

[1]British and American Trustee Corporation *v* Couper, [1894] App. Ca. 399; *re* Denver Hotel Co., [1893] 1 Ch. 495; Dicido Pier Co.'s Case, [1891] 2 Ch. 354.

[2]Cooper, Cooper & Johnson, [1902] W. N. 199.

[3]Munt's Case 22 Beav. 55; Spackman *v*. Evans, [1868] L. R. 3 H. L. 171; Houldsworth *v*. Evans, [1868] L. R. 3 H. L. 263; Hart *v*. Clarke, [1858] 6 H. L. C. 633.

[4]Lane's Case [1852] 1 De G. J. & Sm. 504; Kipling *v*. Todd, [1878] 3 C. P. D. 350; Teasdale's Case, [1874] 9 Ch. 54.

[5]Bellerby *v*. Rowland and Marwood's Steamship Co., [1902] 2 Ch. 14.

[6]Hall's Case, [1870] 5 Ch. 707; Snell's Case, [1870] 5 Ch. 22; London and Provincial Coal Co., [1877] 5 Ch. D. 525.

[7]Bath's Case, [1878] 8 Ch. D. 334; Dixon's Case, [1870] L. R. 5 H. L. 606; Wheeler *v*. Wilson, 6. O.R., 421; Livingston *v*. Temperance Colon. Society, 17, A.R., 379.

The directors must not, however, use the company's money to buy out shareholders with whom there is a quarrel, or who desire for any reason to retire, even if the Articles appear to authorise such a coures;[1] but this may be made the subject of an arrangement, to which the sanction of the Court is obtained as for a reduction of capital;[2] and directors, or other members, may personally buy out shareholders, taking a transfer to themselves, and applying their own money to the purchase.

A surrender of partly paid shares in consideration of a release by the company of the shareholder's liability constitutes a purchase by the company of those shares, and is therefore *ultra vires;* and even after the lapse of a long period the Court will restore to the Register the member who made the surrender;[3] and a surrender even of fully paid shares will not generally be lawful without the sanction of the court, for this disturbs the equilibrium of the balance sheet and may render the payment of a dividend possible which otherwise would be unlawful.[4]

Where a company had power to accept surrenders of fully paid shares, such a surrender, as part of a bargain that the former owner of the shares should purchase an onerous lease from the company, was held valid and not to require the sanction of the Court, unless the shares were also to be permanently extinguished;[4] but the authority of this case is now doubtful.

When a forfeiture is about to be made, the directors must see, first, that they have the power to forfeit, and, secondly, that they conform very strictly to all the preliminaries prescribed by the Articles.[5]

[1]Morgan's Case, [1849] 1 Mac. & G. 225; Trevor *v.* Whitworth, [1888 12 App. Ca. 409.
[2]British and American Trustee Corporation *v.* Couper, [1894] App. Ca. 399.
[3]See case last cited and Anglo-French Exploration Co., [1902] 2 Ch. 845.
[4]*Re* Denver Hotel Co., [1893] 1 Ch. 495.
[5]Nellis *v.* Second Mutual Building Society of Ottawa, 29, Gr., 399.

A forfeiture of shares may be attacked from two sides—(A) If the shares subsequently turn out valuable, the original owner may seek to have them restored to him; (B) If there is a liability upon the shares, the creditors are interested to see that someone remains upon the Register to meet the liability. Accordingly, great exactness is required. Forfeiture must be preceded by all the proper notices, containing all the matters prescribed by the Articles, and giving all the time required. If the notice claiming payment claims too much, a forfeiture based on such notice will be bad, *e.g.* if interest is claimed from too early a date.[1] It must be carried out by properly qualified and appointed directors,[2] and the due quorum must be present.[3] Moreover, it must be for the cause intended by the Articles, and not with a view to getting rid of an obnoxious shareholder, or with a view to relieving the owner of the shares of his liability.[4] In short, the power must be exercised alike for the benefit of the company and with strict justice to the shareholder.

The power to forfeit and the power to accept surrenders are distinct, and the former will not justify a surrender being made which if made without express power will be invalid.[5]

If the shares are invalidly forfeited, the holder will remain a member of the company both as regards his liabilities and as regards his privileges, and the mere lapse of time will not cure the defect.[6] But where a shareholder

[1]Johnson *v.* Lyttle's Iron Agency, [1877] 5 Ch. D. 687.

[2]Garden Gully United Quartz Mining Co. *v.* McLister, [1875] 1 App. Ca. 39; Christopher *v.* Noxon, 4, O.R., 672; Provincial Insurance Co. *v.* Cameron, 1880, 31, C.P., 523.

[3]Bottomley's Case, [1881] 16 Ch. D. 681.

[4]Richmond and Painter's Case, [1858] 4 K. & J. 305; Spackman *v.* Evans, [1868] L. R. 3 H. L. 171.

[5]Hall's Case, [1870] 5 Ch. 707; Esparto Trading Co., [1879] 12 Ch. D. 191.

[6]Garden Gully United Quartz Mining Co. *v.* McLister, [1875] 1 App. Ca. 39; Bottomley's Case, [1881] 16 Ch D. 681; Esparto Trading Co., [1879] 12 Ch. D. 191; Bellerby *v.* Rowland and Marwood's Steamship Co., [1902] 2 Ch. 14.

has for a long period acquiesced in an irregular forfeiture he will not be allowed upon the company becoming prosperous to assert his right to have the forfeiture set aside.[1]

It is usual for the Articles to contain a power for the directors to annul a forfeiture upon terms, and this power may be acted upon when desirable; but it is only possible to annul the forfeiture if the former owner of the shares consents.[2] Another provision generally made is a declaration that the member remains liable for unpaid calls made before the forfeiture; and if this provision is found in the Articles, the former holder of shares which have been forfeited may be sued even after the forfeiture.[3]

A shareholder induced to take shares by fraud may, even after a forfeiture, repudiate the bargain and defend an action for calls,[4] and where an action for rescission of the contract to take shares is pending the Court will, upon the plaintiff paying into court the amount of any calls made, restrain the company from forfeiting the shares until the hearing of the action.[5]

The company usually has power to reissue forfeited shares (*e.g.* Clause 27 of Table A). If in exercise of this power it reissues shares irregularly forfeited it may be liable in damage to the original holder.[6] When forfeited shares have been reissued the company may make a fresh call upon the new holders in respect of the amount remaining unpaid by the former holder upon which the forfeiture was made; but any payment made by the former owner, even after

[1] Prendergast *v.* Turton, [1843] 13 L. J. Ch. 268; Rule *v.* Jewell, [1881] 18 Ch. D. 660; Jones *v.* North Vancouver Land Co., [1910] App. Ca. 317.

[2] Exchange Trust, [1903] 1 Ch. 711. Table A has this power (Clause 27).

[3] Ladies' Dress Association *v.* Pulbrook, [1901] 2 Q. B. at page 381; Randt Gold Mining Co. *v.* Wainwright, [1901] 1 Ch. 184; Marmara Foundry Co. *v.* Jackson, 9, U C.R., 509.

[4] Aaron's Reefs *v.* Twiss, [1896] App. Ca. 273.

[5] Lamb *v.* Sambas Rubber Co., [1908] 1 Ch. 845; Jones *v.* Pacaya Rubber Co., [1910] W. N. 257.

[6] New Chile Gold Mining Co., [1890] 45 Ch. D. 598.

forfeiture, goes in reduction of the amount payable by the new owner.[1]

The power of forfeiture may be exercised by the directors after a voluntary winding up, if they obtain the sanction of the liquidator or of a meeting of the company.[2]

4. Consolidation of Shares into Shares of Larger Amount and Conversion of Shares into Stock.

"If so authorised by its Articles," a Company Limited by Shares may consolidate and divide all or any of its share capital into shares of larger amount than its existing shares, or convert all or any of its paid-up shares into stock, and may subsequently reconvert such stock into paid-up shares, and thereafter every copy of the Memorandum must be in accordance with the alteration (Section 48). Notice of any such consolidation or conversion or of any reconversion must be given to the Registrar of Companies (Section 49).

Section 52 also gives certain powers for consolidating shares of different classes, which are discussed at page 22.

It should be noted that a company cannot make an original issue of stock. If it desires to have a capital held as stock it must first issue shares, and when they are fully paid convert them into stock. Shares not fully paid cannot be so converted.

5. Subdivision of Shares.

In cases where the capital of the company is divided into shares of a large amount, it is sometimes considered desirable to subdivide them into shares of smaller amount, as, for example, each share of a hundred dollars into ten shares of ten dollars each. Section 48 allows a Company Limited by Shares to do this by special resolution, if the

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[1]New Balkis Eersteling *v.* Randt Gold Mining Co., [1904] App. Ca. 165; *re* Randt Gold Mining Co., [1904] 2 Ch. 468.

[2]Ladd's Case, Fairburn Engineering Co., [1893] 3 Ch. 450.

company is so authorised by its Articles. If, therefore, power to pass such a resolution is not contained in the Articles, two special resolutions will be required—one taking power, "by special resolution," to subdivide; the other acting upon that power.

The statement of capital in every copy of the Memorandum of Association issued after the passing of the special resolution must be in accordance with the resolution, and a penalty of five dollars for each copy attaches to default in this respect (Sub-section 3).

As the Act prescribes that on a subdivision of shares the amount paid on the original shares shall be equally apportioned to the shares of reduced amount, it is well to express the fact in the resolution authorising the subdivision.

Section 52 also gives certain powers for the division of shares into shares of different classes, which are discussed at page 22.

CHAPTER XIX.

MISCELLANEOUS MATTERS.

ANNUAL RETURNS OF CAPITAL AND MEMBERS.

EVERY company having a share capital is required to make, once at least in every year[1] a List of all persons who were members of the company on the fourteenth day after the first or only ordinary general meeting in the year, and a List of all persons who have ceased to be members since the date of the last Return or (in the case of the first Return) of the incorporation of the company. The List must state the names, addresses, and occupations of all the past and present members of the company therein mentioned, and the number of shares held by each of the existing members at the date of the Return, specifying shares transferred since the date of the last Return and the dates of registration of the transfers.

The List must be accompanied by a Summary distinguishing between shares issued for cash and shares issued as fully or partly paid up otherwise than in cash, and specifying the following particulars:—

(*a*) The amount of the share capital of the company and the number of the shares into which it is divided;

(*b*) The number of shares taken from the commencement of the company up to the date of the Return;

[1]This is in addition to the Return which has to be made within one month after each allotment of shares (see page 130, *supra*). "Every year" means every calendar year: *i e.* from the 1st January to the 31st December inclusive (Gibson *v.* Barton, [1875] L. R. 10 Q. B. 329; Edmunds *v.* Foster, [1875] 33 L. T. 690).

(*c*) The amount called up on each share;
(*d*) The total amount of calls received;
(*e*) The total amount of calls unpaid;
(*f*) The total amount of the sums (if any) paid by way of commission in respect of any shares or debentures, or allowed by way of discount in respect of any debentures, since the date of the last Return;
(*g*) The total number of shares forfeited;
(*h*) The total amount of shares or stock for which share warrants are outstanding at the date of the Return;
(*i*) The total amount of share warrants issued and surrendered respectively since the date of the last Return;
(*j*) The number of shares or amount of stock comprised in each share warrant;
(*k*) The names and addresses of the persons who at the date of the Return are the directors of the company, or occupy the position of directors, by whatever name called; and
(*l*) The total amount of debt due from the company in respect of all mortgages and charges which are required to be registered with the Registrar under the Act.

The summary must also include a statement in the form of a balance sheet as described on page 335 (Section 34, Sub-section 3).

The List and Summary must be signed by the manager or secretary of the company (Sub-section 4).

The above-mentioned particulars have to be entered in a separate part of the Register of Members, made up to the fourteenth day after the ordinary general meeting, and the entry completed within the next seven days, and a copy forthwith filed with the Registrar of Companies (Sub-sec-

tion 4). Where there is more than one ordinary general meeting in the year, the above entries have to be made up to the fourteenth day after the first of such meetings. The same particulars are required to be entered after the first or statutory general meeting where such meeting is an ordinary general meeting. If default is made in holding the general meeting in any year the Return cannot be made so as to comply with the Act, and the penalties mentioned on the following page are incurred, as well as penalties for not holding the meeting.[1]

The "Annual Return," or copy of the above entries, must be registered within the seven days mentioned above, or, in other words, within twenty-one days after the first ordinary general meeting in each year. Any company neglecting to make this Return "shall be liable to a fine not exceeding twenty-five dollars for every day during which the default continues, and every director and manager of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty" (Sub-section 5). In making out the Return, care should be taken that it does not contain any notice of trust, "expressed, implied, or constructive," contrary to Section 35, or it will be refused by the Registrar. It should be observed that the Return has to be made up to the *fourteenth day after the first ordinary general meeting*—not to the 30th of June or the 31st of December, or to end of the company's financial year.

In addition to the risk of penalties incurred by a company neglecting to make its Annual Returns, there is the danger that the Registrar may treat the omission as being reasonable cause for belief that the company is not carrying on business or in operation, and, after certain formalities, removing its name from the Register of Companies under Section 268.

[1]Gibson *v.* Barton, [1875] L. R. 10 Q. B. 339; Park *v.* Lawton, [1911] W. N. 24.

CARRYING ON BUSINESS WITH LESS THAN THE MINIMUM NUMBER OF MEMBERS.

Every member of a public company carrying on business for more than six months after the number of members has been reduced below five, or in the case of private company below two, becomes severally liable for the whole of the debts of the company contracted during the time it so carries on business after the six months, if cognisant of the fact that the number has been reduced below the minimum allowed, and may be sued for the same without the joinder in the action or suit of any other member (Section 122). The company may also be wound up by the Court (Section 187). For the purpose of these sections it would seem that past members and persons who are representatives of deceased members must not be counted.[1]

PENALTIES.

The cases in which penalties are imposed are very numerous. By Section 290 all offences under the Act made punishable by any fine may be prosecuted under the "Summary Convictions Act": *i.e.* by Police Court proceedings.

PRIVATE COMPANIES.

Prior to the passing of the Act of 1910 all companies were treated alike, and the expression "Private Company" could only have any meaning as describing the practice of the persons interested.

By Section 130 a Private Company is defined as one which by its Memorandum or Articles—(*a*) Restricts the right to transfer its shares; (b) Limits the number of its members (exclusive of persons who are in the employment of the company) to fifty; and (*c*) Prohibits any invitation to the public

[1]Compare Bow ing and Welby's Contract, [1895] 1 Ch. 663.

to subscribe for any shares or debentures of the company; with a proviso in Sub-section 3 that joint holders of shares shall, for the purposes of the section, be treated as a single member. The definition is not wholly satisfactory. As regards (*a*) it would seem that almost any restriction will suffice, and that even the common-form clause giving the directors power to reject transfers to persons whom they do not approve will satisfy the Act, and as regards all the conditions that they will be satisfied by the insertion of restrictive provisions in the Articles, whether such provisions are or are not observed in practice; and it is doubtful whether any penalty can be enforced for failing to observe them.

A company registered as a Private Company has several advantages. It may consist of *two* or more persons (Section 12), so that there is now no occasion for five "dummies" to sign the Memorandum of Association of a newly formed private company, and the derision which was so often applied to "one man" companies will have no point. Where there are only two members it is necessary to remember that on the death of one of them the same consequences follow as when in a Public Company the number of members is reduced below five (see page 375).

Private Companies are free from the obligations imposed upon companies which do not issue a prospectus to file a statement in lieu of it (Section 91: see page 74). They are also relieved, by Section 34, Sub-section 3, from the necessity of filing an annual balance sheet, and by Section 73, Sub-section 10, from forwarding to their members or filing the report prior to the statutory meeting required in the case of other companies by that section; and they are not subject to the provisions of Section 121 giving holders of preference shares and debentures the same right to receive and inspect balance sheets and the reports of auditors and

other reports that are possessed by ordinary shareholders, although it seems that preference shareholders will still be entitled to inspect and be furnished with copies of the balance sheet and auditors' report under Section 120, Sub-section 3.

They also escape from the provisions of Section 94, requiring a minimum subscription before allotment, and are entitled to commence business immediately on incorporation, for Section 96 does not apply (see Sub-section 6).

Section 80 (requiring directors named in the Articles to file an agreement to take their qualification shares from the company) does not apply to private companies.

Private companies, as well as public companies, can pay a commission for underwriting their shares.[1]

The method of forming a private company is the same as in the case of a public company, save that not more than two persons are required to subscribe the Memorandum and Articles, and that the Articles must contain the provisions above referred to.

Existing companies which are in effect private companies may by altering their Articles become private companies under the Statute and so obtain the benefits above referred to, and a large number of such companies have already done so.[2]

If a private company desires to become a public company, it may do so, subject to anything contained in its Memorandum or Articles (Section 130, Sub-section 2), by passing a special resolution to that effect, and filing a statutory declaration such as is required by Section 96 in the case of other companies before commencing business (see page 113). This involves the filing of a consent to act by the directors

[1]Dom. of Canada Invest. Syndicate *v.* Brigstock [1911] 2 K.B. 648.
[2]Le'ser *v.* Popham Bros., XVII, B.C.R. 187.

named in the statement, and a contract by them to take up their qualification shares, if any, unless they signed the Memorandum of Association therefor at the time of incorporation. It would seem that a private company, even if prohibited by its Articles from so converting itself into a public company, can first alter its Articles and then proceed with the conversion.

The recognition of private companies appears to be a wise step, and it will be seen that Limited Liability may now be obtained in either of the following forms:—

1. Limited Partnerships under The Partnership Act, in which case, however, there must always be at least one partner with unlimited liability.
2. Private Companies, which may consist of any two or more members (not exceeding fifty), whose liability (except in the case of unlimited companies) is strictly limited, and such companies are not required to file any prospectus, statement, or balance sheet.
3. Public Companies, consisting of not less than five members, which must give publicity to their condition by filing a prospectus or statement and an annual balance sheet.

CONVERTING PRIVATE BUSINESSES INTO COMPANIES.

It frequently happens that the members of a private firm desire to turn their business into a company, although they do not propose to publish any prospectus or to invite the public to take shares. The advantages are obvious. The limitation of liability is of great importance to all, and can be extended to all the partners, and not as in the case of limited partnerships, only to sleeping partners; while, in addition, persons willing to lend money to the concern can be secured by debentures charged on the property, and persons willing to risk a certain amount in the venture

without incurring any further liability can take shares, and, paying for them in full, be free from any further risk, while securing the advantage of the many protections afforded by the Companies Act, but not conferred by the Partnership Act.

The common practice is to form a Company Limited by Shares, having a capital sufficient to allow of the assets of the firm being purchased. The Memorandum of Association is then signed by the partners, or if there is only one trader by him and at least one other person. The Articles declare that the partners shall be the first directors, and if the company is to be a Private Company they must contain restrictions upon the sale of shares to strangers. If the company is intended to be a "Public" one there must be at least five subscribers to the Memorandum of Association.

An agreement is next entered into whereby the firm agrees to sell and the company to buy all the assets and the goodwill of the business, the purchase money being payable in shares to be treated as fully or in part paid up, and to be divided among the partners in proportion to their interests in the business sold.

The usual method is for the company to take over the book and other debts, and to agree to pay the outstanding liabilities of the firm; or to arrange that only the stock-in-trade, freehold and leasehold properties, and other things requisite for carrying on the business shall be sold to the company, that the company shall collect the outstanding debts as agent for the partners, and that the partners shall themselves pay the existing liabilities. If this plan would leave the company with insufficient working capital, it can be set right by the partners agreeing to subscribe for further shares, which they can pay for as the debts ars collected.

It is not necessary to purchase the goodwill; for, as the partners will share in the profits of the company

in the same manner as they do in those of the firm, they will not lose by no mention being made of it and no price paid for it, provided that there is a covenant by the partners individually not to trade in competition with the new company; but, on the other hand, this course may result in the capital appearing to be too small for the business carried on—a matter which may affect the credit of the company. For instance, a firm doing business yielding profits of $25,000 a year may probably have stock-in-trade only to the amount of $25,000 or $50,000, and then, if the book debts are not assigned, and no value is put on the goodwill, the partners would sell the concern to the company for only this $25,000 or $50,000, a sum which might give the business the appearance of not being very substantial.

Registration of the contract relating to the issue of fully or partly paid shares pursuant to Section 97 must not be overlooked (see page 144, *supra*).

Partners are often willing to continue to take a certain amount of liability, and in such cases the purchase shares should be treated as only paid up in part. Thus, if the amount to be paid for the business is $10,000, it may be paid by the issue of 20,000 shares of $1 each treated as paid up to the extent of fifty cents per share, in which case the members will be under a liability of fifty cents per share, or a further $10,000 in all.

It is usual and desirable that all the partners in the old firm should enter into covenants with the company not to trade in competition with it, and not to allow their names to be used in any rival business.

It frequently happens that after a trader's death his executors desire to convert his business into a company. If the testator has not given power for such a conversion, nor authorised the trustees to invest in shares of incorporated

companies, they cannot effect a sale to the company, and although there have been cases in England where the Court has sanctioned such a proceeding, it appears now that the Court has no jurisdiction for such a purpose,[1] unless the arrangement is part of a compromise of disputes with third parties.[2] The Court has jurisdiction to allow a trustee to go outside the terms of his trust only where the case is one of emergency not foreseen or provided for by the author of the trust and circumstances require that something should be done.[3]

Even before private companies of only two persons were legalised the number of members holding *substantial* interests in a private company might be small, or indeed consist of a single person; for the House of Lords in 1897 held that if a company was incorporated according to law, and six of the shareholders held only one share each, and the seventh held twenty thousand, the Court could not go behind the Certificate of Incorporation and inquire whether or no such a "one man" company was what the Legislature intended when passing the Companies Acts.[4] Phillimore, J., has, however, returned to the view that a limited company may be a mere alias of the principal members in a case where fraud is shown.[5]

A sale, however, by an insolvent trader of substantially all his assets to a company is fraudulent and an act of bankruptcy, and upon the assignor being make bankrupt within three months may be set aside by the trustee in bankruptcy;[6] but even in such a case, if part of the consideration

[1] *Re* Morrison, [1901] 1 Ch. 701: *re* Crawshay, [1889] 60 L. T. 359.
[2] West of England Bank *v.* Murch, [1883] 23 Ch. D. 138.
[3] *Re* New, [1901] 2 Ch 534.
[4] Salomon *v.* Salomon & Co., [1897] App. Ca. 22.
[5] *Re* Darley, *ex parte* Brougham, [1911] 1 K. B. 95.
[6] *Re* Hirth,]1899] 1 Q. B. 612; *re* Wheatley, [1901] 85 L. T. 491.

is issued to persons giving value in good faith and in ignorance of the irregularities practised, this portion of the transaction will stand good.[1]

A transfer by a trader to a company in the *bonâ fide* hope of benefiting his creditors does not necessarily tend to defeat or delay creditors, and should not be set aside as void against the trustee.[2]

[1] *Re* Slobodinsky, [1903] 2 K. B. 517.
[2] *Re* Harris, *ex parte* Trustee, [1907] 54 W. R. 460.

CHAPTER XX.

TAXATION OF CORPORATIONS.

UNDER the Taxation Act, R.S.B.C., 1911, Chap. 222, all land, personal property and income of every corporation doing business in the Province is liable to taxation by the Government (Section 4).

The following are the rates of taxation:—

A.—On Real Property:

(1) Land other than wild land, coal or timber land	½ of 1%	on assessed	value
(2) Wild land	4%	"	"
(3) Coal land—			
Class A (*i.e.* land from which coal is being mined)	1%	"	"
Class B (*i.e.* all other coal lands not included under Class A)	2%	"	"
(4) Timber land	2%	"	"

B.—On Personal Property ......½ of 1% on assessed value

C.—On Income:

Up to and not exceeding $1,000	exempt
Up to and not exceeding $2,000	1 %
Above $2,000 and not exceeding $3,000	1¼%
Above $3,000 and not exceeding $4,000	1½%
Above $4,000 and not exceeding $7,000	2 %
Above $7,000	2½%

An abatement of the first $1,000 or every income is however allowed and incomes up to and including $1,000 are exempt.

There are a great number of exemptions set forth in Section 8, of which the following are the most important:—

Sub-section 11 (*a*)—All property real and personal which is situate out of the Province.

Sub-section 12 (*b*)—Mortgages on real or personal property in the Province.

Sub-section 13 (*c*)—Stocks, bonds or debentures of the Province or of any municipality in the Province, or shares in any company whose personal property and income is taxed under the Act.

Sub-section 14 (*d*)—Monies due on lands sold, the fee of which has not been conveyed.

Sub-section 15 (*e*)—Household furniture, personal effects, etc.

Sub-section 16 (*f*)—Land within any municipality. (This is, of course, liable to taxation by such municipality, and is for that reason exempt for taxation by the Province.)

Sub-section 18—The income of every person up to and including one thousand dollars.

Sub-section 20 (*g*)-Farm and orchard produce, so long as it is in the possession of the producer, and live stock and farm implements up to one thousand dollars.

Sub-section 20 (*h*)—Income derived from cultivation of land.

Sub-section 21 (*i*)—Unsecured book debts.

Sub-section 22 (*j*)—Moneys on deposit in a bank in the Province.

Sub-section 23 (*k*)—Ore minerals, metal or bullion in course of treatment at a smelter.

Sub-section 24 (*l*)—Timber and coal lands held under lease or licence from the Crown, in virtue of the "Land Act" or "Coal Mines Act," under which a royalty and rental or a licence fee is reserved.

Sub-section 25 (*m*)—Timber cut from lands held under timber licence or lease, upon which rental, royalty and licence fees have been paid. This exemption only extends so long as such timber is the personal property of the licencee or lessee.

Sub-section 26 (*n*)—Timber cut from other lands upon which the tax of 50 cents per M., payable under Land Act, has been paid: the exemption is limited to the owner of the lands, and does not extend to others who may acquire the timber so cut.

Where a corporation is assessed and taxed on personal property from which its income is derived, it does not pay taxes on both: it pays the tax on one only. If, according to the above scale, the tax on income would be greater than that on personal property it will only pay the income tax and *vice versa*.

The following classes of Companies are not liable for tax on Income and on Personal Property, but instead are assessed on their Gross Revenue from all sources derived, arising from business transacted in the Province, said tax being at 1%, and being in addition to assessment and taxation on Real Property in the Assessment District in which it is situated:

1. Life Insurance Companies.
2. Insurance Companies other than Life.
3. Guarantee, Loan and Trust Companies.
4. Telegraph, Telephone and Express Companies.
5. Gas and Waterworks Companies.
6. Electric Lighting, Electric Power and Street Railway Companies.

Exception—Fire Insurance Companies are not taxable upon Gross Revenue from premiums which are subject to taxation under the "Fire Insurance Act."

Under the Act, Gross Revenue means "the actual gross revenue or income without any deductions whatsoever earned, derived, accrued or received from any source whatsoever the product of capital, labour, industry or skill of received by any Corporation on Capital account or upon transacted in the Province, and shall not include moneys received by any Corporation on Capital account or upon trust for the use of any other person."

Every corporation of the class named above must make a Return on the appropriate form on or before the 1st of September in each year, signed by an officer of the corporation and must forward to the Minister every year on or before 31st January a certified copy of their annual Balance Sheet and Profit and Loss Account as shown by their books for the year immediately preceding said 31st January, according to the date at which the said Balance has been arrived at.

Taxes become due and payable on 2nd January every year, but if paid on or before 30th June preceding are subject to a discount of 10%. If unpaid on 31st December they become delinquent and bear interest at 6% until paid or recovered.

Corporations have the right of appeal against the assessment made on them to the Court of Revision and Appeal and to the Court of Appeal.

The Personal property of an incorporated company other than a company of the classes named above is assessed and taxed in the Assessment District in which the property is.

Special provisions exist for the taxation of Banks and their Branches in the Province, for Salmon Canneries, for Coal and Coke Companies, for Companies mining minerals other than coal and coke, and for Railways in Parts IV. (Sections 138, 139), II., III., V. and VII. respectively of the Act.

CHAPTER XXI.

DOMINION COMPANIES.

THEIR FORMATION AND MANAGEMENT.

Reference has already been made to the fact that the power of incorporating companies is vested in both the Dominion and the Provinces by the British North America Act (see page 2 *supra*). The Act of the Dominion Parliament, by virtue of which companies may be incorporated, is the Companies Act R.S.C., 1906, Chap. 70 (Part I.), amended by an Act passed in the year 1908, being Chapter 16 of the Statutes of that year.

The general principles of law set forth in the preceding pages apply to Dominion companies as well as to British Columbia companies. The provisions of the Dominion Companies' Act and the British Columbia Companies' Act differ, however, in certain details. The more important of the differences will be pointed out and explained in this chapter.

One of the principal differences is in the names used in describing corresponding documents; for instance, the Certificate of Incorporation issued under the seal of the Registrar of Companies in British Columbia is replaced by Letters Patent issued under the seal of the Secretary of State of Canada. The Memorandum of Association is replaced by a document called an Application for Incorporation, which, however, so far as regards its contents is practically the same as the Memorandum of Association. By-laws take the place of Articles of Association and fulfil the same functions regarding the internal management of the company. By-laws are adopted after the issue of Letters

Patent, and until this has been done, the internal management of a company is subject to provisions in the Act which apply in the absence of By-laws. It is to be observed that the type of resolution called in the British Columbia Act a special resolution, is unknown in the Dominion Act; and a number of things which can only be done in the case of a British Columbia company by means of a special resolution (see page 331, *supra*) are done in the case of a Dominion company by one meeting, by a majority vote of usually two-thirds.

The division of companies into "Public" and "Private" companies in the British Columbia Act is not found in the Dominion Act.

FORMATION OF COMPANY.

Letters patent granting a charter of incorporation are given under the seal of office of the Secretary of State upon application being made by not less than five persons of the full age of twenty-one years. The Application for Incorporation, which must be in accordance with Form A in the Schedule to the Act, must set forth the following particulars:

(a) The proposed corporate name of the company, which shall not be that of any other known company, incorporated or unincorporated, or any name liable to be confounded therewith, or otherwise, on public grounds, objectionable.

(b) The purposes for which its incorporation is sought.

(c) The place within Canada which is to be its chief place of business.

(d) The proposed amount of its capital stock.

(e) The number of shares and the amount of each share.

(f) The names in full and the address and calling of each of the applicants, with special mention of the names of not more than fifteen and not less than three of their number, who are to be the first or provisional directors of the company.

(g) The amount of stock taken by each applicant, the amount, if any, paid in upon the stock of each applicant, and the manner in which the same has been paid, and is held for the company.

The paragraph of the Application of Incorporation giving particulars of the purposes for which incorporation is

sought corresponds to the "Object Clause" in the Memorandum of Association of a British Columbia company, and the observations made in Chapter III regarding this clause apply with equal force to this paragraph of the Application for Incorporation.

The "Purposes" must not include or refer to the construction and working of railways, or of telegraph or telephone lines, the business of insurance, or of a loan company[1] or of banking and the issue of paper money (Section 5).

Section 8 provides that the Application may ask to have embodied in the letters patent any provisions which could be the subject matter of any by-law of the company, and any provision so embodied in the letters patent is not subject to repeal or alteration by by-laws unless such power is given in the letters patent. In addition to the Application for Incorporation, a memorandum of agreement, in duplicate under seal, in accordance with Form B in the Schedule to the Act must accompany the Application. This memorandum is an agreement by each of the subscribers thereto to take the respective amounts of stock of the company set opposite their names. Proof of the truth and sufficiency of the facts contained in the Aplication for Incorporation and in the memorandum of agreement must be made by affidavit or statutory declaration, usually of one of the applicants. A fee is payable to the Dominion Government upon the granting of letters patent. The tariff of fees is established from time to time by the Governor-in-Council, varying with the amount of capital of the company. An accepted cheque for the amount of the fees and advertising charges must accompany the other documents (Section 24).

[1]Loan Companies may be formed under the provisions of Part II of the Dominion Companies Act.

Upon the granting of letters patent, notice is inserted in the *Canadian Gazette* for two weeks, and also on four separate occasions in a newspaper in the city or place where the head office of the company is established (Section 13). The company comes into existence as a body corporate on the date of its letters patent.[1] No acceptance of the letters patent by the company is necessary.

A Dominion company is, so far as regards British Columbia, an "Extra Provincial Company," and must comply with Part V of the British Columbia Companies' Act before it does business in British Columbia.[2]

CHANGING OF NAME.

This is effected upon the application of the company by the issue of supplementary letters patent. The company must first satisfy the Secretary of State that the change is not desired for any improper reason. If it is found that the name of a company given by original or supplementary letters patent is the same as an existing incorporated or unincorporated company, or so similar as to be liable to cause confusion, the Secretary of State may direct the issue of supplementary letters patent changing the name of the company to some other name (Section 21).

COMMENCEMENT OF BUSINESS.

Dominion companies are not allowed to commence business immediately upon the granting of letters patent.

They must not commence operations or incur any liability before ten per cent of their authorised capital has been subscribed and paid for[3] (Section 26).

Every director who expressly or impliedly authorises the

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[1]Baldwin Iron Works *v.* Dominion Carbide Company, 20 W. R. 6.

[2]Waterous Engine Works *v.* Okanagan Lumber Company, 14 B.C. R. 238.

[3]North Sydney Mining Company *v.* Greener, 31 N. S. R. 41.

commencement of operations or the incurring of liabilities by the company before ten per cent of the capital has been subscribed and paid for, is jointly and severally liable with the company for the payment of any liabilities so incurred (Section 86).

In the event of a company not going into actual operation within three years after the charter is granted, the charter becomes forfeited[1] (Section 27).

INCREASE OF CORPORATE POWERS.

The Dominion Companies' Act confers upon a Dominion company great facilities to increase its corporate powers, and places no restrictions on the extent of such increase. A British Columbia company can only alter its objects within certain narrow limits (see page 35, *supra*).

Sections 34 to 37 inclusive deal with the increase in corporate powers. A resolution of the company passed by the votes of shareholders representing at least two-thirds in value of the subscribed stock at a special general meeting called for the purpose must authorise the directors to apply for supplementary letters patent extending the powers of the company to such further or other purposes or objects, for which a company may be incorporated under Part I. of the Dominion Companies' Act, as are defined in such resolution. Within six months of the passing of such resolution, the directors must apply for the issue of such supplementary letters patent, and must furnish satisfactory evidence to the Secretary of State of the due passing of the resolution. Upon this being done, the Secretary of State may grant supplementary letters patent extending the

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[1]See the following cases relating to forfeiture of charter: Lindsay Petroleum Company *v.* Pardee, 22 Gr. 18; Brooke *v.* Bank of Upper Canada, 4 P. R. 162; Dominion Salvage Company *v.* Attoney-General of Canada, 21 S. C. R. 72; Hardy *v.* Pickerell River Co., 29 S. C. R. 211; Attorney-General *v.* Toronto Junction Recreation Club, 8 O.L.R. 440.

powers of the company to all or any of the objects defined in the resolution, and notice must be given in the *Canada Gazette* and in a local newspaper.

PROSPECTUS.

The comprehensive provisions in the British Columbia Companies Act' dealing with the issue of a prospectus are not found in the Dominion Companies Act. One short section contains the statutory requirements in connection with prospectuses issued by Dominion companies. This section 43 is in the following terms:

> "Every prospectus of the company, and every notice inviting persons to subscribe for shares in the company, shall specify the date of and names of the parties to any contract entered into by the company or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors or the company or otherwise.
>
> Every prospectus or notice which does not specify such date and names shall, with respect to any person who takes shares in the company on the faith of such propectus or notice, without notice of such contract, be deemed fraudulent on the part of the officers of the company who knowingly issue such prospectus or notice."

INCREASE OF CAPITAL, ETC.

The capital stock of a company may be consolidated, sub-divided, increased and reduced by by-laws of the directors approved, in the cases of sub-division, increase and reduction, by the votes of shareholders representing at least two-thirds in value of the subscribed stock of the company, at a special general meeting of the company duly called for considering the same, and afterwards confirmed by supplementary letters patent issued under the seal of office of the Secretary of State (Sections 51 and 52). Consolidation can only be made of shares of a less par value of $100, and the shares when consolidated must not exceed the par value of $100. For the purpose of carrying out consolidation, the company is authorised to purchase fractions of shares, but must sell any shares held from such purchase within two years after the purchase.

Increase of capital can only be made after ninety per cent of the capital stock has been taken up, and fifty per cent thereon paid. If these conditions are not satisfied at the time of the purported increase of capital the increase is wholly invalid (Page *v.* Austen, 10 S.C.R., 132, and Meyers *v.* Lucknow Elevator Co., 6 O.W.R. 291. The by-law increasing the capital stock must state the number of shares of the new stock, and may prescribe the manner in which the same shall be allotted. If the by-law does not prescribe this, the control of allotment is left absolutely to the directors.

The directors may at any time make a by-law for reducing the capital stock to an amount which they consider advisable and sufficient for the due carrying out of the undertaking of the company. The by-law must declare the number and value of the shares of stock as so reduced and the allotment thereof, or the manner in which the same shall be made. The liability of the shareholders to persons who were at the time of the reduction creditors of the company, remains the same as if the capital had not been reduced.

Where application is made for supplementary letters patent confirming a subdivision of shares or increase or reduction of capital, proof must be made to the Secretary of State of the due passage and approval of the by-law and the *bona fide* character of the increase or reduction of capital or subdivision of shares as the case may be.

CALLS.

Section 58 provides that not less than ten per centum upon the allotted shares shall be called in within one year from the incorporation of the company. The residue may be called in and made payable as the letters patent or the by-laws direct. It has been held that this provision

regarding the calling in of "ten per centum" of stock is directory only. Neglect by the directors so to do does not make a shareholder liable to pay this "ten per centum" without a call being made in the ordinary way. A transfer, otherwise valid, is not, therefore, invalidated by the fact that the "ten per centum" mentioned was not called in and paid (Ontario Investment Association *v.* Sippi (1890), 20 Ont. R. 440).

Borrowing Powers.

There is an important difference between British Columbia companies and Dominion companies in respect of borrowing. All British Columbia trading companies have the implied right of borrowing, and if the articles of association delegate to the directors all the powers of the company as is usually done, the exercise of the companies' borrowing powers is vested in the directors. The British Columbia Companies' Act does not contain any provision expressly giving the right to borrow or placing any restriction on such right. The Dominion Act, however, authorises the directors to borrow, but only if authority has been given by by-law, sanctioned by a vote of not less than two-thirds in value of the subscribed stock of the company represented at a general meeting, duly called for considering the by-law. Section 69 (as amended by Section 2, of Companies' Act, 1908) is as follows:

"If authorized by by-law, sanctioned by a vote of not less than two-thirds in value of the subscribed stock of the con pany, represented at a general meeting duly called for considering the by-law, the directors may from time to time:—

(a) Borrow money upon the credit of the company.

(b) Limit or increase the amount to be borrowed.

(c) Issue bonds, debentures or other securities of the company for sums not less than one hundred dollars each, and pledge or sell the same for such sums and at such prices as may be deemed expedient.

Provided that such bonds, debentures or other securites may be for sums not less than twenty pounds sterling, five hundred francs, or four hundred marks, or for sums not less than the nearest equivalent in round figures of other money to one hundred dollars in Canadian currency.

(d Hypothecate, mortgage or pledge the real or personal property of the company, or both, to secure any such bonds, debentures or other securities and any money borrowed for the purposes of the company.

Nothing in this section contained shall limit or restrict the borrowing of money by the company on bills of exchange or promissory notes made, drawn, accepted or endorsed by or on behalf of the company."

It is not necessary that each specific loan shall be sanctioned. The directors may pass and the shareholders sanction a general by-law authorising the directors to borrow in such amounts and at such times as they think expedient.

The directors, however, may not exercise any borrowing powers until ten per centum of the authorised capital of the company has been subscribed and paid for (Section 26).

BY-LAWS.

As has been already stated, by-laws are made for the internal management of a Dominion company. These correspond to the articles of association of a British Columbia company. It is not necessary for a company to have by-laws, but by-laws are usually adopted some time after incorporation. It will be remembered that in the case of a British Columbia company, it may adopt as its articles of association Table A of the Act with or without modifications, or file special articles of association, and thus from the moment of its incorporation, the company has articles of association to govern its internal affairs. Until a Dominion company adopts by-laws for its management, it is governed by various sections in the Act, of which the following are the most important:

Sections 77 and 78—Election of Directors and Appointment of Officers.

Section 88—Provisions as to Notice Convening General Meetings and Voting thereat.

A by-law may be in the same form as a resolution, but a resolution is not necessarily a by-law. To be valid a by-law must operate generally, but a resolution is usually adopted for a special or individual case (*Re* Manes Tailoring Co. *v.* Wilson, 4 O.L.R.).

Some by-laws may be made only by the shareholders, as for example a by-law under Section 76 determining the number of directors or changing the location of the chief place of business of the company in Canada. The majority of by-laws, however, must be made by the directors, subject to the sanction of the shareholders in general meeting.[1]

DIRECTORS.

Section 72 provides that the affairs of a Dominion company shall be managed by a board of not more than fifteen and not less than three directors. This maximum and minimum number of directors is fixed by the Act, and between these limits the company may by by-law prescribe the number of directors to manage its affairs. The persons named in the letters patent are the first directors and act until replaced by others duly appointed in accordance with the Act and with the by-laws of the company. No director may be elected or appointed unless his is a shareholder, holding stock absolutely in his own right. The by-laws may prescribe the amount of stock a director must hold. If the by-laws do not specify the amount of stock a director must hold, the holding of one share will be sufficient. In a British Columbia company a director is no more liable for the debts of the company than an ordinary shareholder. The extent of his liability is the amount unpaid on his shares. Of course, if a director is guilty of fraud or breach of the trust imposed upon him by virtue of his position as a director, or if he violates any of the provisions of the Com-

[1]Kelly *v.* Electrical Construction Company, 10 O. W. R. 701.

panies' Act, he incurs a liability. But the directors of a Dominion company incur a special liability for certain of the company's debts. The section creating this liability is Section 85, which is in the following words:

> "The directors of the company shall be jointly and severally liable to the clerks, laborers, servants and apprentices thereof, for all debts not exceeding six months' wages due for service performed for the company whilst they are such directors respectively; but no director shall be liable to an action therefor, unless the company is sued therefor within one year after the debt becomes due, nor unless such director is sued therefor within one year from the time when he ceased to be such director, nor unless an execution against the company in respect of such debt is returned unsatisfied in whole or in part.
>
> The amount unsatisfied on such execution shall be the amount recoverable with costs from the directors.

A foreman or manager is not entitled to recover against a director under this Section.[1]

Section 80 places the business of the company in the hands of the directors and authorises them to make by-laws as to certain matters in the following terms:

> The directors of the company may administer the affairs of the company in all things, and make or cause to be made for the company, any description of contract which the company may, by law, enter into; and may, from time to time, make by-laws not contrary to law, or to the letters patent of the company, or to this Part, as to the following matters:—
>
> (a) The regulating of the allotment of stock, the making of calls thereon; the payment thereof, the issue and registration of certificates of stock, the forfeiture of stock for non-payment, the disposal of forfeited stock and of the proceeds thereof, and the, transfer of stock;
>
> (b) The declaration and payment of dividends;
>
> (c) The amount of the stock qualifications of the directors, and their remuneration,[2] if any;
>
> (d) The appointment, functions, duties and removal of all agents, officers and servants of the company, the security to be given by them to the company and their remuneration;

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[1]Welch *v.* Ellis, 22 A. R. 255; Herman *v.* Wilson, 32 O. R. 60; *re* American Tyre Company, 2 O.W. R. 29; *re* Ritchie Hearn Company, 6 O. W. R. 474; Fee *v.* Turner, Q. R. 13 K. B. 435; Perryman *v.* Jardine, 26, O.L.R., 323; Macdonald *v* Drake, 16, Man., L.R., 96; Crew*v.* Dallas, 9, W.L.R., 598.

[2]Beaudry *v.* Reid 10 O.W.R 622; Birney *v.* Toronto Milk Co, 5 O.L.R. 1. *re* Ontario Express Coy., 253 O.R., 587; Livingstone's case 14 O.R., 211.

(e) The time and place for the holding of the annual meetings of the company, the calling of meetings, regular and special, of the board of directors and of the company, the quorum, the requirement as to proxies, and the procedure in all things at such meetings;
(f) The imposition and recovery of all penalt es and forfeitures not otherwise provided for in this Part;
(g) The conduct, in all other particulars, of the affairs of the company not otherwise provided for in this Part.

Section 81 provides that the directors may from time to time repeal, amend, or re-enact such by-laws, and that every such by-law, excepting by-laws made respecting agents, officers and servants must be confirmed at a general meeting of the company, duly called for that purpose, and shall only have force until the next annual meeting, and in default of confirmation thereat, shall, at and from that time, cease to have effect.

Shareholders holding one-fourth of the subscribed stock may requisition a special meeting of the company. By Section 74 of the British Columbia Act, one-tenth in value of the shareholders may requisition a special meeting.

Statements and Returns.

By Section 105, the directors must lay before the shareholders annually, and at or before each general meeting of the company for the election of officers, a full printed statement of the affairs and financial position of the company.

By Section 106, a return must be made to the Secretary of State whenever he so requests, containing the following particulars:

(a) The amount of the capital of the company, and the number of shares into which it is divided;
(b) The number of shares taken from the commencement of the company up to the date of the return;
(c) The amount of calls made on each share;
(d) The total amount of calls received;
(e) The total amount of calls unpaid;
(f) The total amount of shares for eited.
(g) The names, addresses and occupations of the persons who have ceased to be members within the twelve months next preceding, and the number of shares held by each of them.

PART III.

WINDING UP OF COMPANIES.

INTRODUCTORY.

By Section 91 of the British North America Act, one of the classes of subject expressly assigned to the exclusive legislative authority of the Parliament of Canada, is "Bankruptcy and Insolvency." The Legislature of British Columbia cannot, therefore, pass any act dealing with bankruptcy and insolvency. The Companies (Consolidation) Act of 1908 of the Imperial Parliament, which, as has already been explained (see page 5, *supra*), is the basis of the present "Companies Act" of the Province of British Columbia, contains provisions dealing with the winding-up of insolvent companies. Such provisions, however, could not be included by the Legislature of this Province in its Provincial Act, as, for the reason given above, any legislation dealing with bankruptcy or insolvency, whether of companies or of private persons, is *ultra vires* any Provincial Legislature.

By virtue of Section 91 of the British North America Act, the Parliament of Canada has passed an Act entitled the "Winding-up Act," 1906. While this Act applies to all Dominion companies, it only applies to such Provincial companies as are insolvent.[1] This Act, therefore, supplements the Provincial Act, and the two Acts together provide a means of winding-up any Provincial company, be it solvent or insolvent.

Chapters XXII. to XXV. deal with various forms of winding up under the Provincial Act.

Chapter XXVII. deals with winding up under the Dominion Winding-up Act.

[1] In *re* Cramp Steel Co. 11 O.W.R. 134.

CHAPTER XXII.

WINDING UP BY THE COURT UNDER PROVINCIAL ACT.

The sections regulating the winding up of companies are contained in Part VIII. of the Act.

The Statute recognises three forms of Liquidation: namely—(1) Winding Up by the Court, often called "Compulsory Liquidation;" (2) Voluntary Liquidation; and (3) Voluntary Liquidation subject to the Supervision of the Court (Section 181).

A compulsory liquidation is initiated by an Order of the Court, made on petition. A voluntary winding up is initiated by a special or extraordinary resolution of the company, and is therefore the act of the company alone; but it may be continued under the supervision of the Court upon an Order being made to that effect by the Court on petition duly presented.

WHEN A COMPANY MAY BE WOUND UP COMPULSORILY.

By Section 187 of the Act the Court may wind up a company—

(*a.*) If the company has by special resolution resolved that the company be wound up by the Court:

(*b.*) If default is made in filing the statutory report or in holding the statutory meeting:

(*c.*) If the company does not commence its business within a year from its incorporation, or suspends its business for a whole year:

(*d.*) If the number of members is reduced, in the case of a private company, below two, or, in the case of any other company, below five.

(*e.*) If the Court is of opinion that it is just and equitable that the company should be wound up.

On the first of the above grounds it will be seen that the company is itself the judge. Under the second the Court may, instead of making an order, give directions for the report to be filed or a meeting to be held, or make such order

as may be just (Section 73, Sub-section 9). The third is a question of fact; but the jurisdiction under this head is discretionary, and if the delay in commencing or the interruption of the business is explained, and there is a probability of business being commenced or resumed, the Court will refuse the order,[1] at any rate if a large proportion of the members so desire;[2] but if the majority against the winding up are unreasonable the order will be made.[3]

If less than a year has elapsed the Court may order a winding up under the "just and equitable" paragraph, but will not do so unless a very strong case is made out.[4] To abandon a part of the business of the company does not bring it within this provision unless the part is substantially the whole,[5] but even in the latter case the petitioner usually seeks to bring his case within the principle that it is just and equitable to wind up a company when its substratum is gone. This is discussed below.

In addition to the power given by this Section, there is power under Section 268 to strike off the Register companies which do not reply to an inquiry from the Registrar whether they are carrying on business. Three months after the publication of a notice in the *Gazette* the name is struck off and the company is dissolved (see page 499, *infra*), but in such case there is no winding up.

It is said that no order has ever been made to wind up a company on the ground that the members are reduced to less

[1]Metropolitan Railway Warehousing Co., [1867] 36 L. J. Ch. 827.
[2]Petersburg Gas Co., [1874] W. N. 196 (nine-tenths in favour of continuing the company); Middlesbrough Assembly Rooms Co., [1880] 14 Ch. D. 104 (four-fifths); *re* Capital Fire Insurance Association, [1882] 21 Ch. D. 209 (business had been commenced abroad); Tomlin Patent Horseshoe Co., [1886] 55 L. T. 314.
[3]Tumacacori Mining and Land Co., [1874] 17 Eq. 534.
[4]Langham Skating Rink Co., [1877] 5 Ch. D. 685; London and County Coal Co., [1867] 3 Eq. 355; Hop and Malt Exchange Co., [1866] W. N. 222.
[5]Norwegian Titanic Iron Co., [1866 35 Beav. 232; New Gas Co., [1877] 5 Ch. D. 703; Patent Bread Machinery Co., [1866] 14 W. R. 787, 14 L. T. 582; Kronand Metal Co., [1899] W. N. 15.

than the prescribed minimum. If a company carries on business for a period of six months after such reduction has taken place the members cognisant of the fact become severally liable for the debts contracted during such time, and may be sued without joinder of any other member (Section 122). It would seem also that, in estimating the number of members, past members (although still contingently liable) and the representatives of deceased members must not be counted.[1]

The power of the Court to wind up a company under Section 187, Paragraph (*e*), whenever it considers that it is just and equitable to do so, has been decided not to be a power to be exercised upon any grounds that may *seem* just or equitable, but only upon grounds of the same class as those specified in that section.[2] This rule, however, is relaxed where the substratum of the company is gone (and a complete deadlock in the management of the company's affairs is now also considered a ground for winding up[3]), and the Court will wind up a company even within a year of its formation, although it may be solvent, if it appear that it has become impossible to carry on the business for which it was formed[4]—*e.g.* where the mine which the company was formed to work could not be found,[5] or the patent it was to work was not granted,[6] or the bulk of its property had been sold and its capital exhausted,[7] or if the substratum on which it was founded is gone (as, for instance,

[1]Bowling and Welby's Contract, [1895] 1 Ch. 663.

[2]*Ex parte* Spackman, [1849] 1 Mac. & G. 170; Suburban Hotel Co., [1867] 2 Ch. 737; Anglo-Greek Steam Navigation Co., [1866] 2 Eq. 1.

[3]Sailing Ship Kentmere Co., [1897] W. N. 58.

[4]This principle was first suggested in the case of the Suburban Hotel Co., [1867] 2 Ch. D. 737. But if the petition is presented on this ground a strong case is required (Scobie *v.* Atlas Steel Works, [1907] Court of Sess., 8 F. 1052).

[5]Haven Gold Mining Co., [1882] 20 Ch. D. 151.

[6]German Date Coffee Co., [1882] 20 Ch. D. 169.

[7]Diamond Fuel Co., [1879] 13 Ch. D. 400.

where a bank had ceased to carry on banking business[1]), or the mine which the company was working proved worthless,[2] or a company formed to amalgamate three syndicates for speculating in seats for the Diamond Jubilee proposed, after losing money over that speculation, to do other financial business,[3] or a single steamship company had lost its only ship and proposed with a small sum of cash to carry on business as a charterer of ships.[4] A company may also under these words be wound up, on the ground that the company was in its inception fraudulent and hopelessly embarrassed by actions for rescission, and that a winding up is the best means of recovering money from the promoters,[5] or that the company never had a real foundation and was a mere "bubble,"[6] or is formed to carry on an illegal business, such as the dealing in lottery bonds.[7] It has been stated in the Court of Appeal in England, in an unreported case, that far less attention than heretofore is now paid to the rule that the "just and equitable" grounds for winding up must be of the same class as those stated in the earlier sub-clauses.

The Court will not, however, wind up a company because it is not prosperous[8] or its chance of success small,[9] unless

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[1] *Re* Crown Bank, [1890] 44 Ch. D. 634.

[2] Red Rock Mining Co., [1889] 61 L. T. 7 5.

[3] Amalgamated Syndicates, [1897] 2 Ch. 600.

[4] Pirie *v.* Stewart, [1905] Court of Sess., 6 F. 847.

[5] *Re* Thomas Edward Brinsmead & Sons, [1897] 1 Ch. D. 406; compare Diamond Fuel Co., [1879] 13 Ch. D. 400, and General Phosphate Corporation, [1893] W. N. 142.

[6] Angle-Greek Steam Navigation Co., [1866] 2 Eq. 1; West Surrey Tanning Co., [1866] 2 Eq. 737; London and County Coal Co., [1867] 3 Eq. 355.

[7] International Securities Corporation, [1908] 99 L. T. 581, where Swinfen Eady, J., also held that the company was conducted in a fraudulent manner.

[8] Langham Skating Rink Co., [1877] 5 Ch. D. 669; Suburban Hotel Co. [1867] 2 Ch. D. 737.

[9] Kronand Metal Co., [1899] W. N. 15.

the company pass a special resolution for liquidation. In considering whether the sub-stratum is gone the Court will look at what the company puts in the forefront of its Memorandum of Association as its special object, and if that object has failed the Court will treat the substratum as gone, and order a winding up, although the general powers of the Memorandum authorise other business, such as working mines other than those originally forming the company's business;[1] but the terms of the later clauses may be such as to show that the primary clauses are really not intended to be exclusive of other wide powers.[2]

The Court will not, however, make a winding-up order to redress wrongs other than those of the class indicated in the sections above quoted: *e.g.* frauds by promoters where the company still has a business to carry on,[3] or frauds on the public not connected with the formation of the company,[4] or mismanagement or misapplication of funds by directors,[5] or the commission of *ultra vires* acts;[6] nor can a shareholder obtain a winding up on the ground that he was induced to take his shares by fraud.[7]

Section 192 of the Act enacts that an order to wind up shall not be refused on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.

[1]Red Rock Mining Co., [1889] 61 L. T. 785; Coolgardie Consolidated Gold Mines, [1897] 76 L. T. 269; Stephens *v.* Mysore Reefs (Kangundy) Mining Co., [1902] 1 Ch. 745. But the Memorandum must be closely scanned. With words only slightly differing from those in the cases cited, Warrington, J., held that other mines were within the original contemplation of the company (Pedlar *v.* Road Block Gold Mines [1905] 2 Ch. 427); and see Campbell *v.* Australian Mutual Provident Society, [1908] 77 L. J. P. C. 117, 99 L. T. 3.

[2]Butler *v.* Northern Territories Mines of Australia, [1907] 96 L. T. 41.

[3]Haven Gold Mining Co., [1882] 20 Ch. D. 151.

[4]Medical Battery Co., [1894] 1 Ch. 444.

[5]Anglo-Greek Steam Navigation Co., [1866] 2 Eq. 1; Bwlch-y-Plwm Lead Mining Co., [1868] 17 L. T. 35; Anglo-Egyptian Steam Navigation Co., [1869] 8 Eq. 660, 21 L. T. 19.

[6]*Ex parte* Fox, [1871] 6 Ch. 173, 18[illegible].

[7]Union Hill Silver Co., [1870] 22 L. T. 402.

In deciding whether to order a compulsory winding up or one under supervision, or to allow a voluntary winding up to continue, as also in regard to other matters in a windingup, the Court will have regard to the wishes of the majority of creditors, and, if the debts are not likely to exhaust the assets, to the wishes of the majority of shareholders (Sections 196 and 245), and may direct meetings of creditors or shareholders to be held, giving directions as to the manner of holding the meetings (Section 256).

The Court on a shareholders' petition will in general have regard to the wishes of a majority of shareholders, unless such majority consists of persons whose conduct is impunged or there are matters requiring investigation,[1] or some plain injustice is being done to the petitioning shareholders which cannot be avoided except by a winding-up order.[2]

COMPULSORY ORDER WHERE THERE IS A VOLUNTARY WINDING UP.

Section 241 provides that the voluntary winding up of a company shall not bar the right of any creditor or contributory to have it wound up by the Court if the Court is of opinion that the rights of the creditors or of the contributories will be prejudiced by a voluntary winding up. This rule prevails even when the voluntary winding up is commenced after the presentation of the petition.[3]

The petition of the creditor or contributory must be presented before the company is dissolved under the voluntary liquidation; otherwise the Court has no jurisdic-

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[1] West Surrey Tanning Co., [1866] 2 Eq. 737; British Oil and Cannel Co.' [1866] 15 L. T. 601; Varieties, Limited, [1893] 2 Ch. 235; General Phosphate Corporation, [1893] W. N. 142; Berlin Great Market Co., [1871] 24 L. T. 773, 19 W. R. 793.

[2] Professional Building Society, [1871] 6 Ch. 856; City and County Bank, [1875] 10 Ch. 470.

[3] New York Exchange, [1888] 39 Ch. D. 415; Russell, Cordner & Co., [1891] 3 Ch. 171; *re* Medical Battery Co., [1894] 1 Ch. 444; Dore Gallery, [1891] W. N. 98; *re* Greenwood & Co., [1900] 2 Q. B. 306.

tion to make the order, except perhaps in a case where the dissolution has been fraudulently procured,[1] and it is sometimes alleged as a ground of prejudice that unless a compulsory order is made dissolution will take place and the creditors' rights will be defeated. Now, however, a dissolution may be re-opened at any time within one year (see page 500, Section 260).

It often happens that, although a voluntary liquidation is in progress, the resolution commencing it was not validly passed, in which case the Court makes a compulsory order at the instance of a creditor proving the fact. For instance, where the notice convening the meeting to pass the resolution for winding up was issued without the authority of a properly constituted board,[2] or by the secretary on receipt of a requisition without waiting the necessary twenty-one days,[3] or where the chairman made an obviously incorrect declaration of the result of the voting,[4] it was held that no voluntary winding up existed, and a compulsory order was made.

If a majority of the creditors desire a compulsory order, the Court has the jurisdiction to make such an order without proof that the voluntary winding up will prejudice them, for Section 241 must be read with Sections 196 and 245.

Where an order is made to wind up compulsorily a company already in voluntary liquidation, the Court has power to adopt any of the proceedings in the voluntary

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[1]Pinto Silver Mining Co., [1878] 8 Ch. D. 415; London and Caledonian Marine Insurance Co., [1879] 11 Ch. D. 140.

[2]*Re* Haycraft Gold Reduction Co., [1900] 2 Ch. 230. In Boschoek Co. *v.* Fuke, [1906] 1 Ch. 148, Swinfen Eady, J., held that when the number directors was less than the minimum number allowed by the Articles, they could still, by a resolution otherwise duly passed, direct the summoning of a general meeting by the secretary.

[3]*Re* State of Wyoming Syndicate, [1901] 2 Ch. 431.

[4]Caratal (New) Mines, [1902] 2 Ch. 498. In this case Buckley, J., held the chairman's declaration not conclusive, for he gave the figures, which of themselves showed that the resolution had been lost.

liquidation (Section 242); but if it does not do so all such proceedings are void.[1] Even where there has been a a pre-existing voluntary winding up, in cases where a compulsory order is made the winding up commences from the date of the presentation of the petition for winding up by the Court,[2] a rule which sometimes affects the rights of the parties: *e.g.* past members may escape by reason of a year having elapsed since they ceased to be members,[2] or fraudulent preferences may have become unimpeachable.[3]

Who may Present a Petition to Wind Up.

The petition for winding up the company may (Section 188) be presented by—

1. The company itself, acting either through its directors or in pursuance of a resolution of the shareholders, or, if the company is in voluntary liquidation, by its liquidator;[4]
2. One or more of its contributories;

or by all or any of those parties together or separately.

By Section 188, Sub-section 2, the Liquidator may petition for the winding up of a company where the voluntary winding up or winding up under supervision "cannot be continued with due regard to the interests of the creditors or contributories."[5]

A "contributory" is a person liable to contribute to the assets of the company in the event of a winding up, and for

[1]Taurine Co., [1884] 25 Ch. D. 118, explaining Thomas *v.* Patent Lionite Manufacturing Co., [1881] 17 Ch. D. 250.

[2]Taurine Co., [1884] 25 Ch. D. 118. From West Cumberland Iron and Steel Co., [1889] 40 Ch. D. 361, it appears the Court has no power to alter the date from which the liquidation is to commence.

[3]Russell Hunting Record Co., [1910] 2 Ch. 78.

[4]Zoedone Co., [1884] 53 L. J. Ch. 465. Note.—The company's funds must not be applied in paying costs of a petition presented by a majority of the directors against the wishes of others and of a number of the shareholders (Smith *v.* Duke of Manchester, [1883] 24 Ch. D. 611).

[5]Such a petition was allowed in *re* 1897 Jubilee Sites Syndicate, [1899 2 Ch. 204— the company being already in voluntary liquidation.

the purpose of petitioning also includes any person alleged to be a contributory (Section 183) and, notwithstanding Sub-section 1 (*d*) of Section 182, a holder of fully paid shares.[1] A contributory of a company registered under the Acts, not being an original allottee, cannot, except where the number of members is reduced below the minimum of two or five, petition unless he has held his shares and had them registered in his name for six months during the eighteen months previous to the winding up, or has acquired them by devolution on the death of the previous holder (Section 188, Sub-section 1 (*a*)[2]. A contributory whose shares are fully paid up is entitled to petition,[3] but only if there is a reasonable probability that there will be assets to divide among the contributories.[4] If he himself alleges in the petition that there are no assets, his petition will be dismissed with costs on the preliminary objection being taken,[5] and a contributory who has not paid his calls will only be allowed to petition under very special circumstances,[6] and is usually required to pay the amount of his unpaid calls into court.

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[1]Anglesea Colliery Co., [1866] 1 Ch. 555; National Savings Bank Association, [1866] 1 Ch. 547.

[2]This provision renders it impossible for a holder of share warrants to bearer (not being an original allottee) to petition (Wala Wynaad Co., [1882] 21 Ch. D. 849). The section declares the registration in the name of a trustee to be equivalent to registration in the name of the *cestui que trust*; and where a company neglected to register persons who had established their title for more than six months they were held entitled to petition (Patent Steam Engine Co., [1878] 8 Ch. D. 464). But persons entitled to an allotment who had not received it were held not entitled to petition (*re* A Company, [1894] 2 Ch. 249).

[3]National Savings Bank Association, [1866] 1 Ch. 547; *re* Gold Co., [1879] 11 Ch. D. 701; National Company for the Distribution of Electricity, [1902] 2 Ch. 34.

[4]Diamond Fuel Co, [1879] 13 Ch. D. 400; Rica Gold Washing Co., [1879] 11 Ch. D. 36; Dore Gallery, [1891] W. N. 98. But these cases must be read now in the light of Section 192, which allows an order to be made where the company has no assets.

[5]Kaslo Slocan Mining Corporation, [1910] W. N. 13.

[6]Crystal Reef Gold Mining Co., [1892] 1 Ch. 408.

The executor of a creditor[1] or shareholder[2] may petition, and where a petitioner dies while the petition is pending his personal representative may obtain an order to carry on the proceedings.[3] The petition by an executor may be filed before probate is obtained,[1] but probate must be got before the hearing,[4] for the petitioner's title cannot otherwise be proved.

A contributory can obtain a compulsory order for winding up a company in voluntary liquidation where he shows that the rights of the contributories are prejudiced by the continuance of the voluntary liquidation (see page 429). Such an order was made where an unfair scheme of reconstruction had been forced through by an interested majority.[5]

A provision in the Articles restricting the right of members to petition for a winding up is inoperative,[6] for a statutory right cannot be taken away by Articles.

A petitioner residing out of the jurisdiction,[7] or who does not give an address at which he can be found,[8] can be compelled to give security for costs. If the petitioner be another company in liquidation, security will be ordered unless the petitioner is shown to be able to pay the costs.[9]

If it appears that the petition is presented from improper motives, the Court has power to restrain its advertisement and all other proceedings, and in such a case will not allow the name of the company to transpire;[10] or on an application made in time will restrain the presentation of the petition.[11]

[1]United Club Co., [1889] 60 L. T. 665; W. Powell & Sons, [1892] W. N. 94.
[2]Norwich Yarn Co., [1849] 12 Beav. 366.
[3]Dynevor Collieries, [1878] W. N 199.
[4]Masonic Assurance Co., [1886] 32 Ch. D. 373.
[5]Consolidated South Rand Mines, [1909] 1 Ch. 491.
[6]Peveril Gold Mines, [1898] 1 Ch. 122.
[7]Home Assurance Association, [1871] 12 Eq. 112.
[8]Sturgis Motor Syndicate, [1875] W. N. 218, 53 L. T. 715.
[9]Section 292; Pure Spirit Co. *v.* Fowler, [1890] 25 Q. B. D. 235.
[10]*Re* A Company, [1894] 2 Ch. 349.
[11]New Travellers' Chambers *v.* Cheese, [1894] 70 L. T. 271; Circle Restaurant Co. *v.* Lavery, [1880] 15 Ch. D. 555.

An action will lie for maliciously presenting a petition, and no proof of special damage is necessary, for injury to the credit of a trading company will be assumed.[1]

STAY OF WINDING-UP PROCEEDINGS.

The Court has jurisdiction under Sections 195 and 247 of the Act to stay proceedings in a winding up by the Court or under supervision either altogether or in part, on motion made by any creditor or contributory, but not on the application of the company alone.[2] Such an application is frequently made when proceedings are being taken under Section 129 for a reorganisation of the company's business or where a reconstruction is anticipated;[3] but the Court will refuse consent if the directors' conduct requires investigation.[4] After an arrangement has been adopted the winding-up order may be discharged.[5]

Sometimes the stay is only partial, and the winding up is allowed to continue for the purpose of ascertaining and paying debts.[6]

Proceedings in a voluntary winding up can also be stayed.[7]

First Meetings of Creditors and Contributories.

As soon as a winding-up order has been made, it is the duty of the Liquidator to summon separate meetings of the creditors and contributories for the purpose of—

[1]Quartz Hill Mining Co. *v.* Eyre, [1884] 11 Q. B. D. 674, 50 L. T. 274.
[2]*Re* Baxters, Limited, [1898] W. N. 60.
[3]Marine Investment Co., [1873] 8 Ch. 702; South Barrule Slate Quarry Co., [1869] 8 Eq. 688; Western of Canada Oil Co., [1874] W. N. 148.
[4]Telescriptor Syndicate, [1903] 2 Ch. 174.
[5]Patent Automatic Knitting Co., [1882] W. N. 97.
[6]Western of Canada Oil Co., [1874] W. N. 148.
[7]Steamship Titian Co., [1888] W. N. 16; Eastern Investment Co., 1905] 1 Ch. 352.

Determining whether or not an application is to be made to the Court for the appointment of a committee of inspection to act with the liquidator, and who are to be the members of such committee if appointed (Section 200).

Other Meetings of Creditors and Contributories.

Section 205, Sub-section 2, confers on the Liquidator in a winding up by the Court the right to summon general meetings of the creditors or contributories for the purpose of ascertaining their wishes.

Under Section 256 the Court may, as to all matters relating to the winding up (see Section 196), if it thinks it expedient, direct meetings of the creditors or contributories to be summoned, held, and conducted in such manner as the Court directs, for the purpose of ascertaining their wishes. In the case of creditors regard is to be had to the value of the debt due to each creditor, and in the case of contributories to the number of votes conferred on each contributory by the Articles.

Section 256 applies at any time after the presentation of a petition to wind up the company, and the Court may direct meetings to be held to ascertain whether the majority of the creditors or contributories desire a winding up by the Court,[1] and give directions as to the time, place, and manner of holding such meetings; but it is not now common to order meetings, as the wishes of those who take a strong view are usually ascertained by their being representel in Court. The Court is not bound to comply with the wishes of the majority, and on good cause shown will set them aside,[2] but this will usually only be in cases where fraud or misconduct is alleged against those holding the balance.

[1]Western of Canada Oil Co., [1874] 17 Eq. 1.

[2]Contributories: West Surrey Tanning Co., [1866] 2 Eq. 737; Varieties, Limited, [1893] 2 Ch. 235. Creditors: Medical Battery Co., [1894] 1 Ch. 448. Debenture holders: Western of Canada Oil Co., [1874] 17 Eq. 1.

If a company is insolvent the contributories have no interest, and small regard is had to their wishes.[1] On the other hand, if a majority of creditors desire a winding up by the Court the existence of a voluntary liquidation will not prevent the order being made, even where there is no evidence to show that the creditors are prejudiced.[2]

THE LIQUIDATOR.

Appointment of Liquidator.

By Section 197, Sub-section 1, the Court is empowered to appoint a liquidator or liquidators, and by Sub-section 2 may at any time after the presentation of the petition appoint a provisional liquidator.

The liquidator or provisional liquidator may obtain the appointment of a special manager with the powers of a receiver and manager (Section 208).

A liquidator in a winding up by the Court must, at his own expense, give security to the satisfaction of the District Registrar of the Court before acting (Section 197, Sub-section 2).

Where there is an action by debenture holders or mortgagees asking for a receiver, the Court will appoint the liquidator to be receiver,[3] unless the assets are likely to be entirely absorbed in satisfying the debenture holders or mortgagees,[4] or there are special reasons why the receiver nominated by the debenture holders should be entrusted with the duty of realising some or all of the assets.[5]

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[1]Isle of Wight Ferry Co., [1864] 2 H. & M. 597; Lonsdale Vale Ironstone Co., [1868] 16 W. R. 601.

[2]Bishop & Sons, [1900] 2 Ch. 254; Hermann Lechenstein & Co., [1907] 23 Times L. R. 424.

[3]*Re* Joshua Stubbs, Limited, [1891] 1 Ch. 475.

[4]Strong *v.* Carlyle Press, [1893] 1 Ch. 268.

[5]British Linen Co. *v.* South American Co., [1894] 1 Ch. 108.

One or more liquidators may be appointed, and the Court may declare whether any act of the liquidators is to be done by all or any one or more of the persons appointed (Section 197, Sub-section 3). It is not now usual to appoint more than one liquidator. If various interests ought to be represented, that is secured by means of the committee of inspection.

The proper style of a liquidator appointed in a compulsory winding up is "the liquidator," and he is not described by his individual name (Section 197, Sub-section 7).

Status of Liquidator.

As in the case of directors, it is not easy to state succinctly yet accurately the position occupied by a liquidator. In several cases there will be found statements to the effect that he is a trustee for the creditors, or in the case of a solvent company for the contributories. Thus, Lord Selborne says, "The hand which receives the calls necessarily receives them as a statutory trustee for the equal and rateable payment of all the creditors;"[1] and James, L. J., speaks of the assets as being "fixed by the Act of Parliament with a trust for equal distribution among the creditors;"[2] and Lord Cairns has said, "There is . . . . imposed upon the assets of the company . . . . a trust to be applied in discharge of the liabilities of the company."[3] But it must not be inferred that all the results follow which would ensue if the liquidator was a trustee in the full sense of the word; and in particular it is to be noted that the property in the assets remains vested in the company and does not

[1]Black & Co.'s Case, [1873] 8 Ch. 262.
[2]*Re* Oriental Inland Steam Co., [1874] 9 Ch. 559.
[3]Delhi Bank's Case, [1871] 15 Sol. J. 923; so also North, J., in Flack's Case, [1894] 1 Ch. 369; and Buckley, J., in Anglo-Oriental Carpet Co., [1903] 1 Ch. 914.

pass to the liquidator, and when he makes a contract he does so in the name of the company (*e.g.* if he employs a solicitor in the company's business he is not personally liable for the costs[1]). A liquidator "is a person having a *prima facie* right to costs (out of the estate), but he is not in the ordinary sense a trustee. He is a person appointed by the Court to do a certain class of things. He has some of the rights and some of the liabilities of a trustee, but is not in the position of an ordinary trustee. Being an agent employed to do business for a remuneration, he is bound to bring ordinary skill to its performance."[2] Romer, J., has said, "In my opinion the liquidator is not a trustee in the strict sense. . . . . In my view a voluntary liquidator is more rightly described as the agent of the company—an agent who has no doubt cast upon him by Statute or otherwise special duties, amongst which may be mentioned the duty of applying the company's assets in paying creditors and distributing the surplus among the shareholders,"[3] and in the case cited it was held that a liquidator was not liable for damages caused by delay in distributing the assets when the delay was not wilful or fraudulent nor arising from *mala fides.* It is submitted that that case overlooked the fact that a person injured by a failure to perform duties imposed by Statute may recover damages for the default, and Farwell, J., on this principle, has held that after a company has been dissolved a liquidator who has failed to see that the assets are applied in paying the debts is liable to a creditor who has suffered damage,[4] and it is submitted that the same rule should apply even before dissolution when the default is the result of neglect of duty, even though not wilful.

[1] *Re* Anglo-Moravian Co., *ex parte* Watkin, [1876] 1 Ch. D. 130, 133.
[2] *Per* Cotton, L.J., Silver Valley Mines, [1882] 21 Ch. D. at page 392.
[3] Knowles *v.* Scott, [1891] 1 Ch. 721 and 723.
[4] Pulsford *v.* Devenish, [1903] 2 Ch. 625.

It is clear that the liquidator occupies a fiduciary position, and must not make a secret profit out of his position,[1] and it may be safely asserted that the liquidator has all the duties an agent would have; but it is suggested that he is only agent for the company, and therefore not liable to third parties, even though they be creditors or contributories, for negligence apart from misfeasance or personal misconduct.[2] If, however, the liquidator does not faithfully perform his duties and duly observe all the requirements imposed on him by the Statute, he can be brought to account by any creditor or contributory under Section 206 (1).

The liquidator, being an officer of the Court, will be directed to deal fairly: *e.g.* he may be ordered to repay moneys paid under a mistake of law.[3]

When a liquidator contracts, he does so as agent of the company, but if in ordering goods or making a sale note he signs himself merely "A. B. Liquidator," it is not clear that he may not be personally liable, as a broker may be who signs "A. B. Broker."[4] He should therefore always sign with the words "On behalf of the Company."[5] The words "as Liquidator" will protect him from personal liability if they form part of the signature, but not if only found in the body of the document.[6] The provisions of the Bills of Exchange Act, R.S.C. Chap. 119, Section 52, must also be borne in mind: "Where a person signs a bill as a drawer, indorser, or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal or in a representative character, he

[1]Silkstone and Haigh Moor Coal Co. *v.* Edey, [1900] 1 Ch. 167.
[2]Knowles *v.* Scott, [1891] 1 Ch. 723.
[3]Opera, Limited, [1891] 3 Ch. 260; *ex parte* Simmonds, [1886] 16 Q. B. D. 308.
[4]Hutcheson *v.* Eaton, [1884] 13 Q. B. D. 861.
[5]Gadd *v.* Houghton, [1876] L. R. 1 Ex. D. 357.
[6]Paice *v.* Walker, [1870] L. R. 5 Ex. 173.

is not personally liable thereon; but the mere addition to his signature of words describing him as an agent or as filling a representative character does not exempt him from personal liability."

Duties and Powers of Liquidator.

The first duty of the liquidator is, under Section 198, Sub-section 1, to take into his custody or under his control all the property, effects, and things in action to which the company is or appears to be entitled. While there is no liquidator the property of the company is deemed to be in the custody of the Court (Section 198, Sub-section 2).

The powers of the liquidator are defined in Section 199. The liquidator may exercise the powers mentioned under the first three headings only with the sanction of the Court or the Committee of Inspection; as regards the remaining powers he may act on his own initiative, but is subject to the control of the Court, and any creditor or contributory may apply to the Court as to the exercise of any of the powers (Section 199).

The liquidator's powers are—

1. To bring or defend any action or other legal proceeding in the name and on behalf of the company.
2. To carry on the business of the company so far as may be necessary for the beneficial winding up thereof.
3. To employ a solicitor or other agent to take any proceedings or do any business which the liquidator is unable to take or do himself.[1]

[1]The sanction must be obtained before the employment, except in cases of urgency, and even then it must be shown there has been no undue delay in obtaining the sanction. See London Metallurgical Co., [1897] 2 Ch. 262.

4. To sell the real and personal property and things in action of the company by public auction or private contract, with power to transfer the whole or sell in parcels.
5. To execute deeds, receipts, and documents, and use the company's seal.
6. To prove, rank, and claim in the distribution of the estate of any contributory, and receive dividends.
7. To draw, make, and endorse any bill of exchange or promissory note in the name and on behalf of the company.
8. To raise any requisite money on the security of the assets of the company.
9. To take out in his official name letters of administration to any deceased contributory.
10. To do all such other things as may be necessary for winding up the affairs of the company and distributing its assets.

Section 219 provides that Rules may be made adding to the powers of the liquidator in regard to calling meetings of creditors and contributories, settling the list of contributories, and rectifying the Register, requiring the delivery up or property, and making calls, and fixing a time within which debts and claims must be proved.

Moneys received by the liquidator in the course of a winding up by the Court must be paid into a chartered bank (Section 201).

The liquidator is bound, if the liquidation lasts more than a year, to send to the Registrar of Companies from time to time a statement with respect to the proceedings and the position of the liquidation, and to this the creditors and contributories of the company have access, and may obtain copies thereof or extracts therefrom (Section 261).

If the liquidator requires information as to the property of the company, or any alleged wrongful acts done in relation to its property or rights, he should apply to the Court for an examination of the persons concerned, under Section 220 (see page 475, *infra*).

The liquidator is the proper person to take proceedings under Section 254 against directors or officers for misfeasance, although creditors or contributories may take action if the liquidator fails to do so.

The liquidator must keep proper books of account, and minute books recording the proceedings of meetings, and these are to be open to creditors and contributories (Section 203).

Every liquidator of a company which is being wound up by the Court must send, not less than twice in each year, to the District Registrar of the Court an account of his receipts and payments as liquidator (see Section 202). Subsection (3) of this section provides that the Court shall cause the account to be audited and the liquidator must furnish the auditor with such information as he may require. Sub-section (5) further requires that the auditor shall cause the account when audited or a summary of it to be printed and sent by post to every creditor and contributory.

The liquidator, within the limits of the Acts, may use his discretion, but he must obey any directions given him by meetings of the creditors or contributories, giving preference to the former if the directions are inconsistent (Section 205, Sub-section 1). He also has power to call meetings at his discretion, but must call them when required to do so by one tenth in value of the creditors or contributories, as the case may be (Section 205, Sub-section 2). He can allow proceedings to be taken in his name by other persons, but he

should not do so without satisying himself of the propriety of such proceedings.[1]

The liquidator may himself apply at any time to the Court for directions, and any person aggrieved by any act or decision of the liquidator, may apply to the Court to reverse or modify it (Section 205, Sub-sections 3 and 5).

Accounts of Liquidator.

Whether in a compulsory or a voluntary winding up, or a winding up under supervision,[2] the accounts of the liquidator must be made up and delivered in accordance with Section 261. By this section, if the winding up is not concluded[3] within a year, the liquidator must twice in every year send to the Registrar of Companies a statement of account with respect to the proceedings in and the position of the liquidation. Every statement must be in duplicate and be verified by affidavit.

If it appear that the liquidator has any moneys representing assets of the company which have been unclaimed or undistributed for six months after the date of receipt, he must pay them into the Provincial Treasury, after which any person claiming any part of these moneys must obtain a certificate of his title from the liquidator, and apply to the Minister of Finance and Agriculture at Victoria for payment.

Every liquidator of a company being wound up by the Court must pay the moneys received by him into some chartered bank. If the liquidator retains more than two hundred and fifty dollars for upwards of ten days, he is

[1] Practice Note. [1894] W. N. 156, 166.

[2] Stock and Share Auction Co. and Spiral Wood Co., [1894] 1 Ch. 736.

[3] This means if the company is not dissolved either by order of Court or by the lapse of three months from the final meeting in a voluntary winding up.

liable to pay interest at the lawful rate per annum on the excess, to be disallowed all or part of his remuneration, and to be removed from office, as well as to pay any expenses occasioned by his default.

Remuneration of Liquidator.

The liquidator, as occupying a fiduciary relation, must not make any secret profit out of his office.[1] Equally it would be wrong for him to have any personal interest in dealing with the company's assets, even if taken openly.

Section 197, Sub-section 6, provides that in a winding up by the Court the liquidator shall receive such salary or remuneration, by way of percentage or otherwise, as the Court may direct, and if there are two or more liquidators the Court will direct in what proportions the remuneration is divisible.

The liquidator is frequently also appointed to be receiver for the debenture holders, in which case he may obtain also remuneration as such receiver, but this fact will of course be taken into account in fixing his remuneration as liquidator.

Resignation or Removal of Liquidator.

A liquidator appointed by the Court may resign, or "on cause shown," may be removed by the Court (Section 197, Sub-section 4). When a liquidator obtains an order of release, this operates as a removal from office (Section 204, Sub-section 4).

In case of the death, removal, or resignation of a liquidator, another may be appointed in his place by the Court (Section 197, Sub-section 5).

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[1]Devonshire Silkstone Coal Co., [1878] W. N. 71; Silkstone and Haigh Moor Coal Co. *v.* Edey, [1900] 1 Ch. 167.

Except in the case of a liquidator failing to give or keep up his security, due cause must be shown for his removal. The Court accordingly requires a case of unfitness of the person, or of misconduct, to be made out before removing a liquidator:[1] *e.g.* that he has made a profit beyond his proper remuneration,[2] or that it be shown that, although there is no personal unfitness of the liquidator, his removal is for the interests of the liquidation.[3] The Court has removed a liquidator where the conduct of directors required investigation and the liquidator's relationship with them was so intimate that he was not in a position to act independently,[4] or where a liquidator persisted in proceedings against the wishes of the majority of the creditors,[5] and if a supervision order is made and the company is insolvent, the Court may give effect to the wishes of the creditors[6] by removing the voluntary liquidator. Insanity[7] or absence from the province[8] is a ground for removal. The Court sometimes will remove a liquidator on the ground that another person will act gratuitously,[9] but may refuse.[10]

Release of Liquidator.

When a liquidator of a company being wound up by the Court has (A) realised all the property of the company, or so much thereof, as can, in his opinion, be realised without

[1]Sir John Moore Gold Mining Co., [1879] 12 Ch. D. 325, where the liquidator put obstacles in the way of proceedings against the directors. Compare *ex parte* Newitt (1885, 14 Q. B. D. 177).

[2]Devonshire Silkstone Coal Co., [1878] W. N. 71.

[3]Adam Eyton, [1887] 36 Ch. D. 299.

[4]Charterland Goldfields, [1909] 26 T. L. R. 132.

[5]Tavistock Iron Works Co., [1871] 19 W. R. 672, 24 L. T. 605.

[6]Oxford Building and Investment Society, [1883] 49 L. T. 495.

[7]North Molton Mining Co., [1886] 34 W. R. 527.

[8]Scotch Granite Co., [1867] 17 L. T. 533.

[9]Association of Land Financiers, [1879] 10 Ch. D. 269.

[10]Civil Service and General Stores, [1884] W. N. 158.

needlessly protracting the liquidation, and distributed a final dividend to the creditors, and adjusted the rights of the contributories among themselves, and has made a final return (if any) to the contributories, or (B) has resigned, or (C) has been removed from his office, the Court must, on his application, cause a report on his accounts to be prepared, and, after considering such report and the objections (if any) of any creditor or contributory or other person interested, either grant or withhold his release (Section 204).

If the release of the liquidator is withheld the Court may, on the application of any creditor, contributory, or person interested, make an order charging him with the consequences of any act or default done or made contrary to his duty (Sub-section 2).

If the release is granted, it discharges him from all liability in respect of any act or default in the administration of the affairs of the company or in relation to the conduct of the liquidation.[1] The order of release may, however, be revoked on proof that it was obtained by fraud or suppression or concealment of any material fact (Sub-section 3).[2] If the liquidator has not previously vacated his office the release operates as a removal from office (Sub-section 4).

COMMITTEE OF INSPECTION.

By Section 200 it is provided that the liquidator in a winding up by the Court shall summon separate meetings of the creditors and contributories to determine whether an application shall be made to the Court for the appointment of such a committee, and who are to be the members. If

[1] Where a trustee under a deed of arrangement was released, but had money in hand available to pay the dividend he was ordered to pay notwithstanding the release (*re* Prager, [1876] 3 Ch. D. 115).

[2] The element of fraud, however, must be found in the concealment (*re* Harris, [1899] 2 Q. B. 97).

desired, the Court may appoint the committee, and if an important creditor or class of creditors is unrepresented through no fault of his or their own, the Court may direct the liquidator to summon a meeting of creditors to consider whether some member of the committe should not be removed and a representative of the "aggrieved" creditor substituted,[1] or may order a fresh meeting to be summoned under Section 200.[2] The committee must consist of creditors or contributories, or persons holding powers of attorney from them, in such proportions as may be agreed on by the meetings, or in case of difference as may be determined by the Court (Section 207, Sub-section 1).

The committee will meet at such times as are appointed, or in default of appointment at least once a month, and the liquidator or any member of the committee may call a meeting (Section 207, Sub-section 2). The creditors or contributories may remove members of the committee appointed by them, or members of the committee may resign (Sub-sections 3 and 6). They will be disqualified by insolvency, compounding with creditors, or absence from five consecutive meetings without leave of the committee, and upon a vacancy occurring the liquidator must call a meeting of creditors or contributories, as the case may be, to fill the vacancy; but during a vacancy the committee may continue to act so long as two members remain in office (Section 160, Sub-sections 3 to 8).

The committee of inspection to some extent control the liquidator, and by means of their monthly or more frequent meetings are able to keep themselves informed of the progress of the liquidation. It has been seen (page 416, *supra*) that certain acts of the liquidator can only be done with the sanction of the committee.

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[1]Radford and Bright, [1901] 1 Ch. 272.
[2]Radford and Bright No. 2, [1901] 1 Ch. 735.

If there is no committee of inspection the sanction of the Court is required for these last-mentioned acts (Section 207, Sub-section 9).

The committee of inspection are precluded from making any profit directly or indirectly from any transaction arising out of the winding up, unless the sanction of the Court is obtained before the profit is made (*re* Gallard, [1896] 1 Q. B. 68).

"The committee may act by a majority of their members present at a meeting, but shall not act unless a majority of the committee are present" (Section 207, Sub-section 3): that is to say, a majority of the members is necessary to form a quorum.

Under Section 232, which requires the liquidator in a voluntary winding up to summon a meeting of creditors within seven days of his appointment, the appointment of a committee of inspection in a voluntary winding up may be obtained (see page 434).

EFFECT OF A COMPULSORY WINDING UP.

Immediately upon the winding-up order becoming operative the control of the company's affairs passes out of the hands of the directors. Upon the appointment of a liquidator the management becomes vested in the liquidator; but the company's corporate identity continues, and its property remains vested in the corporation.[1] The essential difference, however, is that the business is henceforth not carried on for the benefit of the members of the corporation, but with a view only to its winding up and the distribution of the assets among the creditors in satisfaction of their debts, and when these are satisfied for the division of the balance (if any) among the contributories. The assets are therefore held upon a trust in which the creditors are

[1] *Ex parte* Watkin, [1876] 1 Ch. D. 130.

interested, and they can apply to the Court to have their rights enforced.[1]

Certain results follow by Statute from the making of the order. Thus, by Section 248, Sub-section 2, it is enacted—

In the case of a winding up by or subject to the supervision of the Court, every disposi ion of the property (including things in action) of the company, and every transfer of shares, or alteration in the status of its members, made after the commencement of the winding up, [2] shall, unless the Court otherwise orders, be void.

As regards the position of shareholders, no transfer can be effected without registration of the transfer in the Register of Members of the company, and under Section 209 the Register cannot be rectified without the leave of the Court;[3] but as between the vendor and purchaser of shares under a contract or transfer, equitable rights arise which are not affected by the section cited above, and the purchaser can claim through his vendor any dividends declared on the shares,[4] and may, when calls are made (but not before), enforce his right to indemnity.[5] But the Court may, by allowing a transfer to be registered, give full effect to the dealing, but usually refuses to enforce specific performance of a contract to sell.[6] When a transfer is registered the effect is to make the transferor a past member (to be put on the "B" list of contributories) and the transferee a present member.[7] It has been said that the Court will not sanction transfers except in special circumstances,[8] but in a case where there were considerable dealings in shares of a

[1]See page 413, *supra*, where the question of how far the liquidator is a trustee for the creditors is considered.

[2]The "commencement" in the case of a compulsory liquidation is the date of the presentation of the petition (Section 190), and in the case of a winding up under supervision the date of the resolution for voluntary liquidation (Section 227).

[3]Onward Building Society, [1891] 2 Q. B. 463.

[4]Rudge *v.* Bowman, [1868] L. R. 3 Q. B. 689; Chapman *v.* Shepherd, [1867] L. R. 2 C. P. 228.

[5]Hughes-Hallett *v.* Indian Mammoth Mines, [1883] 22 Ch. D. 561.

[6]Emmerson's Case, [1866] 1 Ch. 433.

[7]Taylor, Phillips and Rickard's Case, [1897] 1 Ch. 298, a case arising in a voluntary liquidation.

[8]Onward Building Society, [1891] 2 Q. B. 463.

company in liquidation, substantially all the transfers were sanctioned on the ground that this put the persons really interested in a position to enforce their rights.[1]

As regards dispositions of property of the company made after the presentation of the petition, the Court leans strongly in favour of giving effect to transactions in the ordinary course of business *bonâ fide* completed before the winding-up order, but does not assist those which remain only in contract.[2] In the latter case the contracting party, even if he has parted with his money, can only prove for damages.[2]

Money paid or property transferred to the company during the period in question is not affected, and the payment is a good satisfaction of the debt,[3] but if payment is made by the company the recipient will be compelled to refund and prove for his debt,[4] although Lord Westbury confirmed payments made before the recipient had notice of the liquidation.[5] Directors who make payments after presentation of the petition may also become personally liable to refund the amount.[6]

As the winding up determines the powers of the directors to act for the company, an acceptance of a bill of exchange in the company's name made after the presentation of the petition is invalid.[7]

The winding-up order also has the effect of determining the operation of all Articles of Association which are inconsistent with the provisions of the parts of the Acts relating

[1]Standard Exploration Co., [1901] *per* Wright, J. (unreported).

[2]Wiltshire Iron Co., [1868] 3 Ch. 443; *re* Oriental Bank Corporation, *ex parte* Guillemin, [1885] 28 Ch. D. 634.

[3]Mersey Steel and Iron Co. *v.* Naylor, Benzon & Co., [1884] 9 App. Ca. 434; Contract Corporation, [1868] 3 Ch. 105.

[4]Brown and Tylden's Case, [1874] 18 Sol. J. 781; Liverpool Civil Service Association, [1874] 9 Ch. 511.

[5]National Bank's Case (European Arbitration), L. T. 92.

[6]Neath Harbour Co., [1887] W. N. 87, 56 L. T. 727; Civil Service and General Stores, [1888] 57 L. J. Ch. 119.

[7]Bolognesi's Case, [1870] 5 Ch. 567.

to winding up. Thus, Articles restricting the right of the company to make calls[1] or giving or restricting rights of inspecting books[2] cease to operate, the rights of the parties being those conferred by the Acts. Similarly, an Article giving rights inconsistent with Section 236 in case of a reconstruction cannot be enforced after a winding up.[3]

On the commencement of a winding up the Statute of Limitations ceases to run (see page 456, *infra*).

A further effect of the winding up is to stay proceedings against the company—which is considered later (see page 452).

The liquidation does not bring the business of the company to an end, and dealings with strangers must proceed; nor does the liquidation of itself constitute a breach of unperformed contracts; nor can third parties refuse to perform their contracts with the company if the liquidator carries out a contract on the company's behalf he can recover the consideration.[4] If, however, the liquidator has declared his inability to perform the company's contracts, the other contracting parties may treat this as an immediate breach of contract, and claim damages as in the case of an individual refusing or admitting inability to carry out his contracts.[5] But where a company has two contracts with the same person the liquidator may adopt one and enforce its performance while not performing the other.[6] In the case of servants, if a winding-up order is made and the business of the company ceases to be carried on,[7] or if a receiver and

[1]Newton *v.* Anglo-Australian Investment Co., [1895] App. Ca. 244.
[2]Yorkshire Fibre Co., [1870] 9 Eq. 650; Birmingham Banking Co., [1867] 36 L. J. Ch. 150, 15 L. T. 207.
[3]Payne *v.* Cork Co., [1900] 1 Ch. 308; Baring-Gould *v.* Shaprington Pick Syndicate, [1899] 2 Ch. 80.
[4]Mersey Steel and Iron Co. *v.* Naylor, Benzon & Co., [1884] 9 App. Ca. 434.
[5]Ogdens, Limited, *v.* Nelson, [1905] App. Ca. 109.
[6]Asphaltic Limestone Concrete Co. *v.* Glasgow Corporation, [1907] Court of Sess., S. C. 463.
[7]Chapman's Case, [1866] 1 Eq. 346; McDowall's Case, [1886] 32 Ch. D. [366.

manager is appointed on behalf of the debenture holders,[1] this operates as a discharge of such servants, and if entitled to notice they may at once commence proceedings to recover damages, and a manager who, having a contract for a term of years, has covenanted not to trade in competition with the company is freed from his obligation by the breach of contract caused by the liquidation.[2] If the liquidator or receiver is willing to retain the company's servants in his employ at wages equal to those they received from the company, there will be no damages, although there is a technical breach of contract.[3] If, however, after the commencement of the liquidation the business is carried on without interruption, the employment continues, or must be taken to be renewed on the same terms, and a notice of discharge must be given in accordance with the terms of the employment.[3] It has been held that the passing of a resolution for voluntary liquidation does not operate as a notice of discharge to the servants of the company where the business is continued.[4]

The appointment of a liquidator, whether in a voluntary or a compulsory winding up, determines the authority of agents of the company appointed by the directors as from the time when notice of the winding up or the appointment of a provisional liquidator reaches them.[5]

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[1] Reid *v.* Explosives Co., [1887] 19 Q. B. D. 264.
[2] Measures Brothers *v.* Measures, [1910] 1 Ch. 336.
[3] *Ex parte* Harding, [1868] 3 Eq. 341.
[4] Midland Counties District Bank *v.* Attwood, [1905] 1 Ch. 257.
[5] *Re* Oriental Bank Corporation, *ex parte* Guillemin, [1885] 28 Ch. D. at page 640.

CHAPTER XXIII.

WINDING UP VOLUNTARILY UNDER PROVINCIAL ACT.

A VOLUNTARY winding up is the act of the company, undertaken in pursuance of a resolution passed by the company whenever it either desires to put an end to its business or finds itself unable, by reason of its liabilities, to continue such business. The procedure leaves the control of the winding up to a considerable extent in the hands of the members, acting through a liquidator appointed by themselves, and was no doubt originally intended mainly for use by solvent companies; but it is not in any way limited by the Statutes to the case of companies able to pay their debts, although there is provision that if creditors are prejudiced by the continuance of the voluntary winding up they may petition for a compulsory order.

Section 226 provides that a company may be wound up voluntarily—

(1) When the period (if any) fixed for the duration of the company by the Act, Charter or instrument of incorporation has expired, or when the event (if any) has occurred upon the occurrence of which it is provided by the Act, Charter or instrument of incorporation that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up.

(2) If the company resolves by special resolution that the company be wound up voluntarily.

(3) If the company, although it may be solvent as respects creditors, resolves by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up.

The first event is one that seldom happens; but sometimes a company's Articles of Association do prescribe a time when the duration of the company shall expire, and in that case it is the duty of the directors to call a general

meeting for the purpose of passing a resolution that, the objects for which the company was formed having been accomplished, or the period having arrived for its termination, the company be wound up voluntarily.

The most frequent course is that provided for in Sub-section 2: namely, to pass and confirm a special resolution to wind up voluntarily.

The third method—namely, by passing an extraordinary resolution—can only be adopted where a company is insolvent, and in that case the resolution must expressly state that the company is to be wound up because it is unable, "by reason of its liabilities," to continue its business. In fact, in this, as in other cases, the proper course is to follow the words of the Act in the resolution, and in the notice of meeting to set out the exact words of the resolution to be submitted.

The resolution will not be effective unless properly passed at a meeting of which a proper notice is given[1] by the direction of a properly constituted board of directors[2] and at which a quorum was present,[3] and if the winding up is by special resolution the proper interval of fourteen days must have elapsed between the passing and confirmation of the resolution.[4] The resolution must be in accordance with the notice or it will be invalid.[5] Irregularity in taking the votes (*e.g.* by reckoning proxies when no poll has been demanded) will equally render the resolution of no effect.[6]

[1]Bridport Old Brewery Co., [1867] 2 Ch. 191; Patent Floorcloth Co., [1869] 8 Eq. 664; Tiessen *v.* Henderson, [1899] 1 Ch. 861. Also see statement of facts in Allison, Johnson & Foster, Limited, [1904] 2 K. B. 327.

[2]Harben *v.* Phillips, [1883] 23 Ch. D. 14; Haycraft Gold Reduction Co., [1900] 2 Ch. 230. Where the secretary summoned the meeting on receipt of a requisition without authority of the board or waiting twenty-one days it was held that the resolution for winding up was invalid (*re* State of Wyoming Syndicate, [1901] 2 Ch. 431).

[3]Cambrian Peat Co., [1874] 31 L. T. 773.

[4]Railway Sleepers Supply Co., [1885] 22 Ch. D. 204.

[5]Teede and Bishop, [1901] 70 L. J. Ch. 409, 8 Mans. 217.

[6]Caratal (New) Mines, [1902] 2 Ch. 498.

The winding up commences at the time of "passing" the resolution to wind up (Section 227): that is to say, in the case of a special resolution when it is confirmed.[1]

On the passing of a resolution to wind up voluntarily Section 228 provides that the company shall cease to carry on its business, except so far as may be required for the beneficial winding up thereof; but the corporate state and corporate powers of the company continue until it is dissolved. On the appointment of the liquidator (which usually forms part of the resolution to wind up) the property of the company comes under his control for distribution among the creditors and shareholders.

A copy of the resolution to wind up, whether it be "special" or "extraordinary," authenticated by the signature of the chairman or other officer of the company, must be filed with the Registrar of Companies within fifteen days after its confirmation or passing (Section 78, Sub-section 1). The resolution must also be advertised in the *Gazette* (Section 229).

EFFECT OF A VOLUNTARY WINDING UP.

The effect of a voluntary winding up is that from the date of the confirmation of the special resolution or passing of the extraordinary resolution to wind up—

1. The company must cease to carry on its business, except in so far as may be required for the beneficial winding up thereof (Section 228).
2. A liquidator or liquidators must be appointed (Section 230 (*b*)).
3. On the appointment of liquidators the powers of the directors cease, except so far as the company in

[1]Dawes's Case, [1868] 6 Eq. 232; Weston's Case, [1869] 4 Ch. 20.

general meeting, or the liquidator, sanctions their continuance (Section 228 (*c*)).[1]

4. All transfers of shares, unless made to or with the sanction of the liquidator, and any alterations in the status of the members of the company made after that date, are void (Section 248, Subsection 1).[2]
5. The property of the company must be applied in satisfaction of its liabilities in accordance with their respective priorities, if any, or if none have priority *pari passu,* and, subject thereto, shall, unless the Articles otherwise provide, be distributed amongst the members according to their rights and interests in the company (Section 230 (*a*)).

But the corporate state and all the corporate powers of the company remain until, its affairs having been wound up, it is dissolved (Section 228). The effect of a winding up on contracts and engagements of the company has been considered at page 427, where it will be noted there is a difference in regard to the discharge of servants between a voluntary and a compulsory winding up.

The company must not, on going into liquidation, give gratuities to directors or servants, and if they are voted the liquidator must refuse to pay them.[3]

The commencement of a voluntary winding up does not prevent the presentation of a petition for the continuance of the liquidation subject to the supervision of the Court (Section 243), or for a compulsory winding up of the company by the Court if the creditors or contributories are

[1]The effect of transfers made after the commencement of the winding up without sanction will be the same as in the case of a winding up by the Court, as to which see page 424, *supra*.

[2]See Ladd's Case, [1893] 3 Ch. 450.

[3]Hutton *v.* West Cork Railway, [1883] 23 Ch. D. 654; Stroud *v.* Royal Aquarium Co., [1903] 89 L. T. 243.

prejudiced by the voluntary liquidation (Section 241: and see also page 405, *supra*).

THE LIQUIDATOR.

Appointment and Removal of Liquidator.

The appointment of the liquidator is properly made by the company in general meeting, and he may be appointed by special or ordinary resolution at the meeting at which the resolution to wind up is passed, or by a wholly distinct resolution. It is not necessary to give notice of the intention to appoint a liquidator if made by ordinary resolution.[1] If the resolution to wind up is special, the appointment of the liquidator cannot be made until after its confirmation, but it may be by a resolution passed before and confirmed after the confirmation of the winding-up resolution.[2] Even if a resolution to appoint a liquidator is joined with the special resolution to wind up, but is not confirmed at the second meeting, another liquidator may be proposed and appointed at the same meeting without notice.[3] The company may, by extraordinary resolution, delegate the power to appoint liquidators to its creditors or any committee of them, or enter into any arrangement as to the exercise of the liquidator's powers (Section 234), this being in addition to the power of the creditors to apply to the Court under Section 232 where a voluntary liquidator has been appointed. Where there is no liquidator the Court may appoint one, or may, "on cause shown," remove a liquidator (as to what is "cause shown," see page 420, *supra*) and appoint another in his place (Section 230 (*h*) and (*i*)). It seems the Court may also, "on cause shown," appoint an

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[1]Oakes *v.* Turquand, [1867] L. R. 2 H. L. 355; *re* Welsh Flannel Co., [1875] 20 Eq. 360; Indian Zoedone Co., [1884] 26 Ch. D. 70.

[2]Indian Zoedone Co., [1884] 26 Ch. D. 70; London and Australian Agency Corporation, [1873] W. N. 198, 29 L. T. 417.

[3]Bethell *v.* French Tubeless Tyre Co., [1900] 1 Ch. 408.

additional liquidator,[1] or it may appoint a liquidator in the place of one retiring.[2]

The liquidator is required, within twenty-one days after his appointment, under penalties not exceeding twenty-five dollars a day, to file with the Registrar a notice of his appointment in the prescribed form (Section 231).

As voluntary liquidations were sometimes run through by a liquidator nominated by the directors without regard to the wishes or rights of the creditors, Section 232 has established a new procedure, giving the creditors greatly extended powers in regard to the appointment of the liquidator in a voluntary winding up. By this section every liquidator appointed by a company in a voluntary winding up must, within seven days after his appointment, "send notice by post to all persons who appear to him to be creditors of the company," convening a meeting of creditors for a day not less than fourteen nor more than twenty-one days after his appointment, and specifying the place and hour, and must advertise notice of the meeting once in the *Gazette* and once at least in two local newspapers circulating in the district where the registered office or principal place of business of the company was situate (Sub-section 1).

At this meeting the creditors are to determine whether an application shall be made to the Court for the appointment of any person in place of or jointly with the liquidator appointed by the company, or for the appointment of a committee of inspection, and, if the creditors so resolve, an application may be made accordingly to the Court at any time not later than fourteen days after the date of the meeting by any creditor appointed for the purpose at the meeting (Sub-section 2). The creditors should go to the meeting prepared with the name of some person willing to

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[1] *Re* Sunlight Incandescent Gas Lamp Co., [1900] 2 Ch. 728.
[2] *Re* Sheppy Portland Cement Co., [1892] W. N. 184, 68 L. T. 83.

take the necessary proceedings, for only the person appointed at the meeting can apply to the Court.

On the application being heard the Court may remove the liquidator appointed by the company and appoint another person, or may appoint some person to act jointly with the liquidator appointed by the company, and may, whether appointing a liquidator or not, make an order for the appointment of a committee of inspection, or make such other order as, having regard to the interests of the creditors and contributories of the company, may seem just, and "no appeal shall lie from any order of the Court" upon such application (Sub-section 4). In these sub-sections there are no provisions as to how the committee of inspection are to be selected, or as to what their functions are to be, Presumably the Court, under its power to make "such other order as . . . . may seem just," will adopt some form of order which will incorporate some or all of the provisions as to the committee of inspection found in the case of a compulsory winding up (see page 422), or possibly Rules may be made dealing with the case. The words "such other order as . . . . may seem just" will no doubt be read as giving power to the Court only to make orders *ejusdem generis* with the matters specified before. There is no indication of the reason why all appeals are forbidden, and it is certainly curious that, where the steps are directed to be taken with so much promptitude that it will be difficult for creditors outside of the Province to be represented at the meetings, there should be no opportunity for an appeal in which new facts might be brought to the notice of the Court.

The costs of the application are in the discretion of the Judge, who is expressly authorised to order the costs to be paid by the company, even though the application has failed, if he be of opinion that, having regard to the interests of

the creditors, there were reasonable grounds for the application (Sub-section 5).

There seems no reason why the meeting of creditors should not be adjourned, but it is not clear whether the time within which the application is to be made to the Court, which is "not later than fourteen days after the date of the meeting," would be reckoned from the date fixed for holding the meeting or from the conclusion of the meeting. The Court will naturally incline to make the meeting an opportunity for an effective expression of the creditors' wishes, and it seems that the time will run from the latest adjournment.

The Court has power (under Section 230 (*i*)) to remove any liquidator and appoint another in his place. This is a matter of judicial discretion, and the Court of Appeal will not interfere if satisfied that there is "cause shown," but for this purpose it will consider the evidence.[1] The application to remove a liquidator cannot be made by any one not a creditor or contributory; *e.g.* a company which has purchased the assets cannot apply.[2] Whether under Section 232 the Court will retain the voluntary liquidator whenever no definite objection is shown remains to be seen. There is no power given to the company itself to remove a liquidator when once he has been appointed. Where a summons to remove a liquidator is taken out on behalf of the applicant and all other shareholders the Court will not restrain the issue of a circular to the shareholders containing charges against the liquidator on the ground of contempt.[3] The Act provides expressly for the resignation of a liquidator in a compulsory winding up (see Section 197, Sub-section 4), but there is no similar provision in the case of a voluntary

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[1] *Re* Urmston Grange Steamship Co., [1900] 17 T. L. R. 553.
[2] New De Kaap, Limited, [1908] 1 Ch. 589.
[3] New Gold Coast Co., [1901] 1 Ch. 860.

liquidation, although such resignation is contemplated by Section 233, which gives the company in general meeting[1] power to fill a vacancy caused by resignation. It would seem that such resignation must be made to a meeting of the members of the company, as there is nobody else to receive it; and if a voluntary liquidator desire to resign, he should summon a general meeting to receive his resignation and to appoint some other person as liquidator in his place.

There are no provisions for the release of a voluntary liquidator similar to those in the case of a company being wound up by the Court.

Powers of Voluntary Liquidator.

The powers of a liquidator in a voluntary winding up are wider than those of one when the winding up is by the Court. By Section 230 (*d*), a voluntary liquidator is given, without requiring the sanction of the Court, all the powers by the Act given to the liquidator in a winding up by the Court. These have already been stated on page 416.

In addition, a voluntary liquidator has power under Section 230 (*a*) and (*e*)—

1. To settle the list of contributories,[2] and if necessary to rectify the Register.[3]
2. To make calls.
3. To adjust the rights of contributories among themselves.
4. To pay the debts of the company.

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[1]Such general meeting may be summoned by the continuing liquidator (if any), or by any contributory (Section 233, Sub-section 2), and be held in the manner prescribed by the Articles, or as directed by the Court on application by a contributory or continuing liquidator (Sub-section 3).

[2]The list, when settled by a voluntary liquidator, is only *prima facie* evidence of the liability of the persons named (Section 230, f.).

[3]Brighton Arcade Co. *v.* Dowling, [1868] L. R. 3 C. P. 175; Taylor, Phillips and Rickard's Case, [1896] 2 Ch. 859.

5. To distribute the property of the company in accordance with the rights of the persons interested.

He also has power—

6. To apply to the Court to determine questions, enforce calls, etc. (Section 237).
7. To call meetings of the Company (Section 238).

Moreover, with the sanction of an extraordinary resolution, he has power—

1. To make a compromise with creditors of the company or any class of them (Section 253, Sub-section 1 (*d*)).[1]
2. To make a compromise with the contributories or debtors of the company (Section 253, Sub-section 1 (*e*)).[1]

With the sanction of a special resolution, a voluntary liquidator may sell the whole or a portion of the business or property of the company in exchange for shares, policies, or other like interests in a purchasing company (Section 236).[2]

Lastly, with the previous sanction of the Court, the liquidator may prosecute delinquent directors, managers, officers, or members of the company (Section 255, Sub-section 2: see page 496, *infra*).

Section 254 applies to companies in voluntary liquidation, and proceedings against directors or officers for misfeasance can accordingly be taken by the liquidator or any creditor or contributory (see page 479, *infra*).

As to the general status of a liquidator see page 413.

By Section 237 the liquidator or any contributory or creditor of a company being wound up voluntarily may

[1]Under this section a liquidator has power to effect compromises with the sanction of an extraordinary resolution of the company; but it has been held (Cycle Makers' Co-operative Society *v.* Sims, [1903] 1 K. B. 477) that a compromise made by the liquidator without such sanction binds the company, following a similar ruling in the case of a company being wound up under supervision (English and Scottish Marine Insurance Co., [1870] 23 L. T. N. S. 685).

[2]This is dealt with at length under "RECONSTRUCTION," page 501 *et seq.*

apply to the Court "to determine any question arising in the winding up, or to exercise, as respects the enforcing of calls, *or any other matter,* all or any of the powers which the Court might exercise if the company were being wound up by the Court;" and the Court, if satisfied that the determination of such person or the required exercise of power will be just and beneficial, may accede thereto, wholly or in part, on such terms and conditions as the Court thinks fit, or make such other order as the Court thinks just. In this manner advantage of all the proceedings in the winding up by the Court may be had in a voluntary liquidation on the application of the liquidator or a contributory or creditor. Thus, questions of the liability of a contributory or the right of a creditor to prove may be tried on summons or motion in the winding up; or inspection of the books obtained (Section 258); or an order for the private examination of any person had (Section 220); or calls may be enforced by order (Section 211).

If more than one liquidator is appointed, the company, at the time of their appointment, may determine that one or more of them may exercise any of these powers, and in default of such determination any number, not less than two, may exercise any of such powers (Section 230 (*g*)); but it is only at the time of their appointment that the company has the power of determination, and if there are two liquidators and one of them dies, the survivor cannot act until a new liquidator is appointed.[1]

"Where any company is being wound up, all books and papers of the company and of the liquidators shall, as between the contributories of the company, be *primâ facie* evidence of the truth of all matters purporting to be therein recorded" (Section 257). It is to be noted that this section does not say "as between the contributories *and* the com-

[1] *Re* Metropolitan Bank *v.* Jones, [1876] 2 Ch. D. 366.

pany," nor does it affect creditors, and appears only to constitute the books, etc., evidence as between the contributories themselves.

The evidence is only *primâ facie,* and may be rebutted.[1]

Remuneration of Liquidator.

The remuneration of the liquidator in a voluntary winding up is fixed by the company (Section 230 (*b*)), absolutely at its own discretion. If it does not fix any, the liquidator should apply to the Court to exercise its power in this respect, and there seems no reason why it should not do so, as Section 230 only prescribes that the company *may* fix such remuneration. The liquidator should, however, see that he has some arrangement at an early date, as the company is unfettered in regard to amount, and it is doubtful if the liquidator is entitled to a *quantum meruit.*

Where a supposed voluntary liquidation proves to have been irregularly commenced the liquidator has no claim for services rendered in the liquidation; but, so far as his services have been useful for other purposes or are subsequently adopted by the compulsory liquidator, he may be entitled to payment upon a *quantum meruit.*[2]

Section 232 contains no provisions as to the remuneration of a liquidator appointed by the Court on the application of creditors under that section, and it seems he will have only the same rights as a liquidator appointed by the company.

Accounts of Liquidator.

Section 261, relating to the filing of accounts, applies to voluntary liquidations as well as to windings up by the Court,[3] and the matters set out at page 419, *supra,* must therefore have attention.

[1]Great Northern Salt Co., [1890] 44 Ch. D. 472; Arnot's Case, [1887] 36 Ch. D. 712.

[2]Allison, Johnson & Foster, [1904] 2 K. B. 327.

[3]Stock and Share Auction Co., [1894] 1 Ch. 736.

There is no provision for the audit of the accounts of a voluntary liquidator. He may be questioned at meetings of the contributories, which he is required to summon once a year, and before which he must lay his accounts (Section 238, Sub-section 2), and the statements of account filed by him (see page 419) are open to inspection; but there is no one to enforce the production of vouchers, etc., although there can be no doubt that, if satisfied of any irregularity, the Court would enforce the making and substantiating of a proper account at the instance of a contributory.[1] Moneys remaining in the hands of a voluntary liquidator for more than six months, representing unclaimed or undistributed assets, must be paid into the Provincial Treasury as in a compulsory winding up (Section 261).

The liquidator must, for his own protection, keep proper books of account, for if money is traced into the possession of a trustee the burden falls on him of proving that it has been properly expended.

MEETINGS DURING WINDING UP.

The liquidator in a voluntary winding up must summon the original meeting of creditors required by Section 232; but, with this exception, he is not required to summon meetings of creditors. By Section 238, however, he is empowered from time to time to summon meetings of the company (*i.e.* the contributories) "for the purpose of obtaining the sanction of the company by special or extraordinary resolution, or for any other purposes he may think fit," and if the winding up continues for more than a year he is *required* to summon a general meeting of the company at the

[1]Wright's Case, [1870] 5 Ch. 437. In the Camina Nitrate Co.'s Case, 2nd March, 1909 (unreported), Swinfen Eady, J., the liquidator consenting, ordered the accounts of a voluntary liquidator, to be taken into Court, but suggested that a more reasonable course would be to direct that the shareholders concerned should be given an opportunity of inspecting the books by their accountant.

end of the first year and of each succeeding year, and to "lay before the meeting an account of his acts and dealings and of the conduct of the winding up during the preceding year."

Several matters require the sanction of resolutions of general meetings: *e.g.* arrangements with creditors (Section 235, extraordinary resolution); filling vacancies in the office of liquidator (Section 233, ordinary resolution); final meeting before dissolution (Section 239); disposal of books on dissolution (Section 259, extraordinary resolution); payments to classes of creditors or compromises (Section 253, extraordinary resolution); compromises generally (Section 253, extraordinary resolution); sale of assets for shares or other interests in the purchasing company (Section 236, special resolution).

FINAL WINDING-UP MEETING.

As soon as the affairs of the company are fully wound up the liquidator is required to prepare an account showing how the winding up has been conducted and the property of the company disposed of, and to call a final general meeting of the members for the purpose of laying his account before them, of giving any explanations that may be required (Section 239), and of obtaining, by extraordinary resolution, the direction of the members as to the disposal of the books, accounts, and other documents (Section 259). Notice of this meeting has to be advertised at least one month beforehand in the *Gazette* (Section 239).

A similar notice should also be sent to the members in the manner prescribed for giving notices. It is also advisable to add an intimation to the following effect:—"The foregoing notice was duly advertised in the *Gazette,* on
in accordance with Section 239 of The Companies Act."

Unless authorised by the final resolution to deal otherwise with the books and papers of the company, the

liquidator or other person to whom their custody has been entrusted should retain possession of them for two years from the date of the company's dissolution, after which "no responsibility shall rest on the company, or the liquidators, or any person to whom the custody of the books and papers has been committed, by reason of the same not being forthcoming to any person claiming to be interested therein" (Section 259).

The liquidator must within one week after such meeting make what is called a "Return of the Final Winding Up Meeting," to the Registrar of Companies, who must forthwith register it (Section 239, Sub-sections 3 and 4). Neglect to make the Return renders the liquidator liable to a penalty of twenty-five dollars for every day until the Return is registered (Sub-section 3).

On the expiration of three months from the date of the registration of the Return of the Final Winding Up Meeting "the company shall be deemed to be dissolved" (Section 239, Sub-section 4), and the name of the company will be removed from the Register. The Registrar will then be at liberty to register any other company under the same name as the old one, if such name has not already been taken by consent.

But the Court has power, under the same sub-section, "on the application of the liquidator or of any other person who appears to the Court to be interested," to make an order deferring the date at which the dissolution of the company is to take effect for such time as to the Court seems fit, which order must be filed with the Registrar by the person on whose application it is made (Sub-section 5), and even after the dissolution the Court may at any time within one year of the date of the dissolution, on a like application, make an order, on such terms as the Court thinks fit, declaring the dissolution to have been void, whereupon such proceedings

may be taken as might have been taken if the company had not been dissolved (Section 260). The person obtaining the order must within seven days after the making of the order file an office copy of it with the Registrar under a penalty not exceeding twenty-five dollars a day for default (Subsection 2).

As to the effect of dissolution see page 498, *infra*.

It should be observed by voluntary liquidators that if the liquidation is not concluded within twelve months from the confirmation of the special resolution or the passing of the extraordinary resolution to wind up, they will then have to make periodical returns of their receipts and expenditure to the Registrar of Companies, and pay any money of the company remaining in their hands into the Provincial Treasury (Section 261). This provision practically means that, to escape having to make these returns and pay into the Treasury, the liquidation should be completed and the final meeting held within *nine* months, as the liquidation is not "concluded" until three months after the Return of the Final Winding Up Meeting has been registered, and all funds have either been distributed or paid into the Treasury.

CHAPTER XXIV.

WINDING UP UNDER SUPERVISION OF THE COURT UNDER PROVINCIAL ACT.

WHERE a company has gone into voluntary liquidation, and some of the creditors or contributories desire that the conduct of the liquidation should be under the control of the Court, they may apply by petition to the Court for an order that the winding up shall be continued subject to the supervision of the Court in the same manner as they would apply for a compulsory winding up by the Court (Section 244), and the Court may thereupon make an order for the continuance of the winding up subject to such supervision, and with such liberty for creditors, contributories, or others to apply to the Court, and generally upon such terms and subject to such conditions as the Court thinks just (Section 243): that is to say, the Court may leave in the hands of the liquidators whatever of their powers it thinks fit, and may exclude from their powers whatever matters it thinks ought to be reserved to the Court.

It has been said that the Court will not as a rule make a supervision order on the application of a contributory,[1] even if it be alleged that the liquidators are guilty of misconduct;[2] but recently such orders have not been uncommon in England, and on the application of a creditor the order will be made, the Court having regard to the wishes of the majority of the creditors and contributories (Section 245). It was said in an early case that if the

[1]London and Mercantile Discount Co. [1866] 1 Eq. 277; Beaujolais Wine Co., [1868] 3 Ch. 15; *re* Gold Co., [1879] 11 Ch. D. 701, 718; Varieties, Limited, [1893] 2 Ch. 235.

[2]Star and Garter Hotel Co., [1873] 28 L. T. 255; Yorkshire Fibre Co., [1870] 9 Eq. 650.

liquidator was guilty of misconduct the creditors should not petition for a supervision order, but should apply in chambers for the removal of the liquidator;[1] but such misconduct is a ground for obtaining a compulsory order, for the creditors are prejudiced.[2] If the company is insolvent and the creditors desire a supervision order the opposition of contributories will not be regarded.[3]

As Section 237 gives any contributory or creditor a right to apply to the Court in a voluntary winding up, there is very little to be gained by a supervision order.

The Court is not often willing to make the order. Special grounds, however, may exist—as, for instance, the desire of the creditors to have an additional or substituted liquidator appointed to represent them, or to have an advisory body similar to a committee of inspection nominated.[4] These objects, however, are attainable by an application under Section 232 by the first meeting of creditors (see page 434). A supervision order is also sometimes asked in order to have a declaration made that some particular act shall not be done without the sanction of the Court, or to have a scheme of reconstruction brought before the Court, for by Section 236, any resolution passed under that section is invalid if an order for winding up by the Court or under supervision is made within a year, unless the sanction of the Court is obtained and a compulsory order has been made with this object.[5]

If the resolution for voluntary winding up is invalid, the Court cannot make a supervision order, for there is no

[1]London and Mediterranean Banking Co., [1867] 15 W. R. 33, 15 L. T. 153.
[2]Caerphilly Colliery Co., [1875] 32 L. T. 15.
[3]Prince of Wales Slate Quarry, [1868] 18 L. T. 77.
[4]This can be done (W. Watson & Sons, [1891] 2 Ch. 55).
[5]Consolidated South Rand Mines, [1909] 1 Ch. 491.

winding up to be continued.[1] The evidence should, therefore prove the due passing of the winding-up resolution.

A supervision order may be made on a petition for a compulsory order; but if the petition has been advertised as asking for a compulsory order only, the Court usually will not make a supervision order unless the petition is amended and re-advertised.[2]

The Court has regard to the wishes of the majority of creditors and contributories in determining whether to make a compulsory or supervision order (Section 245), and in case of difference prefers the wishes of the creditors, unless their debts are small and well secured.

The Court may appoint additional liquidators to act with those already appointed by the company, and subsequently, on due cause shown, may remove any liquidator so apppointed, or any liquidator continued under the supervision order, or fill up any vacancy in the office (Section 246). The Court may also (under Section 230 (*i*)). "on cause shown," remove a liquidator appointed by the company before the supervision order.[3] A liquidator appointed by the Court has to give security, whether the voluntary liquidator has to do so or not.[4]

The making of the order gives to the Court all the powers which it would have in a winding up by the Court, but except so far as the order places restrictions on the liquidators they continue to have all the powers and duties which they would have in a voluntary winding up (Section 247, Sub-section 1). Sub-section 2 of this section

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[1]Bridport Old Brewery Co., [1867] 2 Ch. 191; Patent Floorcloth Co., [1869] 8 Eq. 664.
[2]New Morgan Gold Mining Co., [1893] W. N. 79; New Oriental Bank, [1892] 3 Ch. 563.
[3]*Ex parte* Pulbrook, [1863] 2 De G. J.& S. 348; United Merthyr Collieries Co., [1867] 16 L. T. 170.
[4]Hampshire Land Co., [1894] 2 Ch. 632.

provides that an order for a winding-up subject to supervision shall for all purposes including the staying of actions and other proceedings, the making and enforcement of calls and the exercise of all other powers be deemed to be an order for winding-up by the Court.

The liquidation is deemed to commence from the date of the resolution for winding up, and not from the presentation of the petition, for the order merely continues the existing winding up. The Court has no power to alter the date: *e.g.* where a petition for a compulsory order preceded the voluntary liquidation and a provisional liquidator was appointed, it was held the Court could not direct that the commencement of the winding up should date back to the petition or the appointment of the provisional liquidator.[1]

The costs in a winding up under supervision incurred after the order for such winding up have the same priority as in a winding up by the Court;[2] but the order should provide that the costs and remuneration of the liquidator are to be allowed only after they have been taxed by the Registrar.[3]

The Court usually orders the liquidator to report from time to time the progress of the winding up,[4] and may attach to the exercise of the liquidator's powers a condition that he shall obtain the sanction of a committee of creditors or contributories, thus practically establishing a committee of inspection.[5]

The practice as to a petition for a supervision order is the same as that on petition for an order that the company be wound up by the Court (see page 407 *et seq.*). The petition must be served both on the company and the liquidator.

[1]West Cumberland Iron Co., [1889] 40 Ch. D. 361.
[2]*Re* New York Exchange, [1893] 1 Ch 371.
[3]See W. N. 1893, 5 and 18.
[4]Pritchard, Offor & Co., [1893] W. N. 153.
[5]W. Watson & Sons, [1891] 2 Ch. 55.

The Court may, both before and after the order is made, direct meetings of creditors and contributories to be held to ascertain their wishes, naming the chairman. In case of a division regard must be had to the value of the debts due to each creditor and the number of votes conferred on each contributory by the regulations of the company (Sections 245 and 256).

The presentation of the petition for a supervision order gives the Court the same jurisdiction to stay suits and actions as if the petition were for a compulsory order, and when the order is made it has the like effect in automatically staying actions, suits, and other proceedings (Section 247, Sub-section 2: see page 452 *et seq.*).

When the order is made the liquidator may, "subject to any restrictions imposed by the Court, exercise all his powers, without the sanction or intervention of the Court, in the same manner as if the company were being wound up altogether voluntarily": that is to say, except so far as the *order* restricts him, the liquidator may act as freely as in a voluntary liquidation (Section 247, Sub-section 1).

In cases where in a voluntary winding up the sanction of an extraordinary resolution would be required for any act, in a winding up under supervision the sanction of the Court is necessary. Thus, the disposal of the books of the company on the completion of the winding up (Section 259), compromises with creditors or contributories (Section 253), and sales of the assets of the company for shares in another company (Section 236) in the case of a winding up under supervision require the sanction of the Court.

A winding up under supervision also differs from a voluntary liquidation in the fact that Sections 248 and 252 apply to the former and not to the latter. By Section 248 "every disposition of the property (including things in action) of the company, and every transfer of shares, or

alteration in the status of its members, made after the commencement of the winding up" (*i.e.* the date of the resolution for the voluntary winding up), "shall, unless the Court otherwise orders, be void;" and by Section 252 "any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void to all intents." In relation to these matters, therefore, it is not necessary to make any application to the Court, as the law automatically avoids them (see page 452, *et seq.*).

When a supervision order has been made, the liquidators (including the additional liquidator, if any, appointed by the Court) proceed in the same manner as if there were no such order, except in matters expressly dealt with in the order. The proofs of debts by creditors, the settling of the list of contributories, the making of calls, and the getting in and distributing of assets are therefore governed by the considerations set forth in the case of a voluntary liquidation.

An arrangement with creditors entered into under Section 235 while a company is being wound up under supervision, if sanctioned under Section 237, is binding, for the power of compromise given by Section 253 is additonal to and not in substitution for the power given by Section 235,[1] and, indeed, the liquidator has a power of compromise even without any sanction.[2]

An order continuing a voluntary winding up under supervision is not a bar to the making of a subsequent order for a compulsory winding up; but it would be necessary to comply with the provisions of the Act as to holding meetings to consider the appointment of liquidators and the like,[3] and if the Court approves the continuance of

[1]Anglo-Romano Water Co., [1870] 5 Ch. 437.

[2]English and Scottish Marine Insurance Co., [1870] 23 L. T. 685; Cycle Makers' Co-operative Society *v.* Sims, [1903] 1 K B. 477.

[3]*Re* John Reid & Sons, [1900] 2 Q. B. 634.

the voluntary liquidator there is no reason why he should not be appointed.

If the supervision order is superseded by a compulsory order it seems the winding up will commence from the presentation of the petition for the compulsory order,[1] which may affect the liability of past members.

[1]Taurine Co., [1883] 25 Ch. D. 118, overruling United Service Co., 1868] 7 Eq. 76.

CHAPTER XXV.

THE CONDUCT OF THE LIQUIDATION.

IN all liquidations (whether compulsory, voluntary, or under supervision) many matters are dealt with in the same manner. These will now be considered, any differences in the respective methods of procedure being noted.

PROCEEDINGS AGAINST A COMPANY IN LIQUIDATION.

After a company is in liquidation, or a petition has been presented for its winding up by the Court or under supervision, proceedings by creditors against the company cannot be taken or continued at the will of the creditor. But there is this distinction: If an Order of Court has been made for a winding up (compulsorily or under supervision) all proceedings are automatically stayed, but the Court may, on the application of the creditor, allow them to be continued; while in a voluntary winding up or where a petition has been presented, but not adjudicated upon, there is no automatic stay, but the Court may, on application being made to it by interested parties, restrain further proceedings against the company or its property. This is the effect of Sections 191, 193, 244, and 247 of the Act, and in a voluntary liquidation by calling in aid Section 237.

Thus in a voluntary winding up the Court may, upon the application of the liquidator or a contributory or creditor, restrain actions,[1] executions,[2] and distresses,[3] and, if the proceedings were commenced with knowledge of the voluntary winding up, may order the plaintiff to pay the

[1]Keynsham Co., [1863] 33 Beav. 123; Freeman *v.* General Publishing Co., [1894] 2 Q. B. 360.

[2]Thomas *v.* Patent Lionite Manufacturing Co., [1881] 17 Ch. D. 250; Westbury *v.* Twigg & Co., [1892] 1 Q. B. 77.

[3]Roundwood Colliery Co., [1897] 1 Ch. 373.

costs of the proceedings.[1] The power of the Court is discretionary, and it will inquire what course is most convenient. If the claim is undisputed a stay will be granted as of course, but if the debt is disputed it will often be considered most convenient to allow the action to proceed.[2]

A sale by the sheriff under an execution put in before the presentation of the petition is a "proceeding" which may be restrained;[3] but the Court will look at the rights acquired before the petition is presented, and, as a judgment creditor who has procured the sheriff to take possession before the petition is a secured creditor, the Court will not, except in very special circumstances, deprive him of his security,[4] and the same rule applies if the sheriff seeks to take possession and is resisted,[5] or, it seems, if the creditor was put off by representations of the company.[6] The order staying the proceedings frequently provides that the liquidator shall sell, the priority of the creditor being reserved by a charge on the proceeds of sale.

The object of a winding up is to enable an equal distribution of the assets to be made among the creditors, preserving, however, the rights of any who have securities,[7] and therefore where the assets have not been actually seized before the petition the Court will stay proceedings and either restrain the sheriff from seizing, or, if he has actually taken possession after the presentation of the petition, will order him to withdraw.[8] The rule with regard to garnishee pro-

[1]Freeman *v.* General Publishing Co., [1894] 2 Q. B. 360.
[2]Currie *v.* Consolidated Kent Collieries, [1906] 1 K. B. 134.
[3]Perkins *v.* Beach & Co., [1878] 7 Ch. D. 317.
[4]Great Ship Co., Parry's Case, [1864] 4 De G. J. & S. 63, 33 L. J. Ch. 245; Withernsea Brick Works, [1881] 16 Ch. D. 337.
[5]London Cotton Co., [1866] 2 Eq. 53.
[6]*Re* Taylor, [1878] 8 Ch. D. 183. But see Vron Colliery Co., [1882] 20 Ch. D. 442.
[7]See Smith, Fleming & Co.'s Case, [1866] 1 Ch. 545.
[8]London and Devon Biscuit Co., [1871] 12 Eq. 190; Dimson Estate Fire-clay Co., [1874] 19 Eq. 202; *ex parte* Railway Steel Co., *re* Williams, [1878] 8 Ch. D. 183.

ceedings is the same, service of the garnishee order on the garnishee being equivalent to the taking possession by the sheriff. When, therefore, the order has not been served before the presentation of the petition, the Court will restrain further proceedings.[1]

The above principles govern the Court whether it is asked to stay proceedings against a company in voluntary liquidation or to allow proceedings to be continued against a company in compulsory liquidation.

When an order is made for winding up, whether compulsorily or under supervision, "any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void to all intents" (Section 252); but this latter provision is controlled by Sections 191 and 193, so that with the leave of the Court execution, etc., may issue.[2] Therefore when a winding-up order has been made, instead of the company applying to the Court to restrain the creditor, the creditor must ask leave before he can proceed.

The Court will allow actions to proceed where the company is a necessary party to an action against other persons,[3] or proceedings are necessary to enforce a charge or vendor's lien;[4] indeed it is now almost a matter of course to allow a foreclosure suit or debenture holder's action to proceed,[5] for the proceeding being to enforce a security is

[1]Stanhope Silkstone Collieries, [1879] 11 Ch. D. 160.

[2]Exhall Coal Mining Co., [1864] 4 De G. J. & S. 377; *re* Lancashire Cotton Spinning Co., *ex parte* Carnalley, [1887] 35 Ch. D. 656; Higginshaw Mills and Spinning Co., [1896] 2 Ch. 544.

[3]Rio Grande do Sul Steamship Co., [1877] 5 Ch. D. 282; Marshall *v.* Glamorgan Iron and Coal Co., [1868] 7 Eq. 129; McEwen *v.* London and Bombay Bank, [1866] 15 L. T. 495; *re* Marine Investment Co., [1866] 14 L. T. 535.

[4]Blakely *v.* Dent, [1867] 15 W. R. 663.

[5]Lloyd *v.* Lloyd, [1877] 6 Ch. D. 339; *re* Pound, Son & Hutchings, [1889] 42 Ch. D. 402; Wanzer, Limited, [1891] 1 Ch. 305; West Cumberland I on and Steel Co., [1893] 1 Ch. 713; Barney *v.* Stubbs, Limited, [1891] 1 Ch. 187, 475; Strong *v.* Carlyle Press, [1893] 1 Ch. 268.

in reality rather against the property of the company than against the company itself. Actions for specific performance of agreements are also allowed to proceed.[1] In each case the respective convenience of the alternative remedies will be considered. In other cases the creditor should prove in the winding up.

The Court, in allowing proceedings by parties other than mortgagees, will usually attach a condition that no steps will be taken to enforce the judgment against the company without further leave.

A landlord will not be allowed to distrain for rent accrued before the commencement of the winding up, for he is a creditor in respect of such rent, and should prove in the winding up;[2] but this rule does not apply if the company is sub-lessee, and the distress is by the head landlord, for there is no privity between them, and therefore no debt for which the landlord can prove;[3] but if the company has given the over-landlord a security, so that he can prove in the liquidation, he will not be allowed to distrain.[4] If the assets are so heavily charged as to belong in effect to the debenture holders the Court will not interfere to prevent a distress.[5] The Court will generally allow the landlord to re-enter if the rent is not paid.[6]

If the liquidator has had a beneficial occupation since the winding up the Court will allow distress for rent as

[1]Thames Plate Glass Co. *v.* Land and Sea Construction Telegraph Co., [1871] 6 Ch. 643; Marshall *v.* Glamorgan Iron and Coal Co., [1868] 7 Eq. 129.

[2]Traders' (North Staffordshire) Carrying Co., [1875] 19 Eq. 60, 44 L. J. Ch. 172; Oak Pits Colliery Co., [1882] 21 Ch. D. 322.

[3]*Re* Carriage Co-operative Supply Association, *ex parte* Clemence, [1883] 23 Ch. D. 154; *re* Lundy Granite Co., *ex parte* Heaven, [1871] 6 Ch. 462; Regent United Service Stores, [1878] 8 Ch. D. 61.

[4]Harpur's Cycle Fittings Co., [1900] 2 Ch. 731, not following *ex parte* Clemence, *supra*, on this point.

[5]New City Club, [1887] 34 Ch. D. 646; Harpur's Cycle Fittings Co., [1900] 2 Ch. 731.

[6]General Trust Co., [1882] 20 Ch. D. 263.

from the date of the winding up,[1] but not if the liquidator has merely abstained from getting rid of the property,[2] or where the occupation has been for the benefit of both parties;[3] and *semble* a mortgagee is in a less favourable position than a landlord.[3]

Creditors.

Section 249 provides that in every winding up under the Act "all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value."

The winding-up order stops the running of the Statute of Limitations, and debts which were not barred at the date of the winding-up order may be proved after the time when but for the order they would be barred.[4]

The liability for calls in another company is a provable debt in the case of a contributory company,[5] but the proof will not make the shares fully paid for the purpose of participating in surplus assets, unless the full amount is in fact paid.[6]

Only one proof is admissible against a company, even though there be separate contracts creating or securing the

[1]*Re* Lundy Granite Co., *ex parte* Heaven, [1871] 6 Ch. 462; North Yorkshire Iron Co., [1878] 7 Ch. D. 661.

[2]Oak Pits Colliery Co. [1882] 21 Ch. D. 322.

[3]*Re* Lancashire Cotton Spinning Co., *ex parte* Carnelley, [1887] 35 Ch. D. 656.

[4]Joint Stock Discount Co.'s Claim, [1872] 7 Ch. 646; Wryghte's Case, [1852] 5 De G. & Sm. 244.

[5]*Re* Mercantile Mutual Marine Assurance, [1884] 26 Ch. D. 415; *re* Hallett, *ex parte* National Insurance Corporation, [1894] 1 Mans. 380.

[6]*Re* West Coast Gold Fields, [1905] 1 Ch. 597.

debt,[1] but if a debt is payable by two companies the creditor can prove against each, and receive dividends from each until he has received the whole principal and interest to the date of payment.[2]

The holder of a bill of exchange is entitled to prove his debt in the liquidations of all the prior parties to the bill, provided he do not receive in the whole more than one hundred cents in the dollar.[3] But if before he prove he have received a part of his claim, or a dividend has been declared under another winding up, he can only prove for the balance of the debt,[4] and this is so also where the bill is given as a guarantee and the principal debtor has paid part of the debt.[5] But this rule only applies in the case of negotiable instruments.

Claims arising out of contracts which are *ultra vires* cannot be proved against the company,[6] nor the claims of solicitor[7] or brokers[8] in respect of services rendered in connection with transactions which were known by them to be *ultra vires*. Money borrowed without authority, but used to pay debts properly incurred, may be the subject of proof to the extent to which it was so used.[9]

A debt founded on an illegal consideration cannot be proved,[10] nor a debt arising from a contract with an alien enemy.[11]

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[1] *Re* Oriental Commercial Bank, [1872] 7 Ch. 99.

[2] Warrant Finance Co., [1870] 5 Ch. 86; *re* Ligoniel Spinning Co., [1900] 1 Ir. R. 324.

[3] *Ex parte* Taylor, *re* Houghton, [1857] 26 L. J. Bank, 58; *ex parte* Wildman, [1885] 1 Atk. 110; *ex parte* Cama, [1874] 9 Ch. 686.

[4] Cooper *v.* Pepys, [1741] 1 Atk. 107, and cases cited in last note.

[5] *Ex parte* Reader, [1818] Buck. 381.

[6] Great North-West Railway *v.* Charlebois, [1899] App. Ca. 114.

[7] Howard *v.* Dollman, [1863] 1 H. & M. 433.

[8] Zulueta's Claim, [1870] 5 Ch. 444.

[9] Cork and Youghal Railway Co., [1869] 4 Ch. 748.

[10] *Ex parte* Dyster, [1815] 1 Meriv. 155; *ex parte* Bell, [1813] 1 M. & S. 751; *ex parte* Chavasse, [1865] 34 L. J. Bank. 17.

[11] *Ex parte* Schmaling, [1 16] Buck. 93.

If a company has not become entitled to commence business, no claim can be established against it for goods supplied or otherwise.[1]

A lessor, although not entitled to a dividend on his claim until something becomes payable to him, nor to have anything impounded to meet his possible claim,[2] may have his claim entered, and prevent the dissolution of the company or the distribution of its assets among contributories,[3] unless provision is made for the rent. If the liquidation continues, the proof must be renewed from time to time as the rent becomes due.[4] As to a lessor enforcing his claim by distress or re-entry see page 455.

The liquidation does not entitle the liquidator to disclaim a lease,[5] nor is the term determined unless an express condition is contained in the lease to that effect, in which case it operates even though the company is solvent and the winding up is with a view to reconstruction.[6] If the liquidator is willing to make and the lessor to accept a surrender of the lease, it may properly be made a term of the bargain that the lessor shall be entitled to prove for the loss he sustains, which would be measured by the difference between the rent reserved by the lease and the rent he can obtain at the time of surrender.[7] Without such a bargain the surrender will extinguish future claims; but he cannot have both damages and rent, or rent and possession: there-

[1]Otto Electrical Co., [1906] 2 Ch. 390.

[2]Westbourne Grove Drapery Co., [1877] 5 Ch. D. 248; Horsey's Claim, [1868] 5 Eq. 561; *ex parte* Lord Elphinstone, [1870] 10 Eq. 412.

[3]Oppenheimer *v.* British and Foreign Bank, [1877] 6 Ch. D. 744; Lord Elphinstone *v.* Monkland Iron and Coal Co., [1886] 11 App. Ca. 322.

[4]*Re* New Oriental Bank Corporation, [1895] 1 Ch. 753.

[5]Westbourne Grove Drapery Co., [1877] 5 Ch. D. 248.

[6]Horsey Estate, Limited *v.* Steiger, [1899] 2 Q. B. 79; Fryer *v.* Ewart, [1902] A. C. 187.

[7]*Re* Panther Lead Co., [1896] 1 Ch. 978.

fore if the lease is not determined the lessor's proof can only be for rent actually due.[1]

As regards the costs of litigation by or against the company prior to the winding up, the rule was that a successful defendant could prove for his costs, whether the action were founded on tort or contract, if the verdict was obtained or judgment pronounced before the winding up,[2] but a successful plaintiff could only prove if judgment were signed or if the debt were one which could itself be proved.[3] But in *re* British Goldfields of West Africa[4] the Court of Appeal allowed persons who had applied to have their names removed from the Register on the ground of misrepresentation, and whose claim, although never adjudicated upon by the Court, was admitted to be good, to prove for the costs incurred prior to the winding up.

The Court can go behind and reopen a judgment obtained before the liquidation if there was no consideration or a bad consideration for the debt, particularly if the judgment was obtained by consent or by default.[5] It can equally examine the consideration for which a mortgage was given, and if not good can set the mortgage aside.[6]

Although a liquidator has made a payment and taken a receipt purporting to be "in full discharge of the claim," the creditor will not be precluded from claiming and recovering

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[1]*Re* New Oriental Bank Corporation, [1895] 1 Ch. 753.

[2]*Ex parte* Peacock, *re* Duffield, [1873] L. R. 8 Ch. 682; *ex parte* Bluck, [1887] 57 L. T. 419; *ex parte* Newman, *re* Brooke, [1876] 3 Ch. D. 494.

[3]See cases in previous note, and Vint *v.* Hudspith, [1885] 30 Ch. D. 24

[4][1899] 2 Ch. 7.

[5]Great North-West Railway *v.* Charlebois, [1899] App. Ca. 114 (a consent judgment obtained in respect of an ultra vires contract); *ex parte* Butterfill, *re* Dingle, [1811] 1 Rose 192; *ex parte* Prescott, [1840] 1 M. D. & D. 199; *ex parte* Kibble, *re* Onslow, [1879] 10 Ch. D. 373 (judgment by default); *ex parte* Banner, *re* Blythe, [1881] 17 Ch. D. 480 (a compromise); *ex parte* Lennox, [1886] 16 Q. B. D. 315 (a judgment by consent); *re* Deerhurst, *ex parte* Seaton, [1891] 8 Mor. 97 (a gambling debt which had been assigned).

[6]*Re* Van Laun, *ex parte* Chatterton, [1907] 2 K. B. 23.

any further amount due (*e.g.* interest), unless there has been a *bonâ fide* compromise of a disputed claim.[1]

A foreign creditor seeking to prove may be ordered to give security for costs.[2]

Set-Off.

All claims provable in the winding up may be the subject of set-off, provided that there is mutuality;[3] so that damages for breaches of obligation arising out of a contract, such as fraudulent misrepresentation on a sale may be set off, as well as damages for the actual breach of the contract;[4] nor does it make any difference that the claims sought to be set off are of a different nature, or that one is secured and the other unsecured.[5] But each claim must result in a liability to pay money; a claim to the return of goods cannot be set off against a money debt.[6]

There must be mutuality: that is to say, a joint debt cannot be set off against a several debt;[7] money held for a specific purpose or on a trust cannot be set off against a debt,[8] and money due to an executor as executor cannot be set off against money due from him personally;[9] and a debt to the liquidator arising in the liquidation cannot be set off against a debt due from the company before winding up.[10]

[1] *Re* W. W. Duncan & Co., [1905] 1 Ch. 307.

[2] Pretoria Petersburg Railway Co., [1904] 2 Ch. 359.

[3] Booth *v.* Hutchinson, [1873] 15 Eq. 311: *re* Mid-Kent Fruit Factory, [1896] 1 Ch. 567; Palmer *v.* Day, [1895] 2 Q. B. 618. [113.

[4] Peat *v.* Jones, [1881] 7 Q. B. D. 147; Jack *v.* Kipping, [1882] 9 Q. B. D.

[5] *Ex parte* Law, [1846] De Gex 378; *ex parte* Barnett, *re* Deveze, [1874] 9 Ch. 293; McKinnon *v.* Armstrong, [1877] 2 App. Ca. 531.

[6] Eberle's Hotels and Restauarant Co. *v.* Jonas, [1887] 18 Q. B. D. 459.

[7] *Ex parte* Ross, [1817] Buck 125; Stamforth *v.* Fellowes, [1814] 1 Marsh. 181; *ex parte* Towgood, 11 Ves. 517.

[8] *Re* Mid-Kent Fruit Factory, [1896] 1 Ch. 567; *re* Pollitt, *ex parte* Minor, [1893] 1 Q. B. 455.

[9] Bishop *v.* Church, [1748] 3 Atk. 691.

[10] Ince Hall Rolling Mills Co. *v.* Douglas Forge Co., [1882] 8 Q. B. D. 179; Alloway *v.* Steere, [1883] 10 Q. B. D. 22; Sankey Brook Coal Co. *v.* Marsh, [1871] L. R. 6 Ex. 185, explained in 9 Q. B. 669.

But the real right to a debt will be taken into account, and it will suffice if the debts are in equity in the same right:[1] *e.g.* where debentures are assigned to a trustee the debt of the *cestui que trust* can be set off against the debenture.[2]

Primâ facie, if a debt be assigned, the assignee takes subject to all equities existing between the debtor and the creditor at the time of the assignment; and, accordingly, upon proof being tendered by the assignee of a debt, the liquidator can set off any claims he had against the assignor at the time of the assignment, but not those arising subsequently, unless such claims arise out of the same contract from which the debt assigned arose, and are intimately connected with it.[3] But if the company have invited persons to treat a debt as assignable free from equities—*e.g.* by declaring that a debenture will be paid to bearer or without regard to equities—it will be precluded from setting up any right it may have against the original or any intermediate creditor,[4] unless the assignee is merely a trustee for the assignor.[2]

These rules as to Set-Off do not apply to calls payable in the liquidation (see Section 211, Sub-section 2), and a contributory cannot set off against such calls debts due from the company to him.[5] He must pay his calls in full and then prove for his debt, and will receive dividends when

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[1]Bailey *v.* Finch, [1872] L. R. 7 Q. B. 34; Bailey *v.* Johnson, [1872] L. R. 7 Ex. 263.

[2]Brown and Gregory, Limited, [1904] 1 Ch. 627, 2 Ch. 448.

[3]Government of Newfoundland *v.* Newfoundland Railway Co., [1888] 13 App. Ca. 199; Mangles *v.* Dixon, [1868] 3 H. L. C. 702; Athenaeum Life Assurance Society, [1859] 3 De G. & J. 294; Financial Corporation's Claim, [1868] 3 Ch. 355.

[4]Farmer *v.* Goy & Co., [1900] 2 Ch. 149; Blakeley Ordnance Co., [1868] 3 Ch. 154; Goodwin *v.* Roberts, [1876] 1 App. Ca. 476; *ex parte* Asiatic Banking Corporation, [1868] 3 Ch. 391.

[5]Even if Set-Off has been pleaded in litigation prior to the winding up, this will not suffice unless judgment has been obtained (Hiram Maxim Lamp Co., [1903] 1 Ch. 70).

declared,[1] nor can this rule be varied even by special agreement,[2] and the same rule applies in a voluntary liquidation.[3]

A director or officer of the company against whom damages for misfeasance are recovered under Section 254 cannot set off against such damages any debt due from the company to him,[4] nor can damages recovered from a promoter for misfeasance be set off by him against an amount due on a debenture of the company. The misfeasant cannot receive anything until he has paid, either actually or in account, all that is due from him.[5]

Undue or Fraudulent Preference.

Section 251 provides that—

> Any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property which would, if made or done by or against an individual, be deemed a fraudulent preference, shall, if made or done by or against a company, be deemed, in the event of its being wound up, a fraudulent preference of its creditors, and be invalid accordingly.

The essence of a fraudulent preference is that it should be made "with a view to giving such creditor a preference over the other creditors," so that the motive or object is of the first importance, and it must not be inferred that payment by a debtor who is insolvent to his own knowledge is fraudulent if he is continuing to carry on business, and only pays in the ordinary course of business;[6] but if the payment is not in the ordinary course it will be held to be fraudulent.[7] Further, if the payment is made under

[1]Grissel's Case, [1866] 1 Ch. 528 Gill's Case, [1879] 12 Ch. D. 755; *ex parte* Brown, [1879] 12 Ch. D. 823; Auriferous Properties No. 1, [1898] 1 Ch. 691.

[2]Black & Co.'s Case, [1873] 8 Ch. 254. [8 Ch. 262.

[3]Whitehouse & Co., [1878] 9 Ch. D. 595; Black & Co.'s Case, [1873]

[4]Carriage Co-operative Supply Association, [1881] 27 Ch. D. 322; *ex parte* Pelly, [1882] 21 Ch. D. 492; Flitcroft's Case, [1882] 21 Ch. D. 519.

[5]Leeds and Hanley Theatres of Varieties, [1904] 2 Ch. 45, where the manner of working out cross claims which are not set off is shown.

[6]*Re* Clay & Sons, [1896] 3 Mans. 31.

[7]*Re* Eaton & Co., [1897 2 Q. B. 16.]

pressure of the fear of legal proceedings, whether civil or criminal, or with a view of repairing a wrong done (*e.g.* making good moneys misapplied), it will be protected,[1] and the same rule applies in the case of a trustee making good breaches of trust.[2] The payment will also be unobjectionable if made in pursuance of a precedent contract or engagement,[3] or even under the belief that there is a legal obligation to pay,[4] or if the fund had been specially appropriated to the particular object,[5] for in all these cases it will be observed the motive is not that of preferring the creditor. But where a director was entitled under an earlier agreement to have a debenture issued for advances already made, and obtained the debenture shortly before the commencement of the winding up, Buckley, J., held the debenture void on the analogy of certain cases relating to bills of sale given by an insolvent trader.[6]

Again, if the object is not to prefer the creditor, but to benefit some other person—*e.g.* to relieve a surety from being called upon to pay,[7] or to obtain some advantage for the debtor himself,[8] or to repair an error, as by giving a good security in place of a void one[9]—there will be no fraudulent

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[1]*Ex parte* Taylor, *re* Goldsmid, [1887] 18 Q. B. D. 295; New, Prance and Garrard's Trustee *v.* Hunting, [1897] 2 Q. B. 19, affirmed *sub nom.* Sharp *v.* Jackson, [1899] App. Ca. 419.

[2]*Re* Lake, *ex parte* Dyer, [1901] 1 K. B. 710; Sharp *v.* Jackson, [1899] App. Ca. 419.

[3]*Ex parte* McKenzie, *re* B nt, [1873] 42 L. J. Bank. 25; *ex parte* Hodgkin, *re* Softley, [1875] 20 Eq. 746.

[4]Bills *v.* Smith, [18 5] 34 L. J. Q. B. 68; *re* Vautin, *ex parte* Saffrey, [1900] 2 Q. B. 325.

[5]Toovey *v.* Milne, [1819] 2 B. & Ad. 683; Vacher *v.* Cocks, [1817] 1 B. & Ad. 145.

[6]*Re* Jackson and Bassford, Limited, [1906] 2 Ch. 467.

[7]*Re* Mills, *ex parte* Official Receiver, [1888] 5 Mor. 55; *re* Stenotyper Limited, [1901] 1 Ch. 250.

[8]*Re* Arnott, *ex parte* Barnard, [1889] 6 Mor. 215.

[9]*Re* Tweedale, [1892] 2 Q. B. 216. Compare *re* N. Defries & Co., [1903 1 Ch. 37a.

preference. But, on the other hand, to make a payment because the debtor thinks the creditor's case is one of hardship is essentially an undue preference.[1]

The intention to prefer the particular creditor must in fact be the "substantial, effectual, or dominant" view, but it need not be the sole view in the debtor's mind.[2]

In the same way, if the creditor brought pressure to bear on the debtor to induce him to pay or give security, this pressure (if sufficient) will negative the idea that the debtor's view was to give the creditor a preference,[3] for the word "preference" involves the debtor having a free choice.[4] The question is, however, always one of fact, to be determined by all the circumstances of the case.

It has been said that a director of a company cannot put pressure upon his company so as to avoid the operation of these sections.[5]

The payment or security must be to a creditor with a view of preferring such creditor, and for this purpose the word "creditor" includes any person who would be entitled to prove in the winding up: *e.g.* a surety under a contingent liability.[6]

The whole effect of the Companies Acts must be taken into account. Thus, as there is no set-off in a winding up of calls against debts, it will be a fraudulent preference for directors to effect a set-off of their calls just before liquidation.[7] But where directors having guaranteed the company's overdraft made calls, paid up the amount of their

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[1]Buckley's Case, [1899] 2 Ch. 725.

[2]*Ex parte* Hill, *re* Bird, [1883] 23 Ch. D. 695; *re* Fletcher, *ex parte* Suffolk, [1892] 9 Mor. 8.

[3]Butcher *v.* Stead, [1875] L. R. 7 H. L. 846; *ex parte* Topham, *re* Walker, [1873] 8 Ch. 614; *ex parte* Kevan, *re* Crawford, [1874] 9 Ch. 752; Smith *v.* Pilgrim, [1876] 2 Ch. D. 127.

[4]Sharp *v.* Jackson, [1899] App. Ca. 427.

[5]Gas Light Improvement Co. *v.* Terrell, [1870] 10 Eq. 168.

[6]Blackpool Motor Car Co., [1901] 1 Ch. 77.

[7]Washington Diamond Mining Co., [1893] 3 Ch. 95.

own shares, and used the sum received in paying off the bank which had obtained judgment against them personally on their guarantee, there was no fraudulent preference, for the payment was not to themselves, and the object of making it was not to prefer the bank.[1]

When there is a fraudulent preference the dealing can only be set aside for the benefit of the general body of creditors, and not for a single creditor or class of creditors, so that if the debenture holders take all the assets a preference will not be set aside for their benefit.[2]

The directors who make payments by way of fraudulent preference are jointly and severally liable to repay the amount paid to the company,[3] but it may be that upon proof that the creditors preferred are able to repay the amount the directors' liability will be reduced, for the loss to the company is only the sum it is unable to recover, together with the costs of recovering the balance.

CONTRIBUTORIES AND CALLS.

Settling List of Contributories.

For the purpose of ascertaining the persons who are liable to contribute in the way of paying calls and those who are entitled to participate in the surplus assets, the liquidator must settle the list of contributories.

183. The term "contributory" means every person liable to contribute to the assets of a company in the event of its being wound up, and, in all proceedings for determining and in all proceedings prior to the final determination of the persons who are to be deemed contributories, includes any person alleged to be a contributory.

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[1]Poole's Case, [1878] 9 Ch. D. 322.

[2]Willmott *v.* London Celluloid Co., [1886] 31 Ch. D. 425, [1887] 34 Ch. D. 147.

[3]Washington Diamond Mining Co., [1893] 3 Ch. 95 C. A. But note that this point was not argued, the persons who received the payment being the two directors who made it, and it was therefore a matter of indifference to them on what ground they were ordered to pay.

The liquidator, whether in a voluntary or compulsory winding up, has power to settle the list of contributories; but in a compulsory winding up he cannot rectify the Register without the special leave of the Court. He must put upon the list every person who is a member at the time of the liquidation, and if a "B" list is prepared (see *infra*) all who have been members within one year before the commencement of the liquidation. Under Section 185 the executors or adminsitrators of a deceased member must be put on the list in their representative capacity. The heirs and devisees may also be added if necessary (Section 185).

The Court can rectify the Register, either on the occasion of the original settlement of the list of contributories or subsequently (*e.g.* upon a transfer of shares being made with the sanction of the Court[1]), and if a member's name should have but has not been removed before the liquidation may direct that it shall be excluded from the list of contributories[2] (Sections 43 and 209).

As the power of the liquidator to make calls is on "the contributories for the time being settled on the list of contributories," it is essential to settle this list before any call is made.

In a voluntary liquidation the same procedure may be followed with advantage, but it is not essential to give notice to persons to be settled on the list.[3]

If it is shown that existing members are unable to satisfy the contributions required, the list will be divided into two portions, the "A" List and the "B" List, which between them must contain the names of all the

[1]Onward Building Society, [1891] 2 Q. B. 463.
[2]Nation's Case, [1866] 3 Eq. 77.
[3]Brighton Arcade Co. *v.* Dowling, [1868] L. R. 3 C. P. 175, 187.

contributories, who are defined by Section 183, from which and Section 182 it will be seen that all present members and all past members who have not ceased to be members for more than a year are contributories. The names of past members who are subject to the contingent liability are placed in the "B" List; the names of present members in the "A" List.

The list in a voluntary winding up is only *primâ facie* evidence of the liability of the persons named Section 230 (*f*)), and any person named may, when proceedings are taken against him for calls, show that he was not properly included in the list.

It does not follow, because a person's name is placed upon the list of contributories, that he is therefore liable to pay calls. It will often happen that the fact of his being on that list will entitle him to receive dividends. Every person on the Register of Members at the time a company goes into liquidation is *primâ facie* a "contributory," whether his shares are fully paid or not, for the word is used in the Acts in respect of distributions of assets and adjustments of rights as well as in connection with calls.[1] Where the shares are fully paid the holders of such shares are of course exempt from further calls in respect of them.

It is the duty of the liquidator in a voluntary liquidation to rectify and in a compulsory winding up to procure the rectification of the Register by placing or asking the Court to place upon it the names of persons who have agreed to take shares and become members, but have never been placed upon the Register, or who having previously had their names upon the Register have afterwards had them improperly removed, either by an irregular transfer of the shares to some other person, or by an invalid forfeiture or

[1]Anglesea Colliery Co., [1866] 1 Ch. 555.

surrender of the shares. If the liquidator in a voluntary winding up believes a person to be liable as a contributory, he should place his name on the list (under Section 230 (*e*)), and leave him to take proceedings in order to correct the error if there be any;[1] but in a proper case the liquidator may take out a summons to have it determined whether any class of persons ought to be included in the list of contributories. Such a question should not, however, be included in a summons asking other relief.[2]

When a company has gone into liquidation it is too late for a member to get his name removed on the ground that he was induced to take shares by fraudulent misrepresentation. Unless his action was commenced before the winding up, he will remain liable upon his shares.[3]

A person who has transferred his shares to an infant, or who has, by false representations, procured an irresponsible person to be accepted in his place, or a member who has procured a fraudulent or collusive forfeiture or surrender of his shares, or a forfeiture or surrender which is not within the powers of the directors to be made, will be restored to the Register and held liable.[4] But a purchaser who has procured the transfer to be made to a person of small means as trustee for him,[5] or even to an infant,[6] cannot be put on the list of contributories, for there is no privity between him and the company.

The holders of shares forfeited more than a year before the commencement of the winding up cannot be placed on the list of contributories, even if they remain liable for calls

[1] *Re* Cornwall Brick Co., [1893] W. N. 9.
[2] *Re* E. J. Wragg, [1897] 1 Ch. 801.
[3] Tennent *v.* Glasgow Bank, [1879] 4 App. Ca. 615.
[4] See pages 49 and 152, *supra.*
[5] King's Case, [1871] 6 Ch. 196.
[6] Massey and Giffin's case, [1907] 1 Ch. 582.

made before the forfeiture,[1] nor can the company[2] or the liquidator[3] under the common form of Articles annul the forfeiture without the consent of the member so as to make him a contributory; but if the forfeiture was within a year of the winding up he may be placed on the "B" List.[4] An irregular forfeiture or surrender of shares, however, does not become valid by lapse of time.[5]

In the case of transfers, if a transfer has not been completed by registration the transferor remains a member and must be put on the "A" List of Contributories. If the transfer has been completed by registration less than a year before the commencement of the winding up, the transferor should be put on the "B" List, even if the shares have in the meantime been forfeited.[6]

Where shares are fully paid there is no occasion to put past members on the "B" List, for only the liability of the holders is affected thereby.

The liability of the "B" contributories (past members) is limited (A) to the amount remaining unpaid on the shares they previously held, after exhausting all means of obtaining payment from the present holders; and (B) to the amount required to pay the debts contracted while they were members, after taking credit against such debts for the amounts paid out of the assets and calls on present members, the unsecured debts of whatever date ranking equally against such assets and calls.[7] There is no rule that either set of

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[1]Needham's Case, [1867] 4 Eq. 135; Ladies' Dress Association *v.* Pulbrook, [1900] 2 Q. B. 376.

[2]*Re* Exchange Trust, [1903] 1 Ch. 711.

[3]Dawes's Case, [1868] 6 Eq. 232.

[4]Creyke's Case, [1870] 5 Ch. 63.

[5]Esparto Trading Co., [1879] 12 Ch. D. 191; Bottomley's Case, [1881] 16 Ch. D. 681; Bellerby *v.* Rowland & Marwood's Steamship Co., [1902] 2 Ch. 14.

[6]Badger and Neill's Case, [1869] 4 Ch. 266.

[7]Brett's Case and Morris's Case, [1873] 8 Ch. 800.

contributions is to be applied rather to one set of debts than the other.[1]

Calls in a Liquidation.

When a company is ordered to be wound up, the powers of the directors to make calls cease, the liquidator alone being able to do so; and the Court cannot enable the receiver in a debenture holder's action, or any other person, to make calls.[2]

When the list of contributories is prepared, the liquidator having, if the winding up is by the Court, first obtained the sanction of the Court, must make such calls upon the persons for the time being settled on the list of contributories, whose shares are not fully paid, as he deems necessary for paying the costs of the winding up and the debts of the company.[3] He may make calls in the aggregate exceeding the amount required if he has reason to think that the contributories will not all pay up in full (Section 212 and Section 230 (*e*)), or he may enforce a call previously made by the directors,[4] but the simpler course is to make a new call, unless interest has accrued in respect of calls made before the liquidation.

The liquidator should make calls in respect of any shares supposed to be fully paid, but which are not in fact properly protected (such as shares issued at a discount and shares for which the company has not received valuable consideration).[5] If he does not make such calls he is not in a position to enforce payment against the contributories,

[1]Webb *v.* Whiffin, [1871] L. R. 5 H. L. 711.

[2]Fowler *v.* Broad's Patent Night Lights Co., [1893] 1 Ch. 724.

[3]Even if debts disputed (Contract Corporation, [1867] 2 Ch. 95).

[4]Stone *v.* City and County Bank, [1878] 3 C. P. D 282; Westmoreland Slate Co. *v.* Fielden, [1891] 3 Ch. 15.

[5]Welton *v.* Saffery, [1897] App. Ca. 299; Weymouth and Channel Islands Steam Packet Co., [1891] 1 Ch. 66.

although he may obtain a declaration of their liability to pay what may be called, and subsequently when the call is made he will be able by fresh proceedings to enforce it.[1]

The liability to contribute in a winding up is a liability created by Statute (Section 184), and takes the place of the liability which previously existed under the Articles of Association to pay calls when made by the directors.[2] Accordingly the liability cannot be affected or controlled by the Articles or by contract with the company, nor do the provisions of the Articles as to interest during default bind the contributory.[3] Moreover, the Statute of Limitations runs from the time the liquidator makes the call, and even when a call made by the directors is Statute barred the liquidator can enforce a call made by himself.

The amount called is "a debt of the nature of a specialty accruing due from him at the time when his liability commenced,[4] but payable at the times when calls are made" by the liquidator (Section 184).

From this it follows that if a company is indebted to one of its members, and before the winding up the member assigns the debt to a stranger, the company can only set off against the debt calls made previously to notice of the assignment,[5] but if the winding up precedes the notice of assignment the company can, by virtue of this section, set off calls made subsequently.[6]

In making calls, the liquidator is not bound by any agreement which may have been made between the members and the company, and he may call up the amount unpaid

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[1] *Re* E. J. Wragg, [1897] 1 Ch. 802.
[2] Burgess's Case, [1880] 15 Ch. D. 507.
[3] Welsh Flannel Co., [1875] 20 Eq. 360.
[4] That is when the contributory first contracted to become a member (*ex parte* Canwell, [1866] 4 De G. J. & S. 539; Williams *v.* Harding, [1866] L. R. 1 H. L. 29; *ex parte* Hatcher, [1879] 12 Ch. D. 284).
[5] Christie *v.* Taunton & Co., [1893] 2 Ch. 175.
[6] China Steamship Co., [1869] 7 Eq. 240.

with greater rapidity than the prospectus and Articles would have allowed the directors to do.[1]

Calls may be made, after all the debts have been paid, for the purpose of adjusting the rights of the contributories among themselves, and for this purpose holders of fully paid shares must be deemed to be contributories.[2] Thus, if, after the debts are paid and the assets are exhausted, some members have paid up twenty dollars per share and others only ten dollars, a call must be made upon the latter to raise such a sum as will, when returned to the members of the former class, make the amounts paid up equal.[3] In a voluntary liquidation directors (if any) may enforce the calls by forfeiture or sale of the shares, and if there are no directors the company may meet and elect directors for that purpose.[4]

If proof is given that there is probable cause for believing that a contributory is about to abscond or remove or conceal his goods for the purpose of avoiding payment of calls, or avoiding examination in respect of the affairs of the company, the Court may order him to be arrested, and his books, moneys, and goods seized and kept (Section 222). This power is seldom used, but has been resorted to in the case of a director.[5]

Inspection of Books and Papers of Company.

In a winding up by or under the supervision of the Court creditors and contributories may obtain an order allowing them to inspect the books and papers in the possession of the company (Section 258). In a voluntary winding up they may apply to the Court for the same

[1]Cordova Union Gold Co., [1891] 2 Ch. 580.

[2]Anglesea Colliery Co., [1866] 1 Ch. 555; *ex parte,* Maude, [1871] 6 Ch. 51.

[3]See *ex parte* Maude, [1871] 6 Ch. 51; Anglo-Continental Corporation, [1898] 1 Ch. 327.

[4]Ladd's Case, [1893] 3 Ch. 453.

[5]Imperial Mercantile Credit Co., [1868] 5 Eq. 264.

purpose under Section 237. The order is rarely refused unless special circumstances exist. On the commencement of a winding up the right which previously existed of inspecting the Register of Members under Section 41 and the Register of Mortgages under Section 109 ceases.[1]

EXAMINATION OF DIRECTORS AND OTHER PERSONS.

In the course of collecting the assets of the company the liquidator is assisted in obtaining information by the provisions of Sections 220 and 221. The former allows the private examination of any persons capable of giving information concerning the affairs of the company; the latter, which is only available in a compulsory winding up, is a more or less penal proceeding against promoters, directors, and officers of the company who appear from the Liquidator's report to have been guilty of wrongdoing. From the information acquired in these proceedings, as well as from the papers and documents of the company, and information obtained from third parties, the liquidator will learn whether he has good ground for taking proceedings for the recovery of any property of the company or damages from its officers for any misfeasance.

Public Examination.

By Section 221 "the Court may, after consideration of the report, direct that any person who has taken any part in the promotion or formation of the company, or has been a director or officer of the company, shall . . . . be publicly examined as to the promotion or formation or the conduct of the business of the company, or as to his conduct and dealings as director or officer thereof." There are no similar provisions in the case of a voluntary winding up.

[1]Kent Coalfields Syndicate, [1898] 1 Q. B. 754; Somerset *v.* Lands Securties Co., [1897] W. N. 29.

The liquidator and any creditor or contributory may take part in the examination personally or by solicitor or counsel (Section 221, Sub-sections 2 to 4), and the Court may put questions.

The examination shall be on oath, and the person examined is bound to answer all questions which the Court shall allow. A person to be examined is entitled, at his own expense, to have, prior to the examination, a copy of the report of the Liquidator, and to employ a solicitor, with or without counsel, who may re-examine him "for the purpose of enabling him to explain or qualify any answers given by him." In practice the Registrar allows in re-examination questions to elucidate any matter fairly arising, and permits witnesses to explain or deny suggestions made against them during the evidence of other persons.

There is no definition of the word "officers." It has been held by the Court of Apppeal that auditors are officers,[1] and the secretary has frequently been reported and examined. Whether such persons as accountants, cashiers, or persons managing agencies are officers is very doubtful.

The examination is a roving inquiry, not confined to a pre-determined issue so long as it relates to "the promotion or formation or the conduct of the business of the company," or as to the conduct and dealings of the person examined "as director or officer thereof." Aggrieved shareholders may seek to obtain information that will be useful in case of future litigation. But the Court will not allow the defendants in an action brought by the company to seek to obtain admissions from directors to be used against the company,[2] and in a case of pending litigation would probably

[1]London and General Bank, [1895] 2 Ch. 116, followed, but doubted, in Kingston Cotton Mill Co. No. 1, [1896] 1 Ch. 6.

[2]*Re* London and Globe Finance Corporation, [1902] W. N. 16, 50 W. R. 253.

also protect the witness against questions prejudicing his case.

Private Examination.

Under Section 220 the Court may, after making an order for the winding up of a company, summon "any officer of the company or person known or suspected to have in his possession any property 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, affairs, or property of the company," and may examine him on oath, and require him to subscribe a note of his evidence. The Court may require him to produce any books and papers in his custody or power relating to the company, but if he has a lien this is without prejudice to such lien, as to which the Court has jurisdiction to determine all questions[1] (Section 220, Sub-section 3). In a voluntary winding up a similar order may be obtained, for Section 237 authorises the Court to exercise all the same powers as in a compulsory winding up. The Court may order a recalcitrant witness to be apprehended and brought before the Court for examination (Section 220, Sub-section 4).

It will be observed that strangers to the company may thus be examined if they are deemed capable of giving useful information. An order for such an examination may be obtained by the liquidator, or a creditor or contributory, but the Court has a discretion to make or refuse the order.

The liquidator's application may be made *ex parte* and without affidavit. It is doubtful whether the party ordered to be examined has any right to appeal,[2] and at all events the Court of Appeal will not interfere with the Judge's

[1]The mere reservation of his lien does not give the solicitor any right or priority which he would not otherwise have had (Rorie *v.* Stevenson, [1908] S. C. 559 Court of Sess).

[2]*Re* Gold Co., [1879] 12 Ch. D. 77. Compare North Australian Territory Co., [1890] 45 Ch. D. 87.

discretion unless there has been a serious miscarriage of justice,[1] or unless the application is oppressive.[2] The order will not be made on the application of a creditor or contributory without strong grounds being shown,[3] and a dissentient member will not be allowed to use this procedure to obtain evidence for valuing his interest in the company.[4] Notice of the application by a creditor or contributory should first be given to the liquidator; and even if the order is made an undertaking may be required from the person obtaining the order not to disclose the information obtained in the examination.[5] The procedure is freely used with a view to ascertaining the means of contributories, and whether or not transactions by directors have been irregular.

The examination is a "proceeding in the Supreme Court," and the Court has jurisdiction to order the person on whose application the examination was ordered to pay the personal expenses and costs of the persons examined.[6]

A witness is entitled to require a reasonable sum for his expenses (Section 220, Sub-section 4).

The witness must give all the information in his power, including matters of hearsay,[7] and can only refuse to answer questions on the ground that they might tend to incriminate him, or on the ground of professional privilege.[8] He must produce any documents which are in his custody or control and are asked for.

The examination is conducted by the liquidator or the person to whom the Court grants the order. The Court,

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[1] *Re* Joseph Hargreaves, Limited, [1900] 1 Ch. 347.
[2] Heiron's Case [1880] 15 Ch. D. 139.
[3] Imperial Continental Water Corporation, [1886] 33 Ch. D. 314; Heiron's Case, [1880] 15 Ch. D. 139; Whitworth's Case, [1882] 19 Ch. D. 118.
[4] British Building Stone Co., [1908] 2 Ch. 450.
[5] *Re* Hemp, Yarn, and Cordage Co., [1896]: unreported.
[6] Appleton, French and Scrafton, Limited, [1905] 1 Ch. 749.
[7] Ottoman Co., [1867] 15 W. R. 1069.
[8] Silkstone and Dodworth Coal and Iron Co., [1882] 19 Ch. D. 121.

however, may disallow any question which it considers ought not to be put.[1] Any other person who has leave to take part in the examination may, subject to the directions of the Registrar, put any questions he may think fit. In either case counsel or a solicitor may be employed, and the witness may be represented by counsel or solicitor, who may re-examine him.[2]

A summons is the proper method of securing the attendance of a witness.[3] A witness who fails to attend may be apprehended,[4] or an order be made that he do attend and pay the costs occasioned by his default;[5] failure to obey such an order is punishable as contempt.

COLLECTING THE ASSETS.

By Section 198, Sub-section 1, "in a winding up by the Court the liquidator shall take into his custody, or under his control, all the property and things in action to which the company is or appears to be entitled," and this is one of the powers exercisable by a voluntary liquidator under Section 230 (*d*).

Section 210 empowers the Court to "require any contributory for the time being settled on the list of contributories, and any trustee, receiver, banker, agent, or

[1] North Australian Territory Co., [1890] 45 Ch. D. 87. An officer of a company in liquidation was compelled to answer questions as to what he had done with the company's documents, though such questions tended incidentally to defeat a claim of privilege raised by a third party in an action brought against him by the company (*re* London and Northern Bank, [1901] 18 T. L. R. 130, 206); but the solicitor to the third party, who had documents belonging to the company in his possession, successfully claimed privilege when asked from whom he had received them (*re* London and Northern Bank, [1901] 18 T. L. R. 403). But *semble* the solicitor's principal is not protected (*re* London and Northern Bank, [1901] 18 T. L. R. 537). See also the same case, 85 L. T. 698, 50 W. R. 262.

[2] Cambrian Mining Co., [1882] 20 Ch. D. 376.

[3] English Joint Stock Bank, [1867] 3 Eq. 203; Credit Co. *v.* Webster, [1885] 53 L. T. 420.

[4] Haven Gold Mining Co., *per* Bacon, V. C., 30th May, 1884.

[5] Trower and Lawson's Case, [1872] 14 Eq. 8; Lisbon Steam Tramway, [1876] 2 Ch. D. 575; Silkstone and Dodworth Coal and Iron Co., Whitworth's Case, [1881 50 L. J. Ch. 752 ,30 W. R. 33.

officer of the company to pay, deliver, convey, surrender, or transfer forthwith, or within such time as the Court directs, to the liquidator any money, property, or books and papers in his hands to which the company is *primâ facie* entitled."[1]

Under the above section of the Act the Court has ordered a director to deliver possession of a colliery which he had agreed to sell to the company,[2] and a receiver for debenture holders to hand over such of the books of the company as were not necessary for establishing the title of the debenture holders.[3] But the section must not be strained to bring within them persons who are not within the express words: *e.g.* ordinary debtors or persons who have indirectly obtained moneys of the company.[4]

In cases not within Section 210 the liquidator must resort to an action at law under Section 199 which empowers him "to bring or defend any action or other legal proceeding in the name and on behalf of the company;" but he must in a compulsory winding up first obtain the sanction of the Court, or that of the committee of inspection (if any).

It is to be noted that the power of the Court under Section 213 to order contributories or purchasers or other persons from whom money is due to pay sums due from them into some chartered bank to the account of the liquidator is not by the Act conferred on the liquidator; but he may of course apply to the Court to make such an order.

When property is received by the liquidator or comes under his control he may, with the consent of the Court, or of the committee of inspection (if any), sell it by public

[1]In a voluntary winding up the liquidator can apply to the Court under Section 237 to enforce this right.

[2]Oakwell Collieries Co., [1879] W. N. 65.

[3]Engel *v.* South Metropolitan Brewing Co., [1892] 1 Ch. 442.

[4]United English and Scottish Assurance Co., [1868] 3 Ch. 787; Imperial Land Co. of Marseilles, [1870] 10 Eq. 298.

auction or private contract, and either together or in parcels (Section 199). In a voluntary winding up the liquidator can sell without obtaining any sanction (Section 230 (*d*)).

Section 210, requiring the delivery over of money, property, and books, does not apply in a voluntary winding up; but the liquidator can apply to the Court under Section 237 to exercise these powers.

PROCEEDINGS AGAINST DELINQUENT DIRECTORS, PROMOTERS, AND OFFICERS.

Proceedings against directors, promoters, and officers may be taken by the liquidator or any creditor or contributory under Section 254, which refers to every manner of winding up.

Under this section the liquidator is the proper person to apply for the recovery of money or damages payable to the company. It was, however, doubted in one case whether the liquidator could claim the repayment of dividends paid out of the capital, and to meet the difficulty a creditor was added as co-applicant,[1] but now there seems to be no such doubt.[2] It often happens, moreover, that the liquidator, before taking any steps, requires a satisfactory indemnity, and failing this will not move in the matter. If the liquidator does not take proceedings any creditor or contributory may apply, provided that the state of the assets is such that a benefit will result to the applicant from a successful issue of the proceedings. Thus, in the case of a company whose assets (including what was recovered on the summons) would suffice to pay only a dividend to creditors, a contributory would have no *locus standi* to apply.[3]

This section does not create any new liability on the persons named, but only provides a method of enforcing

[1] *Re* National Funds Assurance Co., [1879] 10 Ch. D. 118.
[2] *Re* National Bank of Wales, [1899] 2 Ch. 650.
[3] Bentinck *v.* Fenn, [1888] 12 App. Ca. 652.

rights which might have been enforced by an action before the winding up, and which even after the winding up may, if more convenient, be so enforced.[1]

But the word "misfeasance" does not cover every misconduct by an officer of the company as such, for which he might have been sued apart from the section; for the section only refers to the recovery of assets. It "means misfeasance in the nature of a breach of trust: that is to say, that it refers to something which the officer has done wrongly by misapplying or retaining in his own hands any money of the company, or by which the company's property has been wasted or the company's credit improperly pledged; it must be something resulting in actual loss to the company,"[2] and elsewhere it has been defined as consisting of any breach of duty (*e.g.* negligence) of an officer, in his capacity as officer, which results in an improper application of the assets or property of the company,[3] including property which ought to have come to the company, but has been intercepted, for "money had and received for the use of the company may in equity, without impropriety, be called money of the company."[4]

Proceedings under this section may be taken against all or any of the persons named for any misfeasance resulting in loss of assets to the company. Accordingly, a promoter who has made a secret profit can be compelled to repay it,[5] and where the directors participated in the profit, the fact that they knew of it does not protect the promoter if the

[1]Coventry and Dixon's Case, [1880] 14 Ch. D. 660, 670.

[2]Coventry and Dixon's Case, [1880] 14 Ch. D. 660, 670; Bentinck *v.* Fenn, [1888] 12 App. Ca. 652.

[3]Kingston Cotton Mill Co. No. 2, [1896] 2 Ch. at page 288, where auditors who failed to use reasonable skill and care were held to be within the section. This is nonfeasance rather than misfeasance.

[4]Sale Hotel and Botanical Gardens, [1898] 78 L. T. 368.

[5]Gluckstein *v.* Barnes, [1900] App. Ca. 240; Leeds and Hanley Theatres of Varieties, [1902] 2 Ch. 809.

shareholders were ignorant of it,[1] even though they might have discovered it by reading the contracts referred to in the prospectus.[2] But if a promoter has disclosed that he is re-selling at a profit property he has recently acquired, he is not liable to account for such profit even though the amount of it was concealed,[3] unless he was promoter at the time when he acquired the property.[4]

Directors may be ordered to repay moneys improperly paid to a promoter,[5] or money paid to a contractor for an improper purpose,[6] or for underwriting the capital in an unlawful manner,[7] or the amount of shares issued as fully paid under the pretence that they were part of the purchase consideration but were in fact promotion money,[8] or moneys paid by way of fraudulent preference of creditors,[9] or the discount at which shares have been issued if by reason of the subsequent sale of the shares the holders are not liable to calls.[10]

The section may also be used to procure the repayment of moneys improperly received by directors, officers, or agents of the company, as, *e.g.*, remuneration improperly received by the directors;[11] commission taken from persons doing business with the company, or presents made

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[1]Erlanger *v.* New Sombrero Co., [1879] 3 App. Ca. 1218; Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392.

[2]*Re* Sale Hotel Co., [1897] W. N. 175; Olmypia, Limited, [1898] 2 Ch. 153, [1900] App. Ca. 240, *sub. nom.* Gluckstein *v.* Barnes.

[3]Lady Forrest (Murchison) Gold Mine, [1901] 1 Ch. 582, where the earlier cases are discussed. Compare Burland *v.* Earle, [1902] App. Ca. 98.

[4]Gluckstein *v.* Barnes, [1900] App. Ca. 240; Ladywell Mining Co. *v.* Brookes, [1887] 35 Ch. D. 400.

[5]*Ex parte* Pelly, [1882] 21 Ch. D. 492.

[6]London Trust Co. *v.* Mackenzie, [1893] W. N. 9

[7]Faure Electric Accumulator Co., [1889] 40 Ch. D. 141.

[8]Bland's Case, [1893] 2 Ch. 612.

[9]Washington Diamond Co., [1893] 3 Ch. 95.

[10]Hirsche *v.* Sims, [1894] App. Ca. 654.

[11]Rance's Case, [1871] 6 Ch. 104; Brighton Brewery Co., Hunt's Case, [1868] 37 L. J. Ch. 278, 16 W. R. 472; Merchants' Fire Office *v.* Armstrong, [1901] W. N. 163.

by promoters;[1] profits made by purchasing shares from the vendor below par;[2] and where a promoter agreed to purchase the directors' qualification at par, and did so, the director was held liable to account to the company for the money so received.[3] Where several directors receive secret profits, knowing of the gifts to each other, they are jointly and severally liable for the aggregate amount received by them all.[4]

A director of a company who has received moneys of the company which it was *ultra vires* for it to pay to him can be made to repay at the instance of the liquidator or creditors, although all the directors and shareholders knew and approved of the payment.[5] But it is otherwise if the payment was *intra vires*.[6]

If all the directors accept gifts from the promoter, the knowledge that the others are receiving benefits does not form a protection to each; the profit is still secret and improper as regards the company.[7]

In cases of receiving benefits from promoters or vendors complete disclosure of the facts in the prospectus will protect the directors from liability to repay;[8] but a partial disclosure in a prospectus which is misleading will not suffice.[9]

[1]London and Provincial Starch Co., [1869] 20 L. T. 390; Oxford Benefit Building Society, [1887] 35 Ch. D. 502; Carriage Co-operative Supply Association, [1884] 27 Ch. D. 322; Pearson's Case, [1877] 5 Ch. D. 336; Hay's Case, [1875] 10 Ch. 593; De Ruvigne's Case, [1877] 5 Ch. D. 306; Englefield Colliery Co., [1878] 8 Ch. D. 388; Metcalfe's Case, [1880] 13 Ch. D. 169. [2]Weston's Case, [1879] 10 Ch. D. 579.

[3]Archer's Case, [1892] 1 Ch. 322.

[4]Carriage Co-operative Supply Association, [1884] 27 Ch. D. 322.

[5]*Re* George Newman & Co., [1895] 1 Ch. 674. But see Innes & Co., [1903] 2 Ch. 254.

[6]*Re* British Seamless Paper Box Co., [1881] 17 Ch. D. 467.

[7]Carriage Co-operative Supply Association, [1884] 27 Ch. D. 322; Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392; Gluckstein *v.* Barnes, [1900] App. Ca. 240.

[8]*Re* Postage Stamp Automatic Delivery Co., [1892] 3 Ch. 566.

[9]*Re* Olympia, Limited, [1898] 2 Ch. 153; [1900] App. Ca. 240, *sub nom.* Gluckstein *v.* Barnes; Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392.

Where directors have improperly received a gift of shares from the promoter the liquidator may claim either the shares or their value at par or their highest value during the time the directors have held them;[1] but the market prices are not necessarily conclusive, and the circumstances of the case must be considered.[2] The company, however, cannot follow the proceeds of any shares sold by the delinquent so as to take the profit he has subsequently made by the use of the money.[3]

Under this section damages may be recovered in respect of a wilful sale of the assets of the company at less than their proper value,[4] and damages in respect of frauds upon the company in its formation or promotion. But a director cannot be made to account for profits made upon a re-sale to the company of property purchased by him on his own account and without mandate from the company, even though he purchased the property with a view to such re-sale and re-sold it without disclosing his interest.[5] Where the purchase price is swollen by fully paid shares to be used for gifts to the directors, the directors cannot be put on the list of contributories as holders of shares not fully paid up;[6] and although in a public company if the gift was secret or not disclosed in the prospectus the directors could be made liable for a misfeasance in accepting the shares,[7] in a private

[1]Eden *v.* Ridsdale's Railway Lamp and Lighting Co., [1889] 23 Q. B. D. 368; *re* Postage Stamp Automatic Delivery Co., [1892] 3 Ch. 566; Metcalfe's Case, [1880] 13 Ch. D. 169; McKay's Case, [1876] 2 Ch. D. 1; Ormerod's Case [1887] 37 L. T. 244, 25 W. R. 765.

[2]Shaw *v.* Holland, [1900] 2 Ch. 305.

[3]Lister & Co. *v.* Stubbs, [1890] 45 Ch. D. 1.

[4]New Travellers' Chambers, [1895] 12 Times L. R. 529; Park Gate Wagon Co., [1881] 17 Ch. D. 239.

[5]Burland *v.* Earle, [1902] App. Ca. at page 98. The company can rescind such a contract if it is in a position to restore the property.

[6]Carling's Case, [1876] 1 Ch. D. 115; Innes & Co., [1903] 2 Ch. 254.

[7]See cases cited in last note. The same rule applies where there is an offer of shares to the public, even if none are in fact taken by persons ignorant of the gift (Postage Stamp Automatic Delivery Co., [1892] 3 Ch. 566; Telescriptor Syndicate, [1903] 2 Ch. 175).

company, where all parties had full knowledge of the facts, no liability attaches either to the vendor or the directors.[1]

The section can also be used to compel directors to make good, with interest to the company, the whole amounts of dividends improperly declared[2] or paid where there are no profits,[3] for no distinction is made as regards liability between the case of dividends improperly received by the directors themselves and those paid to other shareholders;[4] but there is the difference that the Statute of Limitations is a protection in regard to dividends paid to others, but not in regard to those taken by the directors,[5] and, further, if the shareholders received their dividends with knowledge that they were paid out of capital, they will be liable to indemnify the directors to the extent to which they have respectively received such dividends,[6] for which reason it is often made a term of the order that it shall be without prejudice to the directors right to recover from the shareholders,[7] and it has been suggested that an order will not be made against the directors if the only result would be to pay again to shareholders the dividends they have already received,[7] but it is to be noted that with a fluctuating body of shareholders this will seldom be the case even in a solvent company.

The directors will, however, escape liability for the repayment of dividends if it appears that they had a *bonâ fide* and reasonable belief that there were profits available for

[1] *Re* British Seamless Paper Box Co., [1881] 17 Ch. D. 467; Innes & Co. [1903] 2 Ch. 254.

[2] Stringer's Case, [1869] 4 Ch. 475; National Funds Assurance Co., [1879] 10 Ch. D. 118; Oxford Benefit Building Society, [1887] 35 Ch. D. 502; London and General Bank, [1895] 2 Ch. 166, 673.

[3] *Re* Sharpe and Bennett, [1892] 1 Ch. 154; National Bank of Wales,, [1899] 2 Ch. 650.

[4] Flitcroft's Case, [1882] 21 Ch. D. 536.

[5] National Bank of Wales, [1899] 2 Ch. 663.

[6] Moxham *v.* Grant, [1900] 1 Q. B. 88.

[7] Alexandra Palace Co., [1883] 20 Ch. D. 149; National Funds Assurance Co., [1879] 10 Ch. D. 118.

the payment of the dividends, and for this purpose it has been held that they are justified in relying upon the reports and valuations of trusted officers of the company,[1] and are not liable if book debts believed to be good prove bad;[2] but they must exercise their discretion in good faith.[3]

A director who took shares in the names of his infant children, although in the special circumstances not liable as a contributory, was ordered to pay the amount of the calls as damages under this section.[4]

Where money is lost to the company through an error of judgment of the directors, it cannot be recovered either under this section or by action.[5] It has even been said that directors have never been held liable for negligence unless it has been so gross as practically to amount to fraud, but although in some cases it has been suggested that it is necessary to show gross negligence,[6] on other occasions the phrase has been objected to as meaningless.[7] The true test appears to be that first a duty must be shown, and then that that duty has been neglected to the detriment of the company, and the charge has more often failed by reason of the difficulty in showing what has been the duty neglected than by inability to prove the neglect. On both points all the circumstances surrounding the acts and the common practice of business men have to be considered. For instance, directors must not be treated as if they were

[1]Rance's Case, [1871] 6 Ch. 118; Denham & Co., [1883] 25 Ch. D. 766; Dovey *v.* Cory, [1901] App. Ca. 35. Compare Kingston Cotton Mill Co. No. 2, [1896] 2 Ch. 288.

[2]City of Glasgow Bank *v.* Mackinnon, [1882] 9 Court of Sess. Ca., 4th Seri s 602.

[3]New Mashonaland Syndicate, [1892] 3 Ch. 577.

[4]*Re* Crenver &c. Co., *ex parte* Wilson, [1873] 8 Ch. 45.

[5]Overend, Gurney & Co., *v.* Gibb, [1872] L. R. 5 H. L. 480; Dovey *v.* Cory, [1901] App. Ca. 477; New Mashonaland Syndicate, [1892] 3 Ch. 577.

[6]Turquand *v.* Marshall, [1869] 4 Ch. 376; Overend, Gurney & Co. *v.* Gibb, [1872] L. R. 5 H. L. 480. Compare Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392.

[7]Wilson *v.* Brett, [1843] 11 M. & W. 115.

accountants knowing and understanding all that the books would show if carefully investigated, nor are they liable if deceived by the fraud of others whom they might reasonably trust,[1] nor must auditors be treated as persons able to value the stock-in-trade of the company.[2]

Non-attendance at board meetings is not such negligence as to create a liability.[3]

By Section 293, if in any proceeding against a director for negligence or breach of trust it appears that he may be liable, but has acted honestly and reasonably and ought fairly to be excused, the Court may relieve him either wholly or partly from his liability on such terms as the Court may think proper.

The directors or others who are wrongdoers will be declared to be jointly and severally liable for the repayments ordered to be made:[4] *e.g.* auditors whose default has led to a payment of dividend out of capital may be declared liable both severally and jointly with the directors.[5]

Persons who are *de facto* officers (*e.g.* directors or auditors) are liable under this section, although their appointment may have been irregular.[6]

The secretary is an officer of the company, and will be ordered to repay the value of the bonus shares given him by the vendor to the company[7] unless he makes full disclosure to the company.[8] The manager, liquidator, and "any person who has taken part in the formation or promotion of the

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[1]Dovey *v.* Cory, [1901] App. Ca. 477; Prefontaine *v.* Grenier, [1907] App. Ca. 101.

[2]Kingston Cotton Mill Co. No. 2, [1896] 2 Ch. 283.

[3]Marquis of Bute's Case, [1892] 2 Ch. 100.

[4]Flitcroft's Case, [1882] 21 Ch. D. 519; Carriage Co-operative Supply Association, [1884] 27 Ch. D. 322.

[5]London and General Bank No. 2, [1895] 2 Ch. 673.

[6]Coventry and Dixon's Case, [1880] 14 Ch. D. 660; Gibson *v.* Barton, [1875] L. R. 10 Q. B. 329; *re* Western Counties Steam Bakeries Co., [1897] 1 Ch. 617.

[7]McKay's Case, [1876] 2 Ch. D. 1.

[8]*Re* Sale Hotel Co., *ex parte* Hesketh, [1898] 78 L. T. 368.

company," are expressly mentioned in Section 254, and may accordingly be rendered liable for any misfeasance.

The trustees for debenture holders are not, it seems, officers for the purpose of this section.[1]

Neither the bankers nor the solicitors of a company are officers within the meaning of this section,[2] unless the solicitors have other duties and occupy a different position from that of purely legal advisers;[3] but if they have in their possession money or property of the company, it may be recovered from them under Section 210. A trustee in whose name funds are or ought to be invested is also within the section.[4]

In the case of the death of a director or other person in the position of a trustee, his estate remains liable for any breach of trust (including payment of dividends out of capital) he may have committed,[5] but not for negligence,[6] or trespass,[7] or deceit, unless his estate has benefited by the fraud;[8] for these are personal actions which die with the person. Proceedings against executors must be by action and not by summons under the section.[9] Where some of the directors have died, proceedings may be taken or continued against the survivors under the section.[10]

After the lapse of six years either The Trustee Act R.S. B.C. 1911 (Section 84) or the Statute of

[1]Astley *v.* New Tivoli, Limited, [1899] 1 Ch. 151, 154.
[2]*Re* Imperial Land Co. of Marseilles, [1870] 10 Eq. 208; Carter's Case, [1886] 31 Ch. D. 496.
[3]*Re* Liberator Permanent Benefit Building Society, [1894] 71 L. T. 406.
[4]British Guardian Co., [1880] W. N. 63; reported on the other points, [1880] 14 Ch. D. 335.
[5]Erlanger *v.* New Sombrero Phosphate Co., [1879] 3 App. Ca. 1211; Ramskill *v.* Edwards, [1886] 31 Ch. D. 100; *re* Sharpe, [1892] 1 Ch. 154.
[6]Overend, Gurney & Co., *v.* Gibb, [1872] L. R. 5 H. L. 480.
[7]Phillips *v.* Homfray, [1883] 24 Ch. D. 439; where the rule *Actio personalis moritur cum persona* is fully discussed.
[8]Peek *v.* Gurney, [1874] L. R. 6 H. L. 377.
[9]Felton's Executors' Case [1866] 1 Eq. 219; British Guardian Co., [1880] 14 Ch. D. 335.
[10]British Guardian Co., [1880] 14 Ch. D. 335.

Limitations forms a bar to proceedings for misfeasance, unless the claim is founded upon any fraud or fraudulent breach of trust, or is to recover trust property, or the proceeds thereof, still retained by the respondent or previously received by him and converted to his use,[1] including dividends received by the directors personally out of capital;[2] for the persons charged must be either trustees, when they get the benefit of The Trustee Act, R.S. B.C. 1911, or not trustees, when they are protected by the Statute of Limitations. But if there is a concealed fraud the Statute will not run until it is discovered[3] or the company has made an investigation of the facts and come to a conclusion not to take proceedings.[4]

The persons ordered under this section (254) to make payments to the liquidator cannot set off other claims which they may have against the company;[5] and third parties cannot be brought in under a third party notice.[6]

ORDER OF APPLICATION OF FUNDS IN WINDING UP.

The secured creditors of a company (debenture holders and mortgagees) can realise their security either under power of sale or by application to the Court, and are outside the liquidation, except so far as any balance remains due after their security is exhausted, for which balance they may prove as unsecured creditors.

They therefore are thus paid, so far as their security extends, in priority even to the costs of liquidation, but this

[1]Lands Allotment Co., [1894] 1 Ch. 617; National Company for the Distribution of Electricity, [1902] 2 Ch. 34; and Trustee Act, R.S.B.C. 1911, section 84.

[2]*Re* National Bank of Wales, [1899] 2 Ch. 629.

[3]Gibbs *v.* Guild, [1882] 9 Q. B. D. 59; North American Land Co. *v.* Watkins, [1904] 1 Ch. 242, and 2 Ch. 233.

[4]Metropolitan Bank *v.* Heiron, [1880] 5 Ex. D. 319.

[5]Anglo-French Co-operative Society, *ex parte* Pelly, [1882] 21 Ch. D. 402; Flitcroft's Case, [1882] 21 Ch. D. 519; Milan Tramways Co., [1884] 25 Ch. D. 587; Leeds and Hanley Theatres of Varieties, [1904] 2 Ch. 45.

[6]Land Securities Co., [1895] 2 Mans. 127.

is because the payment is not made as part of the liquidation.

If the liquidator is also receiver for debenture holders or other secured creditors, or if the secured creditors do not take possession of the property charged but allow the liquidator to realise it, he will in the first instance deduct the costs of realisation, including his own remuneration *as receiver*, and then pay over to the parties entitled the moneys realised in respect of the property charged, retaining the balance (if any) to be dealt with in the winding up. If some other person is receiver for the secured creditors, such receiver will be bound to hand to the liquidator the balance after satisfying the rights of the secured creditors and the costs of realisation. It is with this balance alone that the liquidator can deal.

Out of the moneys to be disposed of by the liquidator he must make payments in the following order:—

1. The Costs of Liquidation, including his own remuneration.
2. The Debts having a Priority in Law.
3. The Ordinary Debts.
4. The Balance will be distributable among the contributories.

1. *The Costs of Liquidation.*

(*a*) *In a Winding Up by the Court.*—By Section 217 in the case of a compulsory liquidation "the Court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the costs, charges, and expenses incurred in the winding up in such order of priority as the Court thinks just."

(*b*) *In a Voluntary Winding Up.*—In this case the costs are governed by Section 240, which is as follows:—

240. All costs, charges, and expenses properly incurred in the voluntary 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.

This means "in priority to all other claims" existing at the date of the winding up. If the liquidator, on behalf of the estate, incurs obligations, these must first be paid. Thus, costs of litigation ordered to be paid out of the assets rank before the costs of winding up,[1] and this section does not give the liquidator any priority over secured creditors, except in so far as he may be entitled in respect of matters of which the mortgagees have had the benefit,[2] *e.g.* expenses of collecting the estate for them.

If the assets are not sufficient to pay the bill of costs of the solicitor employed in the winding up, the liquidator is not personally liable to him.[3] But the costs of the liquidation come before the liquidator's remuneration, and if the assets are not sufficient to pay both in full the solicitor will take priority.[4]

2. *The Debts Having a Priority in Law.*

(*a*) By reason of the Crown not being named in the section staying actions and executions, priority is obtained for debts due to the Dominion and Provincial Governments.[5]

(*b*) By Section 250 priority is given to certain taxes assessed on the company up to the first day of January next before the specified day, and not exceeding in the whole one year's assessment; the wages or salary[6] of any clerk or servant[7] in respect

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[1] House Investment Co., [1880] 14 Ch. D. 167; Dominion of Canada Plumbago Co., [1884] 27 Ch. D. 33; London Metallurgical Co., [1895] 1 Ch. 758. [2] Regent's Canal Ironworks, [1876] 3 Ch. D. 411.

[3] Trueman's Estate, [1872] 14 Eq. 278; re Massey, [1870] 9 Eq. 367.

[4] *Re* Massey, [1870] 9 Eq. 367; Dronfield Silkstone Co., [1881] 23 Ch. D. 511.

[5] Compare Oriental Bank, [1885] 28 Ch. D. 673; West London Commercial Bank, 1888] 28 Ch. D. 364; Henley & Son, [1878] 9 Ch. D. 469; New South Wales Commissioners *v.* Palmer, [1907] App. Ca. 179.

[6] "Salary" includes commission to a traveller *re* Klein, [1906] W. N. 148; Eadle's Shipbuilding Co., [1901] W. N. 78).

[7] This does not include a managing director (Newspaper Proprietary Syndicate, [1900] 2 Ch. 349). It includes a secretary, in the ordinary course, but not one who does not give his whole time to the company and

of services rendered to the company during the three months next before the specified day, not exceeding two hundred and fifty dollars; and the wages of any labourer or workman in respect of services rendered to the company during three months before the specified day; payments due under The Workmen's Compensation Act, not exceeding in any one case five hundred dollars, the liability wherefor accrued before the specified day, but this does not apply if the company is being wound up voluntarily for the purpose of reconstruction or amalgamation. All the above rank equally (Sub-section 2). These payments also have a preference over the claims of holders of debentures or debenture stock under a floating charge created by the company, which preference attaches both in a winding up and when a receiver is appointed or possession taken on behalf of the debenture holders (Section 114 and Section 250, Sub-section 2).[1]

The specified day above referred to is, in the case of a compulsory order being made where the company is not already in liquidation, the date of the winding-up order, and in any other case (*i.e.* either the case of a liquidation wholly voluntary, or a liquidation continued under supervision, or a voluntary liquidation converted into a compulsory winding up) the date of the commencement of the winding up.[2]

performs his duties through clerks (Cairney *v.* Back, [1903] 2 K. B. 746). Under a special contract a singer in opera has been held to be a servant (*re* Winter Garden German Opera, [1907] 23 Times L. R. 662.)

[1] "Any payments made under this section shall be recouped as far as may be out of the assets of the company available for payment of general creditors" (Section 114, Sub-section 3). The right of recoupment is confined to payments made in respect of debts of the company due before the receiver goes into possession, including rates payable in advance (Mannesmann Tube Co., [190] 2 Ch. 93).

[2] Where a company in voluntary liquidation is ordered to be wound up by the Court the date of the commencement of the winding up is the presentation of the petition.

The preferential payments, subject to the retention of sufficient moneys to meet the costs of liquidation, are payable forthwith so far as the assets suffice (Section 250, Sub-section 3), but in case of a deficiency they abate in equal proportions (Sub-section 2).

If a landlord has distrained within one month before the date of the winding-up order,[1] the above preferential payments are a first charge on the goods or effects distrained on or the proceeds of sale, but the landlord becomes entitled to the same rights of priority as the person to whom the payment is made (Sub-section 4).

These are the only priorities recognised by law, and these priorities are only in the liquidation, so that, except so far as Section 114, above referred to, gives priority over floating charges, there is no priority over the claims of mortgagees or debenture holders, who are outside the liquidation.[2]

3. *The Ordinary Creditors.*

These are paid *pari passu,* the debts ranking for payment being those specified at page 456 *et seq.* A contributory who is also a creditor is not entitled to payment until his calls are paid (see page 460), but when all calls are paid he is not to be postponed to other creditors.[3] No sum due to a contributory in his character of a member by way of dividends, profits, or otherwise is to be deemed a debt so as to compete with the debts of other creditors (Section 182, Sub-section 1 (*g*)). So that, although while a company is a going concern a dividend which has been declared is a debt from the company, it is only payable in a liquidation if all the creditors have been satisfied.

[1]There is no similar provision as to a voluntary winding up.

[2]Richards *v.* Overseers of Kidderminster, [1896] 2 Ch. 212.

[3]*Re* West of England Bank, *ex parte* Brown, [1879] 12 Ch. D. 823; *ex parte* Welton, [1899] 1 Ch. 108.

4. *Distribution of the Balance.*

The balance is distributable among the contributories of the company in accordance with their rights under the Memorandum and Articles of Association of the company. Where there are shares having a preference as to capital the amount paid on those shares must be repaid before any amount is paid to those whose rights are deferred—that is to say, the ordinary and deferred or founders' shares; and the provisions of the Memorandum and Articles must be strictly followed. If, however, these do not contain any special provisions in relation to the distribution of the surplus assets, the shareholders all rank equally among themselves—that is to say, if the same amount is paid up on all the shares, the assets are distributed rateably according to the number of shares held by each member; but if more is paid up on some shares than on others, the surplus assets must first be applied in repaying to those who have paid the greater sum the execss they paid over the others, and then the balance (if any) divided equally. This will have the same effect as if all the moneys unpaid on the shares were collected and the whole assets, including these amounts, were divided among the members in proportion to the capital held by them. It may sometimes be necessary to make a call upon those who have paid the less amount, in order to repay those who have paid the greater such a sum as will produce an equality.[1] Money paid in advance of calls is repayable with interest before the ordinary capital is paid to the shareholders.[2]

[1] *Ex parte* Maude, [1871] 6 Ch. 51. If the Articles state that the loss is to be borne in proportion to the amount paid, or which ought to have been paid, on the shares held by the members at the commencement of the winding up, the liquidator must make such calls as will make all the shares paid up to the same extent, and the assets will then be divisible proportionately to the number of hares held [Anglo-Continental Corporation, [1898] 1 Ch. 327) for "capital paid" includes what is to be paid in the liquidation (*ex parte* Lowenfeld, [1894] 70 L. T. 3; see also Welsh Whisky Distillery Co., [1900] W. N. 59).

[2] Wakefield Rolling Stock Co., [1892] 3 Ch. 165.

If the capital is not exhausted by repaying to the shareholders the capital paid up, the balance is, in the absence of express provision, divisible among the shareholders in proportion to the nominal amount of share capital held by them respectively, and not in proportion to the amount paid up on their shares,[1] and where there has been a reduction of capital the shares only rank at the reduced amount.[2]

These are the general principles. The varieties, however, introduced by the terms of the Memorandum or the Articles of Association are numerous, and effect must be given to the provisions interpreting them as in the case of any other deed. The Articles frequently refer to "the surplus assets." These words *primâ facie* mean the fund available after payment of the debts and costs of liquidation of the company,[3] but in certain cases they have been held to mean the amount remaining after also repaying the paid-up capital on all the shares.[4] The context must be considered in each case. If the surplus assets are to be distributed between the members "in proportion to their shares," this means the nominal amount of their shares and not the amount paid up;[5] but "in proportion to the capital paid" has not this meaning.[6] Clauses giving preference shareholders a priority as to capital do not, unless there are other restrictive words, prevent them from participating in any assets remaining after all the capital has been repaid.[2]

If after the payment of the debts of the company and the costs of the liquidation any part of the reserve fund remains unexhausted, it must be treated as profits—not as capital; but it does not follow that it is to be divided in the

[1] Birch *v.* Cropper, [1890] 14 App. Ca. 525; Wakefield Rolling Stock Co., [1892] 3 Ch. 165.

[2] Espuela Land and Cattle Co. No. 2, [1910] 2 Ch. 187.

[3] Crichton's Oil Co., [1902] 2 Ch. 86.

[4] *Re* New Transvaal Co., [1896] 2 Ch. 750; *re* Peabody Gold Mining Co., [1897] W. N. 170.

[5] Driffield Gas Light Co., [1898] 1 Ch. 451.

[6] Mutoscope Syndicate, [1899] W. N. 77.

same way dividends would be paid. Unless the Articles otherwise provide—*e.g.* if the shareholders are only entitled to participate in dividends which have been declared—it will fall into and form part of the surplus assets;[1] and a surplus arising from the sale of the company's undertaking is not divisible profit for the purpose of paying arrears of preference dividend,[2] but if the Articles expressly give the ordinary shareholders the right to all profits after a fixed dividend has been paid to the preference shareholders, and the full preference dividend has been paid, the reserve fund goes to the ordinary shareholders,[3] and if the preference shareholders are entitled to the profits, whether dividends are declared or not, any undivided profits must be applied first in paying arrears of their dividend, but the declaration that they are entitled in the winding up to arrears of the preferential dividend does not give them a right to anything beyond the undivided profits.[4]

DIVIDENDS ON DEBTS IN WINDING UP.

When the liquidator has collected sufficient money and can estimate the liabilities and costs of liquidation he will make a distribution among the creditors by way of dividend. He will of course only do this when satisfied that the balance he retains will be ample to meet the costs of liquidation, including those of any possible litigation; and he will calculate the amount of the dividend with regard to all the claims of which he has knowledge.

When the debts are paid in full the surplus assets are distributable among the contributories. Section 216 provides that "the Court shall adjust the rights of the contributories among themselves, and distribute any surplus among the

[1] Crichton's Oil Co., [1902] 2 Ch. 83
[2] Espuela Land and Cattle Co. No. 2, [1910] 2 Ch. 187.
[3] Bridgewater Navigation Co., [1891] 2 Ch. 317.
[4] W. J. Hall & Co., [1909] 1 Ch. 521.

persons entitled thereto," and this power is not transferred to the liquidator: accordingly an order of Court is required for any distribution.

In a voluntary liquidation the liquidator adjusts the rights of the contributories without reference to the Court (Section 230, i. and ii.).

Criminal Prosecutions.

In a compulsory winding up or winding up under supervision, "if it appears to the Court in the course of a winding up by or subject to the supervision of the Court that any past or present director, manager, officer, or member of the company has been guilty of any offence in relation to the company for which he is criminally responsible, the Court may on the application of any person interested in the winding up, or of its own motion, direct the liquidator to prosecute for the offence, and may order the costs and expenses to be paid out of the assets of the company" (Section 255, Sub-section 1). In a voluntary winding up the liquidator is empowered, "with the previous sanction of the Court," similarly to prosecute, "and all expenses properly incurred by him in the prosecution shall be payable out of the assets of the company in priority to all other liabilities" (Section 255, Sub-section 2).

Prosecutions have been ordered in England under these sections.[1] The principles on which the Court will act were considered by Buckley, J., in the London and Globe Finance Corporation case,[2] where he laid down that a prosecution would be ordered when the circumstances were such that an honest and upright man desirous as a good citizen of

[1] Mercantile Marine Insurance Co., *per* North, J., [1882]; *re* Denham & Co., *per* Chitty, J., [1884] W. N. 122. Leave was refused in Eupion Fuel and Gas Co., [1875] W. N. 10, though the defendants were subsequently convicted (Reg *v.* Aspinall, [1877] 2 Q. B. D. 48).

[2] [1903] 1 Ch. 730.

doing his duty by the State would feel that he ought at his own expense to institute a prosecution.

The crimes for which a prosecution may be ordered are any offences criminally punishable committed "in relation to the company."

If proof is given that there is probable cause for believing that a contributory is about to abscond, or to remove or conceal his goods for the purpose of evading payment of calls, or of avoiding examination respecting the affairs of the company, the Court may cause him to be arrested, and his books, papers, money and goods seized and kept (Section 222). This power has been used to keep a director, who was also a contributory, from absconding, and it has been used for seizing property without arresting the person.[1]

There are very many penalties under the Act for default in complying with its provisions. Section 290 declares that all offences under the Act made punishable by any fine may be prosecuted under the Summary Convictions Acts: *i.e.* in a Police Court.

Fines may be applied in or towards payment of the costs of the prosecution or in or towards rewarding the informer (Section 291).

DISSOLUTION.

In a compulsory winding up Section 218 provides that "when the affairs of the company have been completely wound up, the Court shall make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly."

The order must be reported by the liquidator to the Registrar of Companies (under penalty of twenty-five dollars a day), who makes a minute in his books accordingly (Section 218, Sub-sections 2 and 3). The order may,

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[1]Imperial Mercantile Credit Co., [1868] 5 Eq. 264.

it seems, be made even in the case of a company incorporated by Act of Parliament, showing an intention that it should continue in perpetuity.[1]

In a voluntary winding up the dissolution takes effect three months after the registration of the Return of the Final Winding-up Meeting, as stated on page 443.

AFTER DISSOLUTION.

When a company is finally dissolved the Court has no longer any jurisdiction to reach it, for there is no company,[2] and it has no officers or other agents who can be served with notices or writs on behalf of the company; but it has not unfrequently happened that there were persons who had grievances or claims which they desired to enforce, and in the case of voluntary liquidations, where the dissolution was entirely the act of the liquidator, it was sometimes argued that in a voluntary winding up, inasmuch as the final meeting is only to be held "as soon as the affairs of the company are fully wound up" (Section 239), the dissolution would not take place if in fact there was property not disposed of or liabilities not dealt with. This contention was, however, disposed of in the Court of Appeal,[3] and the words cited must be read with the qualification "as far as the liquidators can wind them up."

Under the old law a dissolution could not be re-opened "except in the case of absolute fraud—fraud with which the company could be fixed." "If there were a case of that kind, then very likely the whole thing might be set aside: that is to say, it might on proper proceedings being taken be made clear that the whole winding up was null and void, and then the company would be restored again to its

[1]Bradford Navigation Co., [1870] 10 Eq. 331, 5 Ch. 600.
[2]Westbourne Grove Drapery Co., [1879] 27 W. R. 37, 29 L. T. 30.
[3]Pinto Silver Mining Co., [1878] 8 Ch. D. 273; London and Caledonian Marine Insurance Co., [1879] 11 Ch. D. 144.

position, subject to the claims of creditors and contributories;"[1] but, as stated on page 443, the Court has now power to reopen a dissolution at any time within one year after it has been effected.

The Court also has power after the final meeting has been called, but before the lapse of three months, to defer the date of the dissolution (Section 239, Sub-section 4). This will render unnecessary the former practice of presenting a petition for compulsory liquidation, or obtaining an order to stay the winding up, to which resort was had to prevent a dissolution becoming effective while claims were pending or property remained undistributed.[2]

A creditor has a remedy in damages against the liquidator if, with knowledge of the existence of a debt, he has wilfully or negligently distributed or parted with the assets and caused the dissolution of the company without providing for such a debt.[3]

ABORTIVE AND DEFUNCT COMPANIES.

Companies which have never commenced operations, or have ceased to carry on business, and have no assets to divide, are frequently disposed of without a winding up, under the provisions of Section 268, which provides that where the Registrar has reasonable cause to believe that a company, including an Extra-provincial Company, is not carrying on business or in operation he shall send to the company a letter of inquiry. If he does not within a month receive an answer, he may, after fourteen days, publish in the *Gazette* a notice that at the expiration

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[1]Per James, L. J., London and Caledonian Marine Insurance Co., [1879] 11 Ch. D. 144. What the "proper proceedings" would be are not indicated. The Lord Justice also suggested that before the dissolution a creditor might "take proceedings to obtain an injunction to prevent the completion of the winding up and the dissolution of the company."

[2]*Re* Eastern Investment Co., [1905] 1 Ch. 352.

[3]London and Caledonian Marine Insurance Co., [1879] 11 Ch. D. 144; Pulsford *v.* Devenish, [1903] 2 Ch. 625.

of two months the name of the company will be struck off the Register and the company dissolved. At the expiration of this period the name is struck off and the company dissolved, and notice thereof is published in the *Gazette;* but the liability (if any) of every director, managing officer, and member continues, and may be enforced as if the company has not been dissolved.[1]

Any company, member, or creditor aggrieved by this proceeding may before the completion of the last mentioned publication apply by petition to the Court in which the company is liable to be wound up, and the Court, if satisfied that the company was carrying on business or in operation when struck off,[2] or that it is otherwise just so to do, may order its restoration to the Register, whereupon it shall be deemed to have continued in existence as if its name had never been struck off (Section 268, Sub-section 4).

Further, by Sub-section 6, where a company is being wound up, if the Registrar has reasonable cause to believe that no liquidator is acting, or that the affairs of the company are fully wound up, and the proper returns have not been made by the liquidator for three consecutive months after notice demanding the returns has been sent to the registered address of the company, or to the liquidator at his last known place of business, the provisions of Section 268 apply, and the company's name may be struck off the Register with the same results.

[1]This liability continues after the company is restored to the Register unless the Court makes an order under Section 268, Sub-section 4, relieving them (Brown, Bayley's Steel Works, [1905] 21 Times L. R. 374).

[2]While a voluntary liquidation is proceeding the company is "in operation" for this purpose (Outlay Assurance Society, [1887] 34 Ch. D. 479).

CHAPTER XXVI.

RECONSTRUCTION OF A COMPANY UNDER PROVINCIAL ACT.

RECONSTRUCTION of companies is common, the process known by this name being a sale of the undertaking of the existing company to a new company. The object is most commonly to raise fresh capital, which is effected by issuing partly paid shares in the new company in exchange for the fully paid shares of the old company and calling up the balance on the new shares; but reconstruction is also resorted to for the purpose of amalgamating two or more companies, or taking new powers in the Memorandum, or re-arranging the capital of the old company, or effecting compromises with creditors by inducing them to take shares or debentures extending over years in place of their claims as creditors, and occasionally a very prosperous company reconstructs so as to give its members two or more shares for every share already held by them.

A liquidation for the purpose of reconstruction has the same effect as any other winding up: *e.g.* debentures and other debts payable at a future date become immediately payable, and leases forfeitable in the event of a winding up are determined.[1] In cases where the debentures are repayable with a premium in case of a reconstruction, the premium is payable even though a single company does not take over the whole business of the liquidating company.[2]

[1]Horsey Estate, Limited *v.* Steiger, [1899] 2 Q. B. 79; Fryer *v.* Ewart [1902] App. Ca. 187. Where such leaseholds are mortgaged the mortgagee are allowed a reasonable time to remove the tenants' fixtures comprised in their security (Glasdir Copper Mines, [1904] 1 Ch. 819).

[2]South African Supply and Cold Storage Co., [1904] 2 Ch. 268, where Buckley, J., discussed what constitutes a reconstruction.

The sale of the undertaking may be effected (1) before the liquidation, under powers contained in the Memorandum, but this is only possible when a liquidation is not in immediate contemplation, or (2) after the liquidation is commenced under the powers contained in Section 236.

For some years it was considered that if the Memorandum of Association contained powers for the company to sell its business to another company in consideration of shares,[1] and to distribute the shares[2] in specie, this would enable the company to avoid compliance with the provisions of Section 236 referred to below;[3] but the contract for sale had to be made before the company was in liquidation. In 1908, however, the question came before the Court of Appeal in England, which held[4] that the proper function of the Memorandum of Association was to deal with the objects of the company during its corporate life, and not after that life had come to an end, nor "to define under the corporate objects the distribution of the assets after the corporate life is at an end;"[5] and further, considering that the object of the scheme of selling for partly paid shares was to compel members to accept a further liability or lose all interest in the concern, declared that "any clauses which can be used to maintain a scheme which imposes upon the member the alternative of accepting liability for a larger sum or being dispossessed of his status as shareholder upon terms which he is not bound to accept are *ultra vires*." Accordingly, in

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[1]An ordinary power to sell is construed as being a power to sell for cash (Payne *v*. Cork Co., [1900] 1 Ch. 308), and would not justify a sale for shares.

[2]Either fully paid or partly paid (Mason *v*. Motor Traction Co., [1905] 1 Ch. 419).

[3]Cotton *v*. Imperial and Foreign Agency Corporation, [1892] 3 Ch. 454; Wall *v*. London and Northern Assets Corporation, [1898] 2 Ch. 469; Booth *v*. New Afrikander Gold Mining Co., [1903] 1 Ch. 295; New Zealand Gold Extraction Co. *v*. Peacock, [1894] 1 Q. B. 622.

[4]Bisgood *v*. Henderson's Transvaal Estates, [1908] 1 Ch. 743

[5]*Ibid*. 1 Ch. 757.

cases where Section 236 is not called into operation the right of every member is "to have the assets, including the shares in the purchasing company, realised and applied, first in payment of the debts, and then to have his proportionate share of the balance."[1] Therefore, although a company can sell its undertaking under powers in the Memorandum when it is intended to retain the proceeds of sale in the business of the company (*e.g.* when a single steamship company sells its only ship and with the purchase price buys another), yet "if the company is proposed to be wound up and the transaction is a sale and distribution, then . . . . the Statute provides that sale by conversion into money may be replaced by exchange for shares upon the terms, but only upon the terms, of complying with the provisions of Section 236,"[2] in which case the right of a member to dissent cannot be excluded. Before this decision it had been held that the sale, when made under the Memorandum, must be one which contemplates the payment of the consideration to the vendor company. Any scheme which involves the issue of the new shares direct to the members and declares that those who do not take up their proportion shall lose their interest in the assets is *ultra vires*,[3] for the old company could not take powers to distribute its assets among its members except in a liquidation, and if a liquidation necessarily intervenes Section 236 applies.

The procedure under Section 236 is as follows:—The company must go into liquidation,[4] and pass special resolutions authorising the liquidator to sell the undertaking under Section 236 (for the sale under this section can only be made by the liquidator). The authority may be general,

[1]Bisgood *v.* Henderson's Transvaal Estate (1908), 1, Ch. 761.
[2]*Ibid.* 1 Ch. 762.
[3]Manners *v.* St. David's Gold Mines, [1904] 2 Ch. 593.
[4]The resolution sanctioning the sale may be either before, contemporaneously with, or after the resolution for voluntary winding up (Section 236).

or may be confined to a specified sale, to be made in accordance with a scheme of reconstruction or a draft agreement submitted to the meeting. To avoid unpleasant mistakes, it is advisable that the resolutions authorising the sale of the property should be submitted simultaneously with the winding-up resolutions, so that if the former are not carried the latter may also be dropped: otherwise the company will find itself in liquidation without any scheme for selling its business.[1] Both the voluntary winding up and the authority for a sale require special resolutions; but they may be passed together at the first meeting, and then confirmed together at the second meeting. Special notice of each resolution must, however, be given to the shareholders, specifying that a sale is intended under Section 236, and if the directors derive any special advantage a notice which does not disclose this fact is insufficient.[2] But it is no objection to a scheme of reconstruction that it openly gives a bonus to directors.[3]

Where a draft agreement for sale is prepared the special resolution may refer to and approve it, and no other scheme of reconstruction is necessary. But power should be taken for the agreement to be carried out with or without modifications.

If any member of the company being wound up who has not voted for the special resolution at either of the meetings expresses his dissent from the resolution in writing, addressed to the liquidator and left at the office of the company[4] not later than seven days after the date of holding

[1]Cleve *v.* Financial Corporation, [1874] 16 Eq. 363; Clinch *v.* Financial Corporation, [1869] 4 Ch. 117; Thomson *v.* Henderson's Transvaal Estates, [1908] 1 Ch. 765.

[2]Kaye *v.* Croydon Tramways, [1908] 1 Ch. 358; Tiessen *v.* Henderson, [1899] 1 Ch. 861.

[3]Southall *v.* British Mutual Life Association, [1871] 6 Ch. 614.

[4]In the case of a Rhodesian company, under similar words in the Colonial Ordinance, Warrington, J., held that a notice actually served on the liquidator in England and not left at the registered office was sufficient, and that the liquidator could waive service at the office (Brailey *v.* Rhodesia Consolidated, Limited, [1910] 2 Ch. 95.

the confirmatory meeting, he may require the liquidator either not to carry out the scheme, or to purchase his interest at a price which, if not settled by agreement, shall be determined by arbitration (Section 236, Sub-sections 3 and 6). In such an arbitration the dissentient has to prove the value of his interest, but he will not be allowed to examine the directors under Section 220 to obtain evidence for this purpose.[1] If a person who ought to be but is not on the Register of Members gives notice of dissent the Court may, on making an order for rectifying the Register, declare that it shall relate back, so as to render the notice of dissent effective.[2]

The provisions which may be lawfully inserted in a scheme of reconstruction are summarised by Buckley, L. J., as follows:—"(1) That the shares for distribution be partly paid shares, or (2) that if 'a member' wants the shares he must apply for them within a limited time, or (3) that shares unapplied for are to be at the disposal of the new company, or (4) that shares unapplied for may be sold and the member who does not assent shall take the proceeds.[3] . . . . or (5) that the shares shall not go to the company or be assets of the company, but shall go direct to the members," but "if there are dissentient members unpaid the company may be put under an undertaking not to part with the assets until provision is made for them."[4]

Finding the money to pay out dissentient shareholders in a reconstruction is often a great difficulty where the shares of the new company are not marketable. There is, however, no way of avoiding the obligation to pay out these

[1]British Building Stone Co., [1908] 2 Ch. 450.

[2]Sussex Brick Co., [1904] 1 Ch. 593.

[3]That is, if he is not a "dissentient." If he dissents his rights must be ascertained by agreement or arbitration, and he cannot be compelled to accept the selling value of his shares.

[4]Bisgood v. Henderson's Transvaal Estates, [1908] 1 Ch. at 760.

dissentient members.[1] The Articles used often to provide that shareholders dissenting shall not have the rights given them by this section, or that the value of their interests shall be determined in some other way than by arbitration under the Act; but such provisions are invalid, for the Articles cannot negative a provision in the Statute for the benefit of the whole body,[2] and they are not an agreement settling the price within the meaning of Section 236, Sub-section 3.[3] If the company being wound up is in difficulties, the value of the interest of such members is of course very small.

Usually, when further money is required, the arrangement is that holders of fully paid shares in the old company shall accept shares which are not fully paid in the new. This will of course make the probability of there being dissentient shareholders much greater; but if they have not given notice of dissent within seven days, they cannot claim to be bought out. A shareholder who has not dissented cannot, however, be compelled to take shares having a liability, and if he refuses the new shares he loses all interest in the company, and is not liable for any calls on the new shares.[4] In a case where there is a liability on the new shares, a time should be fixed within which shareholders must elect whether they will take the new shares, and any not taken up will then be at the disposal of the old company or its liquidator;[5] or the scheme may provide that the shares not taken up shall be at the disposal of the new company,[6] or that the consideration shall be reduced by the amount of the shares unapplied for after the expiration of the period

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[1] *Ex parte* Fox, [1871] 6 Ch. 187, 192; and see note [1] on next page.

[2] Payne *v.* Cork Co., [190] 1 Ch. 308, 69 L. J. Ch. 156; Bisgood *v.* Henderson's Transvaal Estates, [1908] 1 Ch. at page 758.

[3] Baring-Gould *v.* Sharpington Pick Syndicate, [1899] 2 Ch. 80.

[4] Higg's Case, [1865] 2 H. & M. 657.

[5] Postlethwai e *v.* Port Philip &c. Co., [1890] 43 Ch. D. 452.

[6] Burdett-Coutts *v.* Hannan's True Blue Gold Mine, [1899] 2 Ch. 616. It is doubtful in such a case whether the new company can treat the shares as partly paid up.

named; but the new company and the liquidator have no power to issue the partly paid shares to members of the old company who have failed to apply in time.[1] Reasonable time must be given for members to elect whether they will take the new shares, and it must extend to a date beyond the registration of the new company.[2] The shares when not fully paid will be allotted direct to the shareholders, and not to the liquidator.[3] The liquidator usually sends a notice to the members of the old company, enclosing a form of application to be sent to the new company. This application, if sent in, is only an offer to take the shares, and may be withdrawn before it is accepted by the new company. It is not an acceptance of the offer by the new company so as to make the applicant a member forthwith.[4]

Where the new company considers that it is an advantage to have as many as possible of the partly paid shares issued, the liquidator should be empowered to sell shares not applied for, and, as far as possible, should sell them. The proceeds of such a sale will belong to the members of the old company who have neither accepted shares in the new company nor dissented, for the other members have already received their proportion of the purchase consideration.[5] The liquidator will nominate the purchasers of the shares to receive an allotment of the number they have bought credited as partly paid.

It must be observed that Section 236 only authorises a sale to a company already in existence or formed for the purpose of purchasing the assets of the old company. Hence a sale to an individual cannot be carried out under this

[1] Macphail *v.* Poorman Gold Mines, *Times*, 13th March, 1897.
[2] *Re* South Australian Petroleum Fields, [1894] W. N. 189.
[3] *Re* City and County Investment Co., [1880] 13 Ch. D. 475; Transvaal Exploring Co. *v.* Albion Gold Mines, [1899] 2 Ch. 370.
[4] Metropolitan Fire Insurance Co., Wallace's Case, [1900] 2 Ch. 671.
[5] Lake View Extended Gold Mine, [1900] W. N. 44.

section,[1] but an agreement may be made with an individual acting as agent or trustee for a company about to be formed, and not purchasing to make a profit for himself.[2] It has been held that the sale can only be to a company incorporated under the Companies Acts,[3] for by the definition clause (Section 2) "company" means a company formed and registered under one of the Companies Acts.

If a sale to an individual is intended, it must be made either under the general power of the liquidator to dispose of the assets of the company—in which case he must sell for cash and will be responsible for obtaining a proper price; or the sale may be sanctioned under Section 129 as part of a compromise or arrangement.

If after a voluntary winding up of a company has been commenced an order is made for winding it up by or under the supervision of the Court, the scheme becomes void unless sanctioned by the Court (Section 236, Sub-section 5), and when a scheme is unfair or improper this will be a ground for the Court making a compulsory order.[4]

The arrangement for a sale under Section 236 can provide for the manner in which the consideration is to be paid, but cannot determine how it is to be distributed among the members of the vendor company, as this must be done in strict accordance with their rights.[5] It will be seen that this introduces a serious difficulty where there are either preference or founders' shares having special rights in the distribution of surplus assets. If 100,000 shares of $1 each are to be distributed, and the rights of the holders of preference shares to the extent of $20,000 are that they shall

[1]Bird *v.* Bird's Patent Sewage Co., [1874] 9 Ch. 358.
[2]*Re* Hester & Co., [1881] 44 L. T. N. S. 757.
[3]Thomas *v.* United Butter Companies of France, [1909] 2 Ch. 484.
[4]Consolidated South Rand Mines, [1909] 1 Ch. 491.
[5]Griffiths *v.* Paget, [1877] 5 Ch. D. 824 and 6 Ch. D. 514; Simpson *v.* Palace Theatre, [1893] W. N. 91; affirmed by Court of Appeal, [1893] 9 Times L. R. 470.

be paid in full the amount of such shares before any repayment is made to the holders of ordinary shares, who shall say how many shares in the new company would be equivalent to a payment in full of the amount of the preference shares?

It is often atempted to meet the difficulty by giving holders of preference shares in the old company preference shares in the new; but this will not prevail over the rights of any old preference shareholders who insist on getting the full value of their shares before the old ordinary shareholders get anything.

The result is that in companies where there are preference shares a reconstruction is not possible unless either there is power in the Articles of Association to meet the circumstances of the case, or the preference shareholders consent unanimously,[1] or those who do not consent to the proposed distribution also dissent from the whole scheme, so as to be paid out under Section 236. The proposed scheme might, however, be brought before the Court[1] in accordance with Section 129, and, if sanctioned, would be binding on the preference shareholders; but should a large section oppose the sanction being given, the Court might refuse to affect their rights by sanctioning the scheme.

Schemes of reconstruction under Section 236 are sometimes upset by a dissentient minority on the ground that some of the provisions are an infringement of the rights of the minority, which the majority cannot impose upon them. But if the method of distributing the purchase consideration can be severed from the provisions for sale, the sale may stand good, leaving the proper distribution of the shares to

[1]Note that the Court does not draw the inference that shareholders not represented at the meeting have consented (North-West Argentine Railway, [1900] 2 Ch. 882).

be made according to the rights of the members of the vendor company.[1] The resolution for winding up is not invalidated by reason of its being coupled with an invalid resolution dealing with the distribution of the purchase consideration.[2]

The liquidator must apply the funds which he receives from the new company in paying the costs of the liquidation and any debts which the old company is bound to pay, and in buying out dissentient members. If anything remains, it must be distributed among the members of the old company according to their rights. If the cash which the liquidator receives is not sufficient for the above purposes, he must raise cash by selling or mortgaging the shares or other property which he receives from the new company. The shares remaining over he will distribute among the members of the old company who have not been bought out.

The contract for sale usually provides that the purchasing company shall take over all the assets and pay all the liabilities of the old company, so that the business of the old company can be wound up at once; but such an arrangement does not relieve the liquidator of the old company from the obligation of seeing that the debts are duly paid before the old company is dissolved.[3]

The agreement for sale usually contains an agreement for the transfer of all book debts, things in action, and claims of the company. This should be perfected by an actual assignment before the old company is dissolved; otherwise the company may be hampered in recovering the amounts.

When executors or trustees hold shares in the old company and have no power to invest in the shares of such

[1]Wall *v.* London and Northern Assets Corporation, [1898] 2 Ch. 469.
[2]Thomson *v.* Henderson's Transvaal Estates, [1908] 1 Ch. 765; *ex parte* Fox, [1871] 6 Ch. 187; Cleve *v.* Financial Corporation, [1874] 16 Eq. 363.
[3]Pulsford *v.* Devenish, [1903] 2 Ch. 625.

a company as the purchasing company, they are compelled to dissent or to agree to a sale of their rights. But if it can be shown that the case is one of emergency not contemplated by the settlor, and a large loss is likely to result from such a course, the Court can, upon application made by the trustees, sanction their taking up the new shares if they are fully paid.[1] It is, however, hardly possible that the Court's assent could be obtained to such speculative transaction as taking partly paid shares.

If a third party has insured or guaranteed the payment of any debts of a company, a reconstruction sanctioned by the Court, and therefore binding on the creditors, does not relieve the guarantor or insurer from his liability to make good the amount payable, but he is entitled to have handed over to him whatever benefit the creditors would have had from the reconstruction.[2]

As regards the new company, the same considerations will apply as in the case of a purchase from ordinary vendors, and the remarks on page 144, *supra*, should be consulted with reference to filing the contracts with the Registrar of Companies.

A reconstruction can also be carried out as an arrangement under Section 129,[3] which applies not only as between the company and the creditors or any class thereof, but as between the company and the members or any class thereof. This section declares that where any compromise or arrangement is proposed between a company and its

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[1] *Re* New's Settlement, [1901] 2 Ch. 534.

[2] London Chartered Bank of Australia, [1893] 3 Ch. 540; Dane *v.* Mortgage Insurance Co., [1894] 1 Q. B. 54.

[3] Doubts as to the legality of this Section have been raised on the ground of its pertaining to insolvency and so *ultra vires* the Provincial Legislature.

creditors or any class of them, or between the company and its members or any class of them, the Court may, on the application of the company, or any creditor or member of the company, or the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called; and if a majority in number representing three fourths in value of the creditors or class of creditors, or members or class of members, present either in person or by proxy, agree to the compromise or arrangement, and it is also sanctioned by the Court, it will be binding on all the creditors or class of creditors, or on the members or class of members, as the case may be, and on the liquidator and the contributories of the company.

In sanctioning a scheme the Court may ignore the fact that a class has not consented if it be proved that upon an immediate distribution of the assets none would be available for that class.[1]

The Court may make it a term of giving its consent that members shall be given the same opportunity of dissenting as they would have had under Section 236.[2]

Compromises with Creditors Before or During Liquidation.

A company can now effect compromises with its creditors without going into liquidation, for Section 129 applies to companies not in the course of being wound up. The result is that with the sanction of the Court any compromise or arrangement between the company and its creditors, or any class of such creditors, may be made binding on all such creditors or class of creditors and the

[1]Sorsbie *v.* Tea Corporation, [1904] 1 Ch. 12.
[2]Canning Jarrah Timber Co., [1900] 1 Ch. 708.

company, provided that it has been submitted to a meeting of the creditors or class of creditors summoned under the direction of the Court and approved by a majority in number representing three fourths in value of such creditors or class of creditors present either in person or by proxy. If the company is in liquidation the compromise or arrangement may be made binding on the liquidator and contributories, and any compromise or arrangement between the company and its members, or any class of its members, may equally be made binding. The cases cited below were decided in reference to a company in liquidation making an arrangement with its creditors; but the general principles will be the same in the case of a going company. The procedure is discussed below.

In the case of the reconstruction of a company, if the creditors of the old company are to be paid in full at once, their consent need not be asked to a reconstruction; but if they are to accept a composition, or to take shares or debentures in the new company in satisfaction of their claims, or to accept deferred payment, their consent must be obtained to a scheme of composition.

Such a composition with creditors may in a voluntary winding up be effected either in accordance with Section 235 or under Section 129.

If the compromise with creditors is proposed in accordance with Section 235, an extraordinary resolution of the company, and the assent of three fourths in number and value of the creditors, are necessary to sanction the arrangement, which will then bind all the creditors. The assent of the creditors need not be given at a meeting, and may be evidenced by their signatures to a document containing the terms of the compromise. There is, however, a right of appeal to the Court within three weeks of the completion of the arrangement (Sub-section 2).

If there be a large number of small creditors (officers, servants, workmen, and tradesmen, for instance), it is often advantageous to pay them off down to the date of the liquidation, and deal only with the larger creditors, whose signatures can more readily be obtained to a proper scheme.

If the assent of three fourths in number and value cannot be obtained without great difficulty, it is desirable to proceed under Section 129. Under that section it is necessary for the liquidator or a creditor to apply in a summary way to the Court to call meetings of the various classes of creditors and members with whom the compromise is to be made. If at the meetings a majority in number representing three fourths in value of those who are present, either in person or by proxy, agree to the arrangement, and it is subsequently sanctioned by an order of the Court (which should be obtained on petition), such arrangement becomes binding on all persons concerned. If part of the arrangement involves a new company taking over the liabilities of the old company, the creditors of the old company, although not actually parties to the agreement for sale, can enforce their rights against the new company.[1]

If in a company different amounts are paid on shares, or a set of shareholders have paid amounts in advance of calls, this makes various classes of shareholders, and separate meetings must be called.[2]

For such an arrangement a resolution of the company is not absolutely necessary; but it is obvious that, unless there is no chance of the contributories receiving anything, it is very desirable that the shareholders should give their consent, as the absence of such sanction might well form a ground for the Court refusing to confirm the arrangement. The company in general meeting should therefore adopt the

[1]Craig's Claim, [1895] 1 Ch. 267.
[2]United Provident Assurance Co., [1910] W. N. 199.

compromise, either directly or by reference to the scheme of reconstruction.

Under the powers given by Section 129, if the requisite majority of debenture holders agree to forego their security, and accept preference shares in the new company in exchange for their debentures in the old company, their decision, if confirmed by the Court, will be binding upon the minority, who oppose the exchange;[1] and an agreement whereby a new company agrees to purchase all the assets and pay a composition to the creditors will be enforced, even though a larger sum may be subsequently offered by another person.[2]

The sanction of the Court to the scheme is essential,[3] and in considering the arrangement the Court looks into the whole scheme, and will take into consideration whether the votes were given *bonâ fide* in the interests of the creditors.[4] It also requires the costs and remuneration payable under the scheme of reconstruction to be subject to taxation.[5] If the arrangement is being carried out without a liquidation, the Court has no jurisdiction to restrain a judgment creditor from levying execution pending the holding of the meeting.[6]

The Court will not sanction a scheme which includes the payment of a commission to persons underwriting the issue of partly paid shares, the reason given by Cozens-Hardy, J., being that such an underwriting was illegal, and by the

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[1] *Re* Empire Mining Co., [1890] 44 Ch. D. 402; *re* Alabama, New Orleans, &c. Railway Co., [1891] 1 Ch. 213; Follit *v.* Eddystone Granite Quarries, [1892] 3 Ch. 75.

[2] *Re* Oriental Bank, [1887] W. N. 109, 112.

[3] In the reconstruction of Olympia, Limited, in 1897, the Court required the claims against directors to be excepted from the sale to the new company and in the result the Official Receiver recovered upwards of £20,000, which was held to be distributable among all the members, whether they took up their shares in the new company or not.

[4] *Re* Alabama, New Orleans, &c. Railway Co., [1891] 1 Ch. 213.

[5] *Re* Mortgage Insurance Corporation, [1896] W. N. 4.

[6] Booth *v.* Walkden Spinning Co., [1909] 2 K. B. 368.

Court of Appeal that to do so would make the Court promoters.[1]

The Court refused to entertain a scheme which provided the shares already fully paid should be treated as subject to a new liability of three shillings per share, holding that any such arrangement must be carried out under Section 236.[2]

An arrangement under Section 129 does not bind foreign creditors, who may, notwithstanding such an arrangement, resort to their own Courts, to enforce their claims against the company.[3]

When the company is in liquidation it is often a term of the scheme that all proceedings in the winding up shall be stayed and that the company shall resume business. In a proper case the Court will make the necessary order under Section 195.

DISSOLUTION OF THE OLD COMPANY.

Upon a reconstruction being carried into effect the liquidator should wind up the old company with all possible speed, and, after making up his accounts, should call and advertise the general meeting for receiving those accounts as provided in Section 238. He should then, at once, make a Return to the Registrar of the meeting having been held, and at the end of three months from the Return the company is dissolved (Section 239), subject, however, to the power of the Court to re-open the dissolution (see page 443). The importance of this is that sometimes claims arise for damages, or on other grounds, which, if the company were still in existence, might give rise to great difficulties. The

[1]Canning Jarrah Timber Co., [1900] 1 Ch. 708, 69 L. J. Ch. 416.
[2]San Francisco Brewery Co., Limited, [1909] 5th April, in the Court of Appeal. T e House of Lords refused to interfere with the discretion of the Court of Appeal.
[3]New Zealand Loan and Mercantile Agency Co., [1898] App. Ca. 349.

liquidator will have to pay all the debts of which he knows;[1] but claims for damage may arise unexpectedly, and if the shares of the new company have been distributed there is nothing to meet such claims. A contract between the old and the new companies that the new will satisfy the liabilities of the old company cannot be enforced against the new company by creditors of the old for their own benefit, unless it has been made part of a scheme sanctioned under Section 129.[2]

[1]He will be personally liable, however, if he does not secure the payment of claims of which he has notice (Pulsford *v.* Devenish, [1903] 2 Ch. 625; New Zealand Joint Stock Corporation, [1907] 23 Times L. R. 238).
[2]Craig's Claim, [1895] 1 Ch. 267.

CHAPTER XXVII.

WINDING UP UNDER DOMINION WINDING-UP ACT

In the introduction to Part V. attention is drawn to the fact that the Provincial Legislature could not deal with the winding up of Insolvent Companies as the Dominion Parliament had exclusive legislative jurisdiction in regard to "Bankruptcy and Insolvency." Such companies must be wound up under the provisions of "The Dominion Winding-Up Act." The purpose of this chapter is to outline quite briefly the procedure in relation to the winding-up of an insolvent company under this Act. Insolvency as a ground for winding up is dealt with at length as there is, for the reason mentioned above, no corresponding provisions in the Provincial Act, but those sections of the Dominion Winding-Up Act dealing with the procedure of the winding up after the Winding-Up Order has been made, being in principle substantially the same as those of the Provincial Act, are only touched upon where there is a difference between the corresponding provisions of the Dominion and Provincial Acts.

The Dominion Winding-Up Act is Ch. 144 of the Revised Statutes of 1906, and was amended in 1907 by Ch. 51, and in 1908 by Ch. 74 and 75. The application of the Act is defined by Section 6 in the following terms:

The 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.

This section has been held to be *intra vires* the Parliament of Canada, and applies to every trading company, wherever incorporated, which carries on business in Canada.[1]

Sub-section A applies to every company, whether Dominion or Provincial, but Sub-section B applies only to companies which are insolvent, or to Dominion Companies which, being incorporated by the Dominion Parliament, are subject to its control.[2]

It may be mentioned here that under the "Dominion Winding-Up Act" there is only one form of winding up, namely, winding up by the Court. A voluntary winding up or a winding up under supervision of the Court is not provided for by this Act. The Court in British Columbia having jurisdiction under the Winding-Up Act is the Supreme Court (Section 2, Sub-section (*e*)), but by Section 13 this Court may only wind up a company which has its head office in British Columbia,[3] or a company which has no head office in Canada, but has its chief place, or one of its chief places, of business in British Columbia. Under the authority conferred upon it by Section 134 of the Act, the Supreme Court has made a general order and rules to regulate the mode of proceeding under the Act,[4] and reference to these rules will be made from time to time.

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[1]Allan *v.* Hanson, 18 S.C.R. 667; *re* Clarke and Union Fire Insurance Co. (2), 14 O.R. 618, 16 A.R. 161; sub nom. Shoolbred *v* Clarke, 17 S.C.R. 265.

[2]*Re* Cramp Steel Co., 11 O.W.R. 133; In *re* Nelson Ford Lumber Coy., [1 Sask. L.R. 503.

[3]A petition to wind up a Dominion Company must be presented in the Province where the head office is situated, Watzel *v.* Oriental Silk, 9 Q.P.R. 289.

[4]These rules do not apply to a winding-up under Part VIII of the [Provincial Companies Act.

Section 11 provides under what circumstances the Court may make a winding-up order. Section 11 is in the following terms:

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.

It will be observed that this section provides, under five paragraphs, five distinct grounds for the Court making a winding-up order. All such grounds are available for a Dominion company, but the third, namely, "When the company is insolvent" is alone available for a Provincial company. This is the effect of the decision of Mabee, J., in *re* Cramp Steel Co., 11 O.W.R. 134.

Paragraphs *a*, *b* and *e* are very similar to the corresponding provisions of Sections 187 (*a*) and (*e*), 226 (1), of the Provincial Companies Act, and need no further comment here. Paragraph (*c*) is dealt with later.

An application for a winding-up order in the cases mentioned in paragraphs (*a*) and (*b*) of Section 11, may be made by the company or by a shareholder, and in the case mentioned in paragraph (*c*) by the company or by a creditor for the sum of at least $200, or by a shareholder holding shares to the amount at least of $500, and in the cases mentioned in paragraph (*d*) and (*e*) by a shareholder to the amount of at least $500.

A creditor is defined in Section 2 in the following terms:—

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.

It now becomes important to consider when a company is to be considered insolvent. Section 3 contains a statutory definition as to when a company is to be deemed insolvent, as follows:—

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;[1]

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

(d) if it has otherwise acknowledged its insolvency;[2]

(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;[3] or,

(g) if it permits any execution issued against it, under which any of its goods, chattels, land or property are seized, levied upon of taken in execution, to remain unsatisfied till within four days of the timefixed by the sheriff or proper officer for the sale thereof, or for fifteen days after such seizure.[4]

Sub-section (*a*) of this section is further explained by Section 4 in the following terms:—

[1]*See* Lake Winnipeg, &c., 7 Man. L.R. 252, 255.

[2]*See re* Briton Medical, 11 O.R. 478; *re* William Lamb Manufacturing Co. (1900), 32 O.R. 243.

[3]*See re* Qu'Appelle Valley Co. (1888), 5 M.R. 160; *re* William Lamb Manufacturing Coy. (1900), 32 O.R. 243. *See* also following cases where order refused as opposed to wishes of majority of creditors: Wakefield Rattan Coy. *v.* Hamilton Whip Coy., 24 O.R. 107; *re* Maple Leaf Dairy, 20 L.R. 590; *re* Strathy Wire Fence Coy., 8 O.L.R. 186.

[4]*See re* Rapid City, 9 Man. L.R. 574; *re* Lake Winnipeg, &c. Coy. 7 Man. L.R. 255.

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 hunded 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.

All proceedings for a winding up of any company must be by petition (Rule 1). Notice of the petition[1] must be served upon the company in the manner prescribed by Rule 2, and except in cases where the petition is made by the company itself four days' notice of the same must be given to the company[2] (Section 13). The petition must be verified by affidavit in the form or to the effect set forth in Form No. 2 in the third schedule of the rules. This affidavit must be sufficient and must prove all the allegations in the petition.[3] If the petition is for a winding up on the ground of insolvency, it must strictly prove the existence of one or more of the circumstances set out in Sections 3 and 4 of the Act quoted.[4] It is essential that the petition contain sufficient allegations to bring the case within the sections of the Act. Leave will not usually be given to file a supplementary petition[5] or affidavit. Since the decision in the English case of *In re* Chic Ltd. (1905), 2 Ch. 345, it would not appear to be necessary to state in the petition that the company has assets available to pay the debt. If the petitioner alleges that the company is unable to pay its debts within the meaning of Section 4, he must show that there has been a strict compliance with the provisions of this section. He must prove a demand in writing and the neglect by the company for sixty days to

[1]For form of Notice of Petition, see Form No. 1 of Rules.

[2]It is not necessary to give four clear days notice. *Re* Arnold, 2 O.L.R. 671.

[3]*Re* Kootenay Brewing Co. (1898), 6 B.C.R. 121.

[4]*Re* Rapid City, 9 Man. L.R. 574.

[5]*Re* Abbott Mitchell, 2 O.L.R. 143.

pay the sum due, otherwise his petition will fail.[1] This was decided in Ontario in the case of *re* Ewart Carriage Works, Ltd., 8 O.L.R. 527, and the effect of the decision is that it is not possible to prove that the company is unable to pay its debts otherwise than by a demand under the section. This demand must be in writing and must be served on the company. Verbal demands and letters are insufficient.[2] The creditor must wait the expiry of the whole period of sixty days, but this period having expired, a reasonable delay will not prejudice his rights under the section.[3] The debt must be due at the time,[4] and the demand will be good, although the creditor may demand more than what is actually due to him if the company neglects to pay or offer him the sum due.[5] If the company *bon fide* disputes the debt, that is a good answer, or if the omission to pay was for some good and reasonable cause, this is not "neglect" within the section.[6]

The petition may be presented by a creditor only on the ground that the company is insolvent (Section 12). His debt must be at least $200, but two or more creditors, each for a sum less than $200, but the total of whose claims is in excess of that sum cannot present a valid petition for the winding-up of the debtor company.[7] In the event of the creditor being secured, the petition will not invalidate his security,[8] but he must not exercise his power of sale pending the hearing of the petition.[9] The petitioning creditor may

[1] *Re* Ewart Carriage Works, Ltd., 8 O.L.R. 527; in *re* Qu'Appelle Farming Coy., 5 Man. L.R. 160; *re* Rapid City Farmers' Elevators, 9 Man. L.R. 574.

[2] *Re* Rapid City Farmers' Elevators, 9 Man. L.R. 574.

[3] *Re* Catholic Publishing Co., 2 De J. & S. 116.

[4] *Re* Britain Medical, 11 O.R. 478.

[5] Cardiff *v.* Norton, 2 Ch. 405.

[6] *Re* London and Paris, 19 Eq. 444.

[7] *Re* People's Loan and Deposit Co., 7 O.W.R. 253.

[8] Moore *v.* Anglo-Italian Bank (1879), 10 Ch. D. 681; Borough of Portsmouth Tramways Co., (1892) 2 Ch. 362; *re* Strathy Wire Fence Co., 8 O.L.R. 186.

[9] Canbria Mining Co., (1881), W.N. 125, 29 W.R. 881.

be the original creditor or only an assignee of the debt,[1] but the assignee must prove his debt was prior in date to the demand under Section 4.[2] A person who has obtained a garnishee order against the company is not a creditor of the company and cannot petition under the section,[3] but he may obtain a judgment and then petition.[4] A creditor whose debt is attached cannot petition,[5] nor a surety who was paid nothing,[6] nor a person who has a claim for unliquidated damages.[7] The latter must first obtain a judgment on his claim. A debenture holder to whom money is due may petition, and this whether the debenture be registered or to bearer.[8] If the debt is a disputed one and the company is not shown to be insolvent, the Court may dismiss the petition.[9]

Section 14 confers upon the Court a very wide discretion in the application for a winding-up order. The section is in the following terms:—

> 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.

The question of the Court's discretion under this section has arisen in Ontario in a number of cases where companies have made assignments for the benefit of their creditors[10] in which either a single creditor or a small minority of creditors petitioned for a compulsory winding

[1]Paris Skating Rink Co. (1887), 5 Ch. D., 959.
[2]*Re* Rapid City, 10 Man. L.R. 681.
[3]Combined Weighing and Advertising Machine Co. (1889), 43 Ch. D. 99.
[4]Pritchett *v.* English and Colonial Syndicate (1899), 2 Q.B. 428.
[5]European Banking Co. (1866), 2 Eq. 521.
[6]Iron Colliery Co. (1882), 20 Ch. D. 442.
[7]Pen-y-van Colliery Co. (1877), 6 Ch. D. 477.
[8]Chapel House Colliery Co. (1883), 24 Ch. D. 259.
[9]Gold Hill Mines, (1883), 23 Ch. D. 210; London and Paris Banking Corporation (1875), 19 Eq., 444.
[10]This establishes the insolvency of the Company (section 3, sub-section g).

up overriding the assignment. In these cases[1] the Court refused the winding-up order on the ground that the Court had discretion to withhold the order in view of the wishes of the majority of creditors. A creditor is entitled under the Act as against the company to a winding-up order, *ex debito justitiae,* but he is not so entitled in opposition to the wishes of all the other creditors. If the Court is of opinion that the minority creditors will be prejudiced unless a winding-up order is made, it will, notwithstanding the fact that the majority of creditors are opposed to a winding up, grant the order.[2]

Sections 15, 16 and 17 outline a procedure which, however, is very rarely adopted. These sections provide that if a company opposes an application on the ground that it is not insolvent, and that any suspension or default was only temporary and was not caused by any deficiency in its assets, the Court may in its discretion adjourn the application for a period not exceeding six months and appoint an accountant to enquire into the affairs of the company. Upon receiving the report of the accountant, the Court may either refuse the application, or make the winding-up order.

Section 18 authorises the Court to restrain further proceedings in any action against the company at any time after the representation of the petition for a winding up and before making the order. This corresponds with Section 191 of the Provincial Act (see page 452, *supra*).[3] After the winding-up order has been made no suit, action or other proceeding may be proceeded with or commenced against the company except by the leave of the Court (Section 22). This corresponds with Section 193 of the Provincial Act

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[1]Wakefield Rattan Co. *v.* Hamilton Whip Co., 24 O.R. 107; *re* Maple Leaf Dairy Co., 2 O.L.R. 590; *re* Strathy Wire Fencing Co., 8 O.L.R. 186.

[2]*Re* Charles H. Davis and Co., 90 W.R. 992.

[3]*See* also Palmer's Precedents (tenth edition), vol. 2, page 419.

(see page 452, *supra*).[1] Application under Sections 18 and 22 should be made by summons to a Judge in Chambers (Sections 109 and Rule 46). Section 22 does not prevent mortgagees who went into possession prior to the winding-up order from selling under their security.[2] Leave under this section must be obtained before proceeding in admiralty.[3] A further effect of the making of the winding-up order is that every judgment, sequestration, distress or execution put in force against the estate after the making of the order is void (Section 23).

In Baxter *v.* Central Bank of Canada, 20 O.R. 214, it was held that the High Court of Justice of Ontario having made an order for the winding up of a company had jurisdiction to restrain an action begun in Quebec against the company on the ground that the Court in such a case acts as a Federal Court, and a Provincial Court cannot interfere with its proceedings. But the Court will not make such an order until evidence is produced showing that the foreign Court had been advised of the winding-up proceedings. A judgment obtained against a company subsequent to the winding-up order has no force or effect and is absolutely null and void. Sections 22, 23 and 84 are for the purpose of providing a rateable distribution of the company's assets amongst all its creditors.

Section 5 of the Act provides that the winding up of the business of the company shall be deemed to commence at the time of serving the notice of presentation of the petition for winding-up. This section differs from the corresponding section of the Provincial Act (Section 190), which provides that the winding-up is deemed to commence at the time of the presentation of the petition.

[1] *See* also Palmer's Precedents (tenth edition), vol. 2, page 430.
[2] In *re* B.C. Tie and Timber Co., XIV., B.C.R. 81.
[3] *Re* B.C. Tie and Timber Co. (No. 2), Colan *v.* Ship Rustler, XIV., B.C.R. 204.

Section 19 authorises the Court to stay the winding-up proceedings at any time. The section is in the following terms:—

> 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.

The words "Upon the application of any creditor or contributory," which are not found in the corresponding section of the Provincial Act (Section 195, see page 410, *supra*), preclude the company from making the application. Under this section the winding up may be completely stayed and the company restored to its former status. It is to be observed that notwithstanding the winding-up the corporate state and powers of the company continue until the winding up is complete (Section 20).

From the time of the making of the winding-up order the company 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 (Section 20). But the liquidator must have the Court's approval to do this (Section 34 (*b*)). Upon the appointment of a liquidator all the powers of the directors cease except in so far as the Court or liquidator sanctions the continuance of such powers (Section 31). There is no express decision as to whether this applies to the appointment of a provisional liquidator, but it is submitted that upon the appointment of the provisional liquidator all powers of the directors come to an end. 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 the winding up, are void (Section 21). This corresponds with Section 248 of the Provincial Act.

Section 109 allows of the powers conferred upon the Court being exercised by a Judge thereof and as a matter of practice in British Columbia these powers are exercised by a Judge in Chambers. Section 110 allows the Court after the winding-up order is made to refer and delegate to any officer of the Court any of the powers conferred upon the Court by the Act. Under the authority of this section a large number of matters are referred to the Registrar of the Court. All applications to the Court in a winding-up must be by summons at Chambers (Rule 46).

Where an advertisement is required for any purpose it must be inserted once in the *British Columbia Gazette* and in such other newspaper or newspapers and for such a number of times as the Court may direct (Rule 48).

As to matters of procedure generally, see Sections 107 to 133 of the Act.

Upon the winding-up order being made[1] the same must be passed and entered within five days (Rule 6), and within twelve days after the date of the order, it must be advertised[2] by the petitioner once in the *British Columbia Gazette,* and must be served on such persons as the Court directs (Rule 5). Upon the order being passed and entered, a summons must be taken out in the winding-up and served upon all parties who have appeared on the petition. Upon the return of this summons the Judge may fix a time for the appointment of a liquidator and for the proof of debts, and for the list of contributories to be brought in, and may give directions as to advertisements to be made for all or any of such purposes and generally as to the proceedings and the parties to attend thereon (Rule 6). It is to be observed that the winding-up rules refer to an official liquidator, while the Act itself merely refers to a liquidator, but they are one and the same official.

[1]For form of this order, see Form No. 3 in Rules.
[2]For form of advertisement, see Form No. 4 in Rules.

Section 24 authorises the Court to appoint a liquidator. A permanent liquidator is not usually appointed at the making of the winding-up order,[1] but by Section 29 the Court may appoint a provisional liquidator, and the order appointing him may limit and restrict his powers (see also Rule 14 and for form of order see Form No. 8 in Rules). The petitioner's nominee will usually be appointed as provisional liquidator. If there has been an assignment for the benefit of creditors, the assignee will be appointed a provisional liquidator. The rules relating to liquidators so far as they are applicable apply to provisional liquidators (Rule 53).

Section 27 provides that a permanent liquidator shall not be appointed unless previous notice is given to the the creditors, contributories, shareholders or members and that the Court shall directly order the manner and form in which such notice shall be given (see also Rules 6, 7 and 8 in regard to the giving of this notice). Unless the provisions of this section are observed it is a substantial objection to the appointment of the permanent liquidator.[2]

When the time and place for the appointment of a liquidator are fixed the same must be advertised as the Court has directed, but so that the first or only advertisement shall be published within fourteen days and not less than seven days before the day so fixed[3] (Rule 8). Upon the day so fixed the provisional liquidator files an affidavit proving the publication and service of the notices in the manner directed by the Court. Nominations for the appointment of liquidator should be substantially in the form of Form No. 6 in the rules. The Court may appoint or

[1]In view of Section 27, it would appear impossible to appoint the permanent liquidator at the same time the winding-up order is made.

[2]*Re* Guelph Linseed Oil Co., 2 O.W.R. 1151: Shoolbred *v.* Union Fire, 14 S.C.R. 624.

[3]For form of advertisement see Form No. 5 in Rules.

reject any person nominated at such time and place and may appoint any person not so nominated (Rule 7). As to the principles which the Court follows in appointing a liquidator, see page 433, *et seq.* The liquidator must give security and the order appointing him must fix the time within which the security shall be perfected (Rule 10). The form of security is by entering into a recognizance with two or more sureties in such sum as the Judge may approve (for form of recognizance see Form 9 in rules). The Court may accept the security of a guarantee society in lieu of its security (Section 28 and Rule 9).

Section 30 enables an incorporated company to be appointed liquidator and an amendment passed in the year 1907 provides that 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 or assignee without giving security, such trust company may be appointed liquidator without giving security.

In order that the Judge, or Registrar of the Court, if the matter has been referred to him, may be in a position to determine the proper amount of security it is one of the duties of the provisional liquidator to bring in an affidavit setting out the assets that have come into his hands and their value. Security is then fixed at usually twice the amount of the assets, following the practice in administration matters. The cost of furnishing security by the liquidator is borne by him personally and cannot be charged against the assets of the company as an expense incurred in the winding up. The Court may appoint a provisional liquidator without requiring security (Rule 14).

As soon as a liquidator is appointed and has given security his appointment must be advertised as the Court directs (Rule 13 and for form of advertisement see Form No. 14 of Rules).

The order appointing a liquidator must fix the times or periods at which he is to leave his accounts with vouchers and receipts with the District Registrar and must name the bank, which must be a chartered bank in the Province, into which all moneys coming into the liquidator's hands must be paid (Rule 16 and for form of this order see Form No. 7 in Rules).

Upon the liquidator being appointed he must 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 (Section 33) and must forthwith proceed to make up, continue, complete and rectify the books of account of the company (Rule 16). He must deposit all moneys coming into his hands which belong to the company in the bank designated by the Court and must not keep in his hands more than $100 at any one time (Sections 42 and 43). Such account must not be opened in the name of the liquidator individually but in his name as liquidator (Section 43, see also Rules 35 to 39). Deposits are usually made to the credit of *"A. B., liquidator of the company."*

By Rule 40, moneys placed to the account of the liquidator may only be paid out by cheque or orders signed by the liquidator and countersigned by the Judge of the Court.

Section 40 and Rule 17 authorise the liquidator being paid such salary or remuneration as the Court directs, but notice must first be given to the creditors and contributories. See *in re* Central Bank, Lyle's claim 22 O.R. 247 and *re* Farmers' Loan and Savings Company 30 O.R. 337, where the question of the liquidator's remuneration was considered.

The Act does not contain any provisions regarding the discharge of the liquidator and his sureties when the winding up is complete, but Rules 59 and 60 enable a liquidator and his sureties to obtain their discharge and

release upon the termination of the proceedings in Chambers for the winding up of the company.

Unclaimed dividends or moneys of the company must be deposited at interest in the bank designated by the Court (Sections 44 and 45), and if unclaimed at the end of three years must be paid over by such bank to the Minister of Finance of Canada (Sections 136 and 137).

POWERS OF THE LIQUIDATOR.

Sections 34 and 35 set out a list of things that the liquidator may do with the approval of the Court. Briefly these are (*a*) bringing or defending suits, (*b*) carrying on the business of the company, (*c*) selling property of the company, (*d*) drawing and indorsing bills and notes, (*e*) proving in bankruptcy, (*f*) borrowing money and (*g*) employing a solicitor.

These sections correspond with Section 199 of the Provincial Act with this difference, however, that in a provincial liquidation the liquidator may exercise any of the foregoing powers without the approval of the Court, except three, that is to say, (*a*) bringing and defending suits, (*b*) carrying on the business of the company, and (*g*) employing a solicitor. Generally as to the powers of a liquidator see page 416, *supra*, and Palmer's Precedents, Vol 2, pages 280 to 298.

CONTRIBUTORIES.

The Act contains a number of sections (48 to 60) providing for the payment, and the enforcement thereof, of all sums due from members of the company in their capacity as shareholders. These sections, which do not differ in principle from those of the Provincial Act, are supplemented by a number of rules (Rules 28 to 39). It must be observed, however, that there is an important difference between the Dominion and Provincial Acts, in that under

the former Act past members are not liable to contribute in respect of the shares they held (Section 52). In other words there is no list of contributories corresponding to the "B" list in a Provincial winding up.

The liquidator has no power to call meetings of creditors or contributories. These may only be called at the direction of the Court (Section 61). Upon the winding up of a company all debts payable on a contingency and all claims against the company, present or future, certain or contingent and for liquidated or unliquidated damages are admissible to proof against the company. If for any reason the claim does not bear a certain value the Court determines the value of same and the amount for which it shall rank (Section 69). Section 70 of the Act gives to clerks or other persons in or having been in the employment of the company in or about its business or trade, a preference in the dividend sheet over other creditors for arrears of salaries or wages which have accrued to them during the three months next previous to the date of the winding-up order. See page 490, *supra*, and Section 250 of the Provincial Act, which corresponds to this section. Creditors are required to send in proof of their claims, and on application of the liquidator the Court fixes a day on or before which such claims must be sent in (Section 72 and Rules 19 and 20). The liquidator must give the notices as directed by the Court. For form of notices see Form No. 15 in rules.

Rule 21 casts upon the liquidator the duty of investigating the claims sent in, and by Section 73 he may give notice in writing to those creditors whose claims he does not consider should be allowed, requiring them to attend before the Court on a day named in the notice to prove their claims to the satisfaction of the Court. Only after the notice calling in claims (Section 72) and the notice requiring creditors to prove their claims (Section 73) have been given

and the respective times therein specified have expired and all claims of which proof have been required by the liquidator have been allowed or disallowed by the Court may the liquidator distribute the assets of the company among the persons entitled thereto (Section 74). This section expressly relieves the liquidator from liability to any person whose claim had not been sent in at the time of any such distribution. If claims are sent in after the liquidator has made a partial distribution such claims, subject to proof and allowance, shall rank with the other claims of creditors in any future distribution (Section 75).

Distribution of Assets.

Section 91 provides that 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.

By Section 92 these charges, costs and expenses, including the remuneration of the liquidator, are payable in priority to all other claims. If any surplus remains after satisfaction of all these debts and liabilities and the winding-up charges, costs and expenses, this surplus must be distributed among the shareholders according to their rights and interests in the company.

PART IV.

FORMS AND PRECEDENTS

1. DECLARATION OF COMPLIANCE WITH STATUTORY REQUIREMENTS.

"COMPANIES ACT"

(R.S.B.C. 1911, Chap. 39).

Declaration of Compliance with the requirements of the "Companies Act" made pursuant to Section 27 (2) of the said Act.

CANADA
PROVINCE OF BRITISH COLUMBIA.
TO WIT:

I,.............................of..........................
do solemnly declare that I am * ....
....
....
of the...
Limited, and That all the requirements of the "Companies Act" in respect of matters precedent to the registration of the said Company and incidental thereto have been complied with. And I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath and by virtue of the "Canada Evidence Act."

Declared before me at..............
....
this...........day of................ ....
A.D. one thousand nine hundred and....

....
A Commissioner for taking Affidavits within British Columbia.

*Insert here:—"A Solicitor of the Supreme Court engaged in the formation," or "A person named in the Articles of Association as a Director or Secretary."

2. DECLARATION AS TO COMMENCEMENT OF BUSINESS.

"COMPANIES ACT."
(R.S.B.C. 1911, Chap. 39).

Declaration made on behalf of....................................

....

..............................., Limited, that the conditions of Section 96 (1) of the said Act have been complied with.

CANADA:
PROVINCE OF BRITISH COLUMBIA.
TO WIT:

I,.............................., of.........................

being..............................of the.........................
(The Secretary or one of the Directors.)

.................................., Limited,.......................
solemnly declare that the amount of the share capital of the Company offered to the public for subscription is $..............................

That the amount fixed by the Memorandum or Articles of Association, and named in the prospectus as the minimum subscription upon which the Company may proceed to allotment, is $............................

That shares held, subject to the payment of the whole amount thereof in cash, have been allotted to the amount of $.........................

That every Director of the said Company has paid to the Company on each of the shares taken, or contracted to be taken, by him, and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered by the Company for public subscription.

And I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath and by virtue of the "Canada Evidence Act."

Declared before me at..............
....
this............day of.............
A.D. one thousand nine hundred and..

....

....
A Commissioner for taking Affidavits within British Columbia.

3. LIST OF PERSONS WHO HAVE CONSENTED TO BE DIRECTORS.

TO THE REGISTRAR OF JOINT STOCK COMPANIES:

I, the undersigned, hereby give you notice, pursuant to Section 83 of the "Companies Act," (1911, R.S.B.C., Chap. 39) that the following persons have consented to be Directors of the.......................... ....Company, Limited.

NAME	ADDRESS	DESCRIPTION
James Brown	Westholm, Park Road, Vancouver	Engineer
John Smith	2932 Melville Street,, Vancouver	Land Surveyor
Robert Craven	1614 River Road, South Vancouver	Tea Merchant
Alex Thomson	328 Cardero Street, Vancouver	Insurance Manager

(Signature of Secretary or Solicitor) JAMES YOUNG,
34 Barnard Place, Vancouver,
Dated this 13th day of May, 1912. Solicitor

4. CONSENT TO ACT AS DIRECTOR.

TO THE REGISTRAR OF JOINT STOCK COMPANIES:

We, the undersigned hereby testify our consent to act as Directors of the.................................... Company, Limited, pursuant to Section 80, of the "Companies Act," (1911, R.S.B.C., Chap. 39).

SIGNATURE	ADDRESS	DESCRIPTION
Jas. Brown	Westholm, Park Road, Vancouver	Engineer
John Smith	2932 Melville Street, Vancouver	Land Surveyor
Robt. Craven	1614 River Road, South Vancouver	Tea Merchant
Alexr. Thomson	328 Cardero Street, Vancouver	Insurance Manager

Dated this 13th day of May, 1912.

5. CONTRACT BY DIRECTOR TO TAKE SHARE QUALIFICATION,

TO BE SIGNED AND FILED WITH THE REGISTRAR PURSUANT TO SECTION 80 (1) OF THE "COMPANIES ACT."

THE..COMPANY, LIMITED.

I, the undersigned, James Brown, of Westholm, Park Road, Vancouver, Engineer, having consented to act as Director of the.......... ....Company, Limited, hereby undertake and agree to take from the said Company and to pay for shares of the Company of the nominal value of One Thousand Dollars, this being the amount fixed by the Articles of Association of the Company as the qualification of a Director of the Company.

Signed by the said James Brown
in the presence of James Young,
Solicitor, Vancouver.
} JAS. BROWN

Dated this 16th day of May, 1912.

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6. BOARD MEETING AGENDA SHEET.

MEETING OF DIRECTORS TO BE HELD ON FRIDAY, THE 27TH SEPTEMBER, 1912, IN THE BOARD OF TRADE ROOMS, VANCOUVER.

Present..

.. ..

AGENDA	DECISIONS
1. Registration of Company......... The Solicitor to report as to this.	The Solicitor reported that the Company was duly registered on 20th inst. The Certificate of Incorporation produced was ordered to be framed and hung in the Company's office.
2. Election of Directors............ Produce result of Meeting of Signatories to the Companies' Memorandum of Association for the election of the following proposed Directors, viz:— James Brown John Smith Robt. Craven Alex. Thomson	The Solicitor produced resolution signed by all the signatories electing the persons named as Directors. Ordered that the said resolution be affixed to the first page of the Company's Minute Book.

3. Election of Chairman............	James Brown unanimously elected.
4. Quorum of Directors.............	Two to be quorum for transaction of business.
5. Bankers..........................	Imperial Bank of Canada appointed
6. Manager..........................	Richard Wallace appointed.
Etc. Etc.	Etc. Etc.

7. MINUTES OF DIRECTORS' MEETING

MINUTES OF THE FIRST MEETING OF THE BOARD OF DIRECTORS HELD IN THE BOARD OF TRADE ROOMS ON FRIDAY, 27TH SEPTEMBER, 1912.

Present:—James Brown (in the Chair).
John Smith.
Robt. Craven.
Alex. Thomson.

In Attendance:—Jas. Young, Solicitor.
Thos. Main, Secretary.
S. T. Grant, Chartered Accountant.

1. The Solicitor reported that the registration of the Company was effected on the 20th September, 1912, and he also produced the Certificate of Incorporation of that date.

2. The Solicitor further reported that at a Meeting of the Signatories held this day, at which all the signatories were present, the following four gentlemen had been unanimously elected directors, viz:—Messrs. James Brown, John Smith, Robert Craven and Alex Thomson. Mr. J. R. Hutchins to join the Board after allotment.

3. RESOLVED—That Mr. James Brown be appointed Chairman of the Directors.

4. RESOLVED—That two Directors shall form a quorum for the despatch of business.

5. RESOLVED—That the banking account of the Company be opened with the Imperial Bank of Canada, subject to the control of the members of this Board, the signature of any one of whom and the counter signature of the Secretary, Mr. Thos. Main, shall be sufficient authority to the Bank for the payment of all monies, to permit the inspection or withdrawal of any Securities, and to receive and act upon any instructions in connection with the transactions of the Company with the said Bank.

6. RESOLVED—That Mr. Richard Wallace be appointed Manager of the Company at a salary of $250 per month terminable on one month's notice on either side, Mr. Wallace to have complete control of etc., etc. (Here define his powers and duties.)

7. RESOLVED—That Mr. James Young be appointed Solicitor to the Company.

8. RESOLVED—That Mr. S. T. Grant be appointed Auditor to the Company at a remuneration of $500 (five hundred dollars) for the first year's audit, including the certifying of the Statutory Report.

9. RESOLVED—That Mr. Thos. Main be appointed Secretary to the Company subject to three months' notice on either side in the event of the termination of the agreement, at a salary of $100 (one hundred dollars) per month.

10. RESOLVED—That the Registered Office of the Company be situated at 1019 Hastings Street, West Vancouver, and that the name of the Company be forthwith affixed outside the Company's office and that the Solicitor be instructed to forthwith register with the Registrar of Joint Stock Companies notice of the situation of the Registered Office.

11. RESOLVED—That Mr. J. R. Hutchins be appointed Managing Director of the Company at a remuneration of $3000 per annum for a period of three years, and that the Solicitor be instructed to prepare an Agreement accordingly.

12. RESOLVED—That the copy of the Prospectus of the Company, dated the 19th September, now submitted (with the signature of all the Directors affixed) be approved, be ordered to be printed and circulated in accordance with the estimate, produced, of the Advertising Agents, so soon as the document shall have been registered with the Registrar. A copy of the Prospectus was ordered to be attached to the Minute Book for reference.

13. RESOLVED—That a letter be written to the Bankers of the Company and signed by the Directors, giving their signatures, and it was further resolved that all monies received be paid into the Bank and that one Director and the Secretary should sign cheques on behalf of the Company, or two Directors.

14. RESOLVED—That the seal of the Company be affixed to documents in the presence of one Director and the Secretary after a Board Minute has been duly passed authorizing the use of the Seal.

15. RESOLVED—That a seal be obtained in accordance with the design and estimate submitted, and that the seal of the Company be kept at the Registered Offices, the Secretary holding the key.

16. RESOLVED—That the First Ordinary General or Statutory Meeting of the Company be held in the office of the Company at five o'clock on Friday, 15th November, 1912.

17. RESOLVED—That it be remitted to the Secretary to obtain such books of account as the Auditor may advise, Office Stationery, Safe and Furniture (at a limit of $750).

18. RESOLVED—That all original agreements and similar documents be kept in a box at the Company's Bankers, to which access is only to be obtained by the authority of the Board.

19. RESOLVED—That the next Board Meeting be held on Friday, 18th October, 1912.

NOTE.—In the foregoing example of Minutes of the First Meeting of the Board, there are several items which would not in the ordinary course be dealt with until a subsequent meeting. A look through them will, however, assist the Secretary to prepare his Agenda for the first Meeting. It is customary for some Banks to have resolutions passed on their own special forms for operations on the Company's account, and the Secretary should first enquire at the Bank as to this.

8. NOTICE OF SITUATION OF REGISTERED OFFICE.

NOTICE OF THE SITUATION OF THE REGISTERED OFFICE OF THE ....COMPANY, LIMITED.

TO THE REGISTRAR OF JOINT STOCK COMPANIES.

The......................................Company, Limited, hereby give you notice in accordance with the "Companies Act," (1911, R.S.B.C., Chap. 39) that the registered office of the Company is situated at No. 1019, Hastings Street, West Vancouver.

(Signature) THOS. MAIN,
Secretary.

Dated 16th October, 1912.

9. NOTICE OF CHANGE OF REGISTERED OFFICE.

NOTICE OF CHANGE IN THE SITUATION OF THE REGISTERED OFFICE OF THE......................................COMPANY, LIMITED.

TO THE REGISTRAR OF JOINT STOCK COMPANIES.

The......................................Company, Limited, hereby give you notice, in accordance with the "Companies Act" (1911, R.S.B.C., Chap. 39), that the Registered office of the Company is now situated at 63 Wallace Road, Vancouver.

(Signature) THOS. MAIN,
Secretary.

Dated 24th day of July, 1912.

10. RETURN OF ALLOTMENTS.

EASTERN STEAMSHIP COMPANY, LIMITED.

Return of Allotments ma'e the............day of............ 1913, in pursuance of Section 97 of the Companies' Act, R.S.B.C. 1911.

Number of *..............Shares allotted payable in cash ....
Number of ....Shares allotted payable in cash ....
Nominal amount of *...............Shares so allotted..............$
Nominal amount of ....Shares so allotted..............$
Amount paid or due and payable on each such *.................share$
Amount paid or due and payable on each such ....share$

(*Distinguish between Preference, Ordinary, &c.)

Number of Shares allotted for a consideration other than cash...............................
Nominal amount of Shares so allotted ....$
Amount to be treated as paid on each such share.................. ....$
The consideration for which such shares have been allotted is

Names, Addresses and Descript'on of the Allottees:

NAME	ADDRESS	DESCRIPTION	NUMBER OF SHARES ALLOTTED

Presented for filing by

11. CHAIRMAN'S AGENDA SHEET AT GENERAL MEETING.

SECOND GENERAL MEETING, WEDNESDAY, 15TH JANUARY, 1913.

1. Secretary to read Notice convening the Meeting.
2. Secretary to read Minutes of previous General Meeting (or Minutes to be taken as read) and to read the Auditor's Report, if not printed on the issued accounts.
3. Ask whether the Report and Accounts submitted shall be taken as read.
4. Make statement as to the position of the Company's affairs, and conclude by moving as follows:

   "That the Report of the Directors produced, together with the annexed Statement of the Company's Accounts at the 31st December, 1912, duly audited, be received, approved, and adopted."
5. Call on Mr............. to second the motion.
6. Invite discussion by Shareholders.
7. Answer questions and put motion to the meeting as above, and declare result.
8. Mr............. to move:

   "That Messrs............ and ...., the retiring Directors be re-elected Directors of the Company."
9. Call on Mr............. to second the motion.
10. Put motion to meeting and declare result.
11. Chairman to move:

    "That the following dividends be now declared out of the net profits of the Company for the twelve months ended the 31st December, 1912, upon the capital issued on that date, viz. on the $100,000 Preference Stock a dividend of 7 per cent for the year and on the $150,000 Ordinary Stock a dividend of 10 per cent for the year, such dividends to be paid to the Shareholders appearing on the Register at this date."
12. Call on Mr............. to second the motion.
13. Put motion to the meeting and declare the result.
14. A Shareholder to move:

    "That Mr. S. T. Grant, Chartered Accountant, be re-elected Auditor of the Company for the ensuing year, at a remuneration for his services of $250."
15. The motion to be seconded by another Shareholder.
16. Put motion to the meeting and declare result.

12. NOTICES OF MEETINGS.

I. STATUTORY MEETING.

NOTICE IS HEREBY GIVEN that the STATUTORY MEETING of the..Company, Limited,

called in accordance with Section 73 of the "Companies Act," (R.S.B.C., 1911, Chap. 39), will be held at the Registered Offices of the Company, 1019 Hastings Street, W., Vancouver, on Friday, 15th November, 1912, at 5 o'clock p.m.

A copy of the Report required to be submitted to the Meeting, under Section 73 of the said "Companies Act" is enclosed herewith.

By order of the Board,

THOS. MAIN,
Secretary.

II. ORDINARY GENERAL MEETING.

NOTICE IS HEREBY GIVEN that the SECOND ORDINARY GENERAL MEETING of the..
Company, Limited, will be held in the Board of Trade Rooms, Vancouver, on Wednesday, the 15th day of January, 1913, at twelve o'clock noon, to pass the Directors' Report and Accounts, to elect Directors and Auditors, to declare a dividend, and to transact the ordinary business of the Company.

By order of the Board,

THOS. MAIN,
Secretary.

Vancouver: 27th December, 1912.

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13. DIRECTORS' REPORT AND ACCOUNTS.

THE..COMPANY, LIMITED

REPORT OF THE DIRECTORS TO BE PRESENTED TO THE SECOND ORDINARY ANNUAL GENERAL MEETING OF THE SHAREHOLDERS, TO BE HELD IN THE BOARD OF TRADE ROOMS, VANCOUVER, AT TWELVE O'CLOCK NOON, ON WEDNESDAY, THE 15TH DAY OF JANUARY, 1913.

1. The Directors beg to present herewith the audited account of the Company for the twelve months ended 31st December, 1912.

2. The profits for the year 1912, amount to $32,594.85

Which the Directors propose to divide as follows:

In payment of a dividend of 7% on the Preference Capital	$ 7,000.00
In payment of a dividend of 10% on the Ordinary Capital	15,000.00
Amount to be carried to Reserve	10,000.00
Balance to be carried forward to next year's accounts	594.85
	$32,594.85

3. The Shareholders have been kept advised by Circular from time to time of the progress of the Company's operations in the field, and the Resident Engineer reports that the plant is now in full working order, and in excellent condition.

4. The Directors to retire are Messrs. .... and .... who, being eligible, offer themselves for re-election.

5. The retiring Auditor, Mr............, also offers himself for re-election.

6. Appended hereto is copy of the Company's Balance Sheet and Profit and Loss Account, duly certified by the Auditor, as at 31st December, 1912.

By order of the Board,

THOS. MAIN,
Secretary.

Vancouver: 3rd January, 1913.

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14. MINUTES OF STATUTORY GENERAL MEETING.

The Statutory General Meeting was Held on Friday, 15th November, 1912, at the Registered Offices of the Company, at 5 o'Clock p.m.

Present:—..

....

1. The notice convening the meeting was read by the Secretary.
2. The Chairman reported that the meeting was called to comply with the provisions contained in Section 73, of the "Companies Act."
3. The Special Report of the Directors and Auditor, a copy of which had been sent to the Shareholders with the notice of meeting, was considered and approved.

4. The Chairman explained shortly the satisfactory position of the Company's affairs, and referred to the promising outlook as mentioned in the Engineer's Reports.

5. A vote of thanks was accorded to the Chairman, who suitably replied.

6. The meeting then terminated.

....
Chairman.

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15. MINUTES OF ORDINARY GENERAL MEETING.

THE SECOND ORDINARY GENERAL MEETING OF THE COMPANY WAS HELD IN THE BOARD OF TRADE ROOMS, VANCOUVER, ON WEDNESDAY, THE 15TH DAY OF JANUARY, 1913, AT TWELVE O'CLOCK. NOON.

Present:—..

....

7. The notice convening the meeting was read.
8. The Directors' Report and Accounts were taken as read.
9. The Report of the Auditor on the Accounts at the 31st December, 1912, was read.
10. RESOLVED—That the Report of the Directors produced, together with the annexed Statement of the Company's Accounts at the 31st December, 1912, duly audited, be received, approved and adopted.
11. RESOLVED—That the following dividends upon the Company's issued Capital be now declared payable out of the Net Profits of the undertaking for the twelve months ended the 31st December, 1912, viz. on the $100,000 Preference Stock a dividend of 7% for the year; on the $150,000 Ordinary Stock a dividend of 10% for the year, such dividends to be paid forthwith.
12. RESOLVED unanimously that Messrs. .... and .... the retiring Directors, be re-elected Directors of the Company.
13. RESOLVED—That Mr............, Chartered Accountant, be re-elected Auditor to the Company for the ensuing year, at a remuneration of $250.
14. The meeting closed with a vote of thanks to the Chairman and the Directors.
15. The Chairman having suitably responded on behalf of himself and his co-Directors, the meeting terminated.

....
Chairman.

16. NOTICE OF EXTRAORDINARY GENERAL MEETING.

(FIRST NOTICE)

NOTICE is hereby given that an Extraordinary General Meeting of the..Company, Limited, will be held at the Registered Office of the Company, 1019 Hastings Street, W., Vancouver, on Monday, the 8th day of August, 1911, at three o'clock in the afternoon, for the purpose of considering, and, if deemed advisable, passing the following resolution, with or without modification:—

That Article 67 of the Articles of Association of the Company be altered by omitting the following words therefrom, namely:—

> "In every subsequent year the one-third of the Directors for the time being, or if their number is not three or a multiple of three, then the number nearest to one-third, who have been longest in office shall retire."

Should the said resolution be passed by the requisite majority, it will be submitted for confirmation as a Special Resolution at a subsequent Extraordinary Meeting of the Members, of which due notice will be given.

By order of the Board,

THOS. MAIN,
Secretary.

Registered Office: 1019 Hastings Street, West,
Vancouver: 23rd July, 1911.

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17. NOTICE OF EXTRAORDINARY GENERAL MEETING

(SECOND NOTIC)

NOTICE is hereby given that an Extraordinary General Meeting of the..Company, Limited, will be held at the Registered Offices of the Company, 1019 Hastings Street, West, Vancouver, on Wednesday, the 24th day of August, 1911, at 3 o'clock p.m., when the subjoined resolution which was passed at an Extraordinary General Meeting of the Company, held on the 8th day of August, 1911, will be submitted for confirmation as a Special Resolution:—

That Article 67, of the Articles of Association of the Company be altered by omitting the following words therefrom, namely:—

> "In every subsequent year the one-third of the Directors for the time being, or if their number is not three or a multiple of three, then the number nearest to one-third, who have been longest in office shall retire."

By order of the Board,

THOS. MAIN,
Secretary

Registered Office: 1019 Hastings Street, West,
Vancouver: 9th August, 1911.

18. REPORT TO STATUTORY MEETING.

REPORT

(Pursuant to Section 73 of the "Companies Act," 1911, R.S.B.C., Chap. 39) of the..Company, Limited

(*a*) The total amount of shares allotted is 125,000 of which 75,000 are allotted fully paid up to the extent of $5 per share in part consideration of the acquirement of the Patent Rights from .... and upon each of the remaining shares the sum of $5 has been paid in cash.

(*b*) The total amount of cash received by the Company in respect of the shares issued wholly for cash is $400,000 and as to shares issued partly for cash is NIL.

(*c*) The receipts and payments of the Company on Capital Account to the date of this report are as follows:—

PARTICULARS OF RECEIPTS			PARTICULARS OF PAYMENTS		
Preference Share Capital........	250,000	00	Preliminary Expenses	2,500	00
Ordinary Share Capital........	150,000	00	LandBuilding and Machinery.....	200,000	00
	400,000	00		202,500	00

The following is an account or Estimate of the Preliminary Expenses of the Company:—

Estimated Preliminary Expenses, including Registration Fees, Printing Prospectus, Advertising, Postages, Stationery, etc. $2,500.00

(*d*) Names, addresses and descriptions of the Directors, Auditors, Manager and Secretary of the Company:

DIRECTORS

Surname	Christian Name	Address	Description
Brown	James	Westholm, Park Road, Vancouver	Engineer
Smith	John	2932 Melville Street, Vancouver	Land Surveyor
Craven	Robert	1614 River Road, So. Vancouver	Tea Merchant
Thomson	Alex.	328 Cardero Street, Vancouver	Insurance Manager

AUDITORS

Grant	Stanley Tytler	1687 Hastings Street Vancouver	Chartered Accountant

MANAGER

Wallace	Richard	Pacific Building, Vancouver	Civil Engineer

SECRETARY

Main	Thomas	1019 Hastings Street, Vancouver	Accountant

(*e*) Particulars of any Contract, the modification of which is to be submitted to the meeting for its approval, together with the particulars of the modification, or proposed modification:—

It is proposed to modify the original Purchase Contract in the following particular, and the Shareholders will be asked to vote upon the following proposed Resolution:—

"That in addition to the Purchase Price mentioned in the Purchase Agreement of 16th July, 1912, the sum of $5,000 cash be paid for additional expenses incurred."

Dated 30th December, 1912.

We hereby certify this Report,

JAMES BROWN
JOHN SMITH } Two of the Directors.

I hereby certify that so much of this Report as relates to the Shares allotted by the Company and to the cash received in respect of such Shares and to the Receipts and Payments of the Company on Capital Account is correct.

S. T. GRANT, C.A.,
Auditor.

19. NOTICE TO REGISTRAR OF INCREASE OF SHARE CAPITAL.

NOTICE OF INCREASE IN THE NOMINAL CAPIT L OF THE.................

....COMPANY, LIMITED.

TO THE REGISTRAR OF JOINT STOCK COMPANIES:

The......................................Company, Limited, hereby give you notice that, in accordance with the "Companies Act" (1911, R.S.B.C., Chap. 39) by an Extraordinary Resolution of the Company passed the nineteenth day of July, 1912, and confirmed as a Special Resolution the twenty-ninth day of July, 1912, the nominal capital of the Company has been increased by addition thereto of the sum of fifty thousand dollars, divided into 50,000 Preference Shares of one dollar each, beyond the Registered Capital of $150,000.

THOS. MAIN,

Dated the 29th day of July, 1912. Secretary.

20. EXTRAORDINARY RESOLUTIONS.

NOTICE OF EXTRAORDINARY RESOLUTION TO WIND UP.

THE......................................COMPANY, LIMITED.

NOTICE IS HEREBY GIVEN that an Extraordinary General Meeting of the above named Company will be held at.................... on Monday, the 14th day of October, 1912, at 3 o'clock p.m., for the purpose of considering, and, if deemed expedient, passing the following Extraordinary Resolution, that is to say:—

"That it has been proved to the satisfaction of this meeting that the Company cannot, by reason of its liabilities, continue its business, and that it is advisable to wind it up, and accordingly that the Company be wound up voluntarily."

Should the Resolution be passed, a further Resolution will be proposed at the same meeting, for the appointment of Mr..................., Chartered Accountant, Vancouver, or some other duly qualified person, to be Liquidator for the purposes of such winding up.

By order of the Board,

THOS. MAIN,

1019 Hastings Street, W., Secretary.

Vancouver: 3rd October, 1912.

NOTE.—It will be observed that the Resolution for Liquidation becomes effective, if passed at one meeting, when it contains a statement as above to the effect that "the Company cannot, by reason of its liabilities, continue its business, and that it is advisable to wind it up."

21. SPECIAL RESOLUTIONS.

NOTICE OF EXTRAORDINARY GENERAL MEETING TO WIND UP.

THE.................................. Company, Limited.

NOTICE IS HEREBY GIVEN that an Extraordinary General Meeting of the above named Company will be held at.................. on Wednesday, the 12th day of April 1911, at 3 o'clock p.m., for the purpose of considering, and, if, deemed advisable, of passing the following Resolutions, with or without modification:—

1. "That the Company be wound up voluntarily."
2. "That Robert Smith, Chartered Accountant, of Vancouver, be, and is hereby appointed Liquidator for the purpose of such winding up."

Should the said Resolutions be passed by the requisite majority, they will be submitted for confirmation as Special Resolutions, at a subsequent Extraordinary General Meeting, due notice of which will be given.

By order of the Board,

THOS. MAIN,
Secretary.

Registered Office, 1019 Hastings Street, W.,
Vancouver, 1st April, 1911.

NOTICE OF THE CONFIRMATORY MEETING.

THE.................................. COMPANY, LIMITED.

NOTICE IS HEREBY GIVEN that an Extraordinary General Meeting of the above Company will be held at.......... on Friday, the 28th day of April, 1911, at 3 o'clock p.m., when the subjoined Resolutions which were duly passed at the Extraordinary General Meeting of the Company, held on the 12th instant, will be submitted for confirmation as Special Resolutions:—

1. "That the Company be wound up voluntarily."
2. "That Robert Smith, Chartered Accountant, of Vancouver, be, and is hereby appointed Liquidator for the purposes of such winding up."

By order of the Board,

THOS. MAIN, Secretary.

Note.—It is not necessary to propose the Liquidator at the first meeting, as he can be appointed, by Extraordinary Resolution only, at the second meeting. If the Liquidator's powers are to be extended, the following notice of Extraordinary Resolution should be given for the second reading, viz.: "That the said Liquidator be and is hereby authorised to enter into such compromises and to do such other acts as he is entitled to do, under the powers for that purpose contained in Section 230 of the "Companies Act" (R.S.B.C., 1911, Chap. 39).

The Resolutions at the first meeting must be passed by a three-fourths majority of those present, and confirmed at the Confirmatory meeting by a simple majority.

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22. NOTICE OF LIQUIDATION TO BE PUBLISHED IN GAZETTE PURSUANT TO SECTION 229 AND FOR REGISTRAR OF JOINT STOCK COMPANIES.

The..Company, Limited.

At an Extraordinary General Meeting of the Members of the above named Company, duly convened and held at...................., in the City of Vancouver, on Monday, the 14th day of October, 1912, the following Extraordinary Resolutions were duly passed; and at a second Extraordinary Meeting, duly convened and held at the same place, on Wednesday, the 30th day of October, 1912, were duly confirmed as Special Resolutions, viz.:—

1. That the Company be wound up voluntarily.
2. That ...., Chartered Accountant, of Vancouver, be and he is hereby appointed Liquidator for the purpose of such winding up.

Dated this 1st day of November, 1912.

....
Chairman.

WITNESS:....................
....

---

23. NOTICE OF APPOINTMENT OF LIQUIDATOR.

To be sent to Registrar pursuant to Section 231.

To the Registrar of Joint Stock Companies:

I, the undersigned Stanley Tytler Grant, of 1687 Hastings Street, Vancouver, hereby give notice that by an Extraordinary Resolution of the Company, I have been appointed Liquidator of the............... Company, Limited.

(Signature) S. T. GRANT.

Dated 11th July, 1912.

24. ADVERTISEMENT FOR CREDITORS IN VOLUNTARY WINDING UP PURSUANT TO SECTION 232.

IN THE MATTER OF THE "COMPANIES ACT" (R.S.B.C., 1911, CHAP. 39)

AND

THE..COMPANY, LIMITED

The Creditors of the above named Company are required, on or before the 31st day of January, 1913, to send their names and addresses and the particulars of their debts or claims, to Robert Smith, Chartered Accountant, of No. 1093 Hastings Street, Vancouver, the Liquidator of said Company and, if so required, by notice in writing from the said Liquidator, are, by their Solicitors, or personally, to come in and prove their said debts or claims at such time and place as shall be specified in such notice, or in default thereof, they will be excluded from the benefit of any distribution made before such debts are proved.

Dated this 31st day of October, 1912.

JAMES YOUNG,
Solicitor for the above-named Liquidator.

216 Granville Street, Vancouver.

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25. NOTICE OF INTENTION TO SETTLE LIST OF CONTRIBUTORIES.

IN THE MATTER OF THE "COMPANIES ACT" (R.S.B.C., 1911, CHAP. 39)

AND

THE..COMPANY, LIMITED.

TAKE NOTICE that I, Robert Smith, the Liquidator of the above-named Company, have appointed Wednesday, the 16th day of February, 1913, at twelve o'clock noon, at my office, 1093 Hastings Street, W., Vancouver, to settle the List of the Contributories of the above named Company, made out by me, pursuant to the "Companies Act," R.S.B.C., 1911, Chap. 39), and that you are included in such list in the character and for the number of Shares stated below; and if no sufficient cause is shown by you to the contrary at the time and place aforesaid, the List will be settled, including you therein.

Dated this 29th day of January, 1913.

ROBERT SMITH,
Liquidator.

To Mr. Herbert Johnston,
624 Westminster Place, Vancouver.

No. in List	Name	Address	Description	In what character included	Pref. Shares of $10 each	Ordy. Shares of $5 each
24	Johnston, Herbert	624 Westminster Pl., Vancouver.	Merchant	Member in his own right.	200	450

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26. VOLUNTARY LIQUIDATION—LIST OF CONTRIBUTORIES.

IN THE MATTER OF THE "COMPANIES ACT," 1911 (R.S.B.C., CHAP. 39)

and

IN THE MATTER OF THE..........................COMPANY, LIMITED.

LIST OF CONTRIBUTORIES OF THE ABOVE NAMED COMPANY, ON 31st JULY, 1912, THE DATE OF THE LIQUIDATION.

The following is a List of the Contributories of the said Company, together with their respective addresses and the number of shares to be attributed to each, so far as I have been able to ascertain.

In the first part of the List the persons who are Contributories in their own right are distinguished.

In the second part of the said list the persons who are Contributories as being representatives of, or being liable to the debts of, others are distinguished.

FIRST PART—A. Contributories in their own right.

No.	Name	Address	Description	In what character included	Pref. Shares of $10 each	Ordy. Shares of $5 each
1	James Brown	Park Road, Vancouver	Engineer	Member in his own right	2000	1000
2	John Smith	2932 Melville Street, Vancouver	Land Surveyor	do.	1500	1500
	&c.	&c.	&c.	&c.		

FIRST PART—B. Contributories in their own right who have been members of the Company within twelve months of the 31st July, 1912, the date of the Commencement of the Liquidation.

112	D. Spencer	16 York Pl., Vancouver	Architect	Member in his own right	20	—
	&c.	&c.	&c.	&c.		

SECOND PART—Contributories as being Representatives of or liable to the Debts of others.

154	A. Taylorand R. Foote	c.o. Messrs. Tumble & Co., Solicitors, Toronto		As Repre-sentative of Hy. Taylor deceased	10	5
	&c.	&c.	&c.	&c.		

27. VOLUNTARY LIQUIDATION--UNDER SUPERVISION ORDER LIQUIDATOR'S REPORT TO THE COURT.

IN THE MATTER OF THE "COMPANIES ACT," 1911 (R.S.B.C., CHAP. 39)

AND

IN THE MATTER OF THE........................COMPANY, LIMITED.

First Quarterly Report of Stanley T. Grant, the Liquidator, up to the 31st October, 1912, in pursuance of order to continue voluntary winding up under supervision made by the Court on the 31st day of July, 1912.

The Liquidator begs to report to the Registrar of Joint Stock Companies as follows:—

1. Notices of Intention to put members on List of Contributories were sent out on 6th August, 1912.
2. The Advertisement for Creditors appeared in the Vancouver Daily Province and the British Columbia Gazette on 1st August, 1912.
3. Notice of having settled List of Contributories on the 20th day of August, 1911, were sent out on that date to the Contributories, and the balance due on the Preference Shares of the Company was called up on the same date.
4. The following is a summary of the Liquidator's Receipts and Payments to date.

RECEIPTS.

Bank Balance	$ 1,000
Calls Received	20,000
Real Estate Sold	15,000
Machinery and Plant Sold	6,750
	$42,750

PAYMENTS.

Insurance, Advertising, Printing, &c	$ 1,675
Law Costs	2,000
Auctioneer and Valuator	250
	$4,625
Balance at credit of Liquidator in Imperial Bank of Canada	38,125
	$42,750

5. Claims to the extent of $395,600 have been received, but the Liquidator estimates that the Liabilities ranking for Dividend will amount to fully $400,000.

Dated 31st October, 1912.

(Signed) S. T. GRANT, Liquidator.

1687 Hastings Street,
Vancouver.

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28. NOTICE OF FINAL GENERAL MEETING.

IN THE MATTER OF THE "COMPANIES ACT" (R.S.B.C., 1911, CHAP. 39)

AND

THE..COMPANY, LIMITED.

NOTICE IS HEREBY GIVEN that a General Meeting of the abovenamed Company will be held in the Board of Trade Rooms, Hastings Street, Vancouver, on Wednesday, the 31st day of October, 1913, at 11 o'clock forenoon, for the purpose of having the account of the Liquidator, showing the manner in which the winding up has been conducted, and the property of the Company disposed of, laid before such meeting, and of hearing any explanation that may be given by the Liquidator, and also of determining by Extraordinary Resolution the manner in which the Books, Accounts and Documents of the Company and of the Liquidator thereof shall be disposed of.

Dated this 12th day of September, 1913.

JAMES YOUNG,
Solicitor for Liquidator.

216 Granville Street, Vancouver.

29. RETURN OF FINAL WINDING UP MEETING.

RETURN OF FINAL WINDING UP MEETING (PURSUANT TO SEC. 239 OF THE "COMPANIES ACT," 1911 (R.S.B.C., CHAP. 39)

OF

THE...COMPANY, LIMITED.

TO THE REGISTRAR OF JOINT STOCK COMPANIES:

I have to inform you that a Meeting of the...................... Company, Limited, was duly held on the fourteenth day of July, 1913, for the purpose of having an Account laid before them showing the manner in which the winding up of the Company has been conducted, and the property of the Company disposed of, and that the same was done accordingly.

(Signature) S. T. GRANT,
Liquidator.

Dated 17th July, 1913.

PART V.

THE COMPANIES ACT

(R.S.B.C., 1911, Chap. 39) as amended by theCompanies Act Amendment Act, 1912.

The Companies Act Amendment Act, 1913, appears separately. See pages 704 to 709. Sections of the Principal Act modified by the 1913 Act have been noted in the margin

An Act relating to Joint-stock Companies.

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:—

Short Title.

Short title.

1. This Act may be known and cited as the "Companies Act," 1910, c. 7, s. 1.

Interpretation, etc.

Interpretation.

2. In this Act, unless the context otherwise requires, the following expressions shall have the meanings hereby assigned to them, that is to say:—

"Existing company."

"Existing company" means a company formed and registered under some former public Ordinance or Act of this Province, except the "Companies Act, 1878," and the "Companies Act, 1890":

"Company."

"Company" means a company formed and registered under this Act or an existing company:

"Extra-provincial company."

"Extra-provincial company" means any duly incorporated company other than a company incorporated under the laws of the Province or the former Colonies of British Columbia and Vancouver Island:

"Articles."

"Articles" means the articles of association of a company as originally framed or as altered by special resolution, including, so far as they apply to the company, the regulations contained (as the case may be) in Table A in the First Schedule to the "Companies Act, 1862," or in that table as altered in pursuance of Section 71 of that Act, or in Table A in the First Schedule to the "Companies Act, 1897," or in that table as altered in pursuance of Section 121 of that Act, or in Table A in the First Schedule to this Act, or in such table as altered in pursuance of the provisions of this Act; and shall include the by-laws of any existing company except by-laws made by directors:

"Memorandum."

"Memorandum" means the memorandum of association of a company as originally framed or as altered in pursuance of the provisions of this Act:

"Charter" of a company means the Act, Statute, Ordinance, or other provision of law by or under which the company is incorporated, and any amendments thereto applying to such company, whether of this or of any other Province, or of the Dominion, or of the United Kingdom, or of any colony or dependency thereof, or of any foreign State or country, the memorandum of association or agreement or deed of settlement of the company, and the letters patent or charter of incorporation, and the licence or certificate of registration of the company, as the case may be: "Charter."

"Charter and regulations" of a company means the charter of the company and the articles of association, and all by-laws, rules, and regulations of the company, and all resolutions and contracts relating to or affecting the capital and assets of the company: "Charter and regulations."

"Document" includes summons, notice, order, and other legal process and registers: "Document"

"Share" means share in the share capital of the company, and includes stock except where a distinction between stock and shares is expressed or implied: "Share."

"Debenture" includes debenture stock: "Debenture."

"Books and papers" and "books or papers" include accounts, deeds, writings, and documents: "Books and papers."

"The Registrar" means the Registrar of Joint-stock Companies or other officer performing under this Act the duty of registration of companies: "The Registrar."

"The Court," used in relation to a company, means the Supreme Court: "The Court"

"General rules" means general rules made under this Act, and includes forms: "General rules."

"Prescribed" means prescribed by general rules or by the Lieutenant-Governor in Council or other lawful authority: "Prescribed."

"Director" includes any person occupying the position of director by whatever name called: "Director."

"Prospectus" means any prospectus, notice, circular, advertisement, or other document offering to the public for subscription or purchase any shares or debentures of a company: "Prospectus."

"Real estate" or "land" shall include all messuages, lands, tenements, hereditaments of any tenure, leaseholds, and all immovable property of every kind: "Real estate" or "land."

"Shareholder" means every subscriber to or holder of shares in a company, and shall extend to and include the personal representatives of such shareholder: "Shareholder."

"Subscriber" means any person who subscribes for shares in the memorandum of association of a company: "Subscriber."

"Company limited by shares."

"Company limited by shares" shall include a company incorporated under Part V. of this Act.

In addition to the above, the following words are defined in this Act:—

"Company"—Secs. 129 (3), 174.

"A company limited by shares," "a company limited by guarantee," "an unlimited company"—Sec. 12.

"Contributory"—Sec. 183.

"Deed of settlement"—Sec. 287 (4).

"Expert"—Sec. 93 (5).

[1913 Act]

"Joint-stock company"—Sec. 275.

"Member"—Sec. 32.

"Minimum subscription"—Sec. 94 (2).

"Private company"—Sec. 130.

"Promoter"—Sec. 93 (5).

"Registered office"—Sec. 70.

"Resolution for reducing share capital"—Sec. 53 (2).

"Share warrant"—Sec. 45.

"Special and extraordinary resolution"—Sec. 77 (1), (2).

"Statutory meeting"—Sec. 73 (1).

"Statutory report"—Sec. 73 (2).

1910, c. 7, s. 2; 1911, c. 8, s. 2.

Division of Act.

Division of Act.

3. This Act is divided into twelve parts, relating to the following subjects:—

Part.		Page.
I.	—Preliminary	561
II.	—Constitution and Incorporation	562
III.	—Distribution and Reduction of Share Capital, Registration of Unlimited Company as Limited, and Unlimited Liability of Directors	570
IV.	—Management and Administration	585
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VI.	—Licensing and Registration of Extra-provincial Companies	623
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IX.	—Registration Office and Fees	664
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1910, c. 7, s. 3.

PART I.

PRELIMINARY.

4. The Lieutenant-Governor in Council, from time to time, may, by Order,—

Powers of Lieut.-Governor in Council.

(*a*.) Appoint such person or persons as he shall think proper to act as Registrar or Deputy Registrar of Joint-stock Companies:

Appointment of Registrar and Deputy Registrar of Companies.

(*b*.) Make and establish such general rules and orders, not inconsistent with this Act, as may appear necessary or expedient for the purpose of giving full effect to the provisions of this Act, or any of them, and for prescribing the course to be adopted in the course of official business under this Act. All such general rules and orders shall, after the making thereof, be published in the Gazette, and shall thereupon have the force of law until amended, altered, or revoked: R. S. 1897, c. 44, s. 3.

Rules.

(*c*.) Make such alterations in the tables and forms contained in the First Schedule hereto (so that it does not increase the amount of fees payable to the Registrar in the said Schedule mentioned) and in the forms in the Second Schedule, or make such additions to the last-mentioned forms as may be requisite. Any such table or form when altered shall be published in the Gazette, and upon such publication being made such table or form shall have the same force as if it were included in the Schedule to this Act; but no alteration made by the Lieutenant-Governor in Council in the Table A in the First Schedule shall affect any company registered prior to the date of such alteration, or repeal, as respects such company, any portion of that table. [25 & 26 Vict., c. 89, s. 71]; R. S. 1897, c. 44, s. 121; [8 Edw. 7, c. 69, s. 118]; 1910, c. 7, s. 4.

Alterations in forms.

5. It shall be the duty of the Registrar to enforce compliance with the several provisions, regulations, and stipulations contained in this Act or in any regulations made thereunder, but such duty shall not affect the right of any other person to compel compliance with the provisions hereof. R. S. 1897, c. 44, s. 2; 1910, c. 7, s. 5.

Registrar's duty to enforce compliance.

6. The forms set forth in the Second Schedule hereto, or forms as near thereto as circumstances admit, shall be used in all matters to which such forms refer. 1910, c. 7, s. 6.

Forms to be used.

7. No company shall be incorporated under this Act for the construction and working of railways, or for carrying on the business of banking or insurance. 1910, c. 7, s. 7.

Railway and insurance companies not to be incorporated.

8. For the purposes of this Act, a company that carries on the business of fire, life, marine, or other insurance in common with any other business

Definition of insurance company.

shall be deemed to be an insurance company. [25 & 26 Vict., c. 89, s 3]; R. S. 1897, c. 44, s. 6; 1910, c. 7, s. 8.

Prohibition of partnership exceeding a certain number.

9. No company, association, or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any business that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Act, or of letters patent. [25 & 26 Vict., c. 89, s. 4]; R. S. 1897, c. 44, s. 7; [8 Edw. 7, c. 69, s. 1, sub-sec. (2)]; 1910, c. 7, s. 9.

Issue of bank-notes prohibited.

10. Nothing in this Act shall be construed to authorise a company to issue any note payable to the bearer thereof, or any promissory note intended to be circulated as money, or as the note of a bank, or to engage in the business of banking. R. S. 1897, c. 44, s. 27; 1910, c. 7, s. 10.

Act does not apply to certain companies.

11. This Act shall not apply to—

(*a.*) The Governor and Company of Adventurers of England trading into Hudson's Bay:

(*b.*) Companies specially incorporated in pursuance of Part VI. of the "Water Clauses Consolidation Act, 1897": unless registered pursuant to Part XI. of this Act.

(*c.*) A company that carries on the business of fire insurance only. 1899, c. 15, s. 3; 1910, c. 7, s. 11; 1911, c. 8, s. 3; 1912, c. 3, s. 2.

PART II.

CONSTITUTION AND INCORPORATION

Memorandum of Association

Mode of forming incorporated company.

12. Any five or more persons (or, where the company to be formed will be a private company within the meaning of this Act, any two or more persons) associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability, that is to say, either—

(*a.*) A company having the liability of its members limited by the memorandum to the amount (if any) unpaid on the shares respectively held by them (in this Act termed "a company limited by shares"); or

(*b.*) A company having the liability of its members limited by the memorandum to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up (in this Act termed "a company limited by guarantee"); or

(*c.*) A company not having any limit on the liability of its members (in this Act termed "an unlimited company"); or

(*d.*) A company having the liability of its members specially limited under Section 131. R. S. 1897, c. 44, s. 9; [2 Edw. 7, c. 69, s. 2 ; 1910, c. 7, s. 12.

Memorandum of company limited by shares.

13. In the case of a company limited by shares,—

(1.) The memorandum must state—

(*a.*) The name of the company, with "limited" as the last word in its name;

(*b.*) The city, town or county in the Province in which the registered office of the company will be situate;

(*c.*) The objects of the company;

(*d.*) That the liability of the members is limited;

(*e.*) The amount of share capital with which the company proposes to be registered, and the division thereof into shares of a fixed amount:

(2.) No subscriber of the memorandum may take less than one share:

(3.) Each subscriber must write opposite to his name the number of shares he takes. [25 & 26 Vict., c. 89, s. 8]; R. S. 1897, c. 44, s. 11; [8 Edw. 7, c. 69, s. 3]; 1910, c. 7, s. 13; 1912, c. 3, s. 3.

Memorandum of company limited by guarantee.

14. In the case of a company limited by guarantee,—

(1.) The memorandum must state—

(*a.*) The name of the company, with "limited" as the last word in its name;

(*b.*) The city, town or county in the Province in which the registered office of the company will be situate;

(*c.*) The objects of the company;

(*d.*) That the liability of the members is limited;

(*e.*) That each member undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and of the costs, charges, and expenses of winding-up, and for adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount:

(2.) If the company has a share capital,—

(*a.*) The memorandum must also state the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount;

(*b.*) No subscriber of the memorandum may take less than one share;

(*c.*) Each subscriber must write opposite to his name the number of shares he takes. R. S. 1897, c. 44, s. 12; [8 Edw. 7, c. 69, s. 4]; 1910, c. 7, s. 14; 1912, c. 3, s. 4.

Memorandum of unlimited company

15. In the case of an unlimited company,—

(1.) The memorandum must state—

(*a.*) The name of the company;

(*b.*) The city, town or county in the Province in which the registered office of the company will be situate ;

(*c.*) The objects of the company:

(2.) If the company has a share capital,—

(*a.*) No subscriber of the memorandum may take less than one share;

(*b.*) Each subscriber must write opposite to his name the number of shares he takes. [25 & 26 Vict., c. 89, s. 10]; R. S. 1897, c. 44, s. 13; [8 Edw. 7, c. 69, s. 5]; 1910, c. 7, s. 15; 1912, c. 3, s. 5.

Execution of memorandum

16. The memorandum must be signed by each subscriber in the presence of at least one witness, who must attest the signature. [25 & 26 Vict., c. 89, s. 11 (*part*)]; R. S. 1897, c. 44, s. 14 (*part*); [8 Edw. 7, c. 69, s. 6]; 1910, c. 7, s. 16.

Restriction on alteration of memorandum

17. A company may not alter the conditions contained in its memorandum, except in the cases and in the mode and to the extent for which express provision is made in this Act. [Replaces s. 12, 25 & 26 Vict. c. 89]; R. S. 1897, c. 44, s. 15; [8 Edw. 7, c. 69, s. 7]; 1910, c. 7, s. 17.

Name of company and change of name

18. (1.) A company or society may not be incorporated nor may an extra-provincial company be licensed or registered by a name identical with that by which a company or society or firm in existence is carrying on business or has been incorporated, licensed, or registered, or so nearly resembling that name as in the opinion of the Registrar to be calculated to deceive, or by a name of which the Registrar shall for any other reason disapprove, except where such company or society or firm in existence is in the course of being dissolved or has ceased to carry on business, and signifies its consent by resolution duly passed and filed with the Registrar.

[1913 Act]

(2.) Any company or society that has, through inadvertence or otherwise, become incorporated, licensed, or registered by a name identical

with that by which a company or society or firm has been incorporated, licensed, or registered, or has been carrying on business prior to the incorporation, licensing, or registration of such first-mentioned company or society, or so nearly resembling that name as to be calculated to deceive, shall change its name in manner provided by this section: Provided that this amendment shall not affect litigation now pending in regard to the name of any company.

(3.) Any company may also at any time, by special resolution and with the approval of the Registrar signified in writing, change its name.

(4.) The company shall, in the last-mentioned case, give at least one month's previous continuous notice in the Gazette, and in some newspaper or newspapers published or circulated in the locality in which the registered office of the company is situate, and in the locality in which the operations of the company are carried on, of the intention to apply for the change of name, and shall state the name proposed to be adopted.

(5.) Where a company changes its name, the Registrar shall enter the new name on the register in place of the former name, and shall issue a certificate that such company has changed its name; and in such certificate the Registrar shall state the name by which such company shall as from the date of such certificate be known.

(6.) The change of name shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against the company, and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name.

(7.) The Registrar may, on request, reserve any name which may be taken by an intended company, or by a company as a change of name, or the name of any extra-provincial company intending to apply for a licence or registration, for a period of fourteen days or any extended period he may allow, not exceeding in the whole thirty days. [25 & 26 Vict., c. 89, ss. 13, 20]; R. S. 1897, c. 44, s. 82, sub-sec. (2); [8 Edw. 7, c. 69, s. 8]; 1910, c. 7, s. 18, sub-secs. (3), (4), (5), (6), (7); 1911, c. 8, ss. 4, 5; 1912, c. 3, s. 6.

Alteration of objects of company.

19. (1.) Subject to the provisions of this section, a company may, by special resolution, alter the provisions of its memorandum with respect to the objects of the company, so far as may be required to enable it—

(*a.*) To carry on its business more economically or more efficiently; or

(*b.*) To attain its main purpose by new or improved means; or

(*c.*) To enlarge or change the local area of its operations; or

(*d.*) To carry on some business which, under existing circumstances, may conveniently or advantageously be combined with the business of the company; or

(*e.*) To restrict or abandon any of the objects specified in the memorandum. [1913 Act.]

(2.) The alteration shall not take effect until and except in so far as it is confirmed on petition by the Court.

(3.) Before confirming the alteration the Court must be satisfied—

(*a*.) That sufficient notice has been given to every holder of debentures of the company, and to any persons or class of persons whose interests will, in the opinion of the Court, be affected by the alteration; and

(*b*.) That, with respect to every creditor who, in the opinion of the Court, is entitled to object, and who signifies his objection in manner directed by the Court, either his consent to the alteration has been obtained or his debt or claim has been discharged or has determined, or has been secured to the satisfaction of the Court:

Provided that the Court may, in the case of any person or class, for special reasons, dispense with the notice required by this section.

(4.) The Court may make an order confirming the alteration either wholly or in part, and on such terms and conditions as it thinks fit, and may make such order as to costs as it thinks proper.

(5.) The Court shall, in exercising its discretion under this section, have regard to the rights and interests of the members of the company or of any class of them, as well as to the rights and interests of the creditors, and may, if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the Court for the purchase of the interests of dissentient members; and may give such directions and make such orders as it may think expedient for facilitating or carrying into effect any such arrangement: Provided that no part of the capital of the company may be expended in any such purchase.

(6.) An office copy of the order confirming the alteration, together with a copy of the memorandum as altered, shall, within fifteen days from the date of the order, be delivered by the company to the Registrar, and he shall register the same, and shall certify the registration under his hand, and the certificate shall be conclusive evidence that all the requirements of this Act with respect to the alteration and the confirmation thereof have been complied with, and thenceforth the memorandum so altered shall be the memorandum of the company.

The Court may by order at any time extend the time for the delivery of documents to the Registrar under this section for such period as the Court may think proper.

(7.) The Registrar shall cause the certificate, together with a statement of the objects of the company, as altered, to be published at the expense of the company for four weeks in the Gazette.

(8.) If a company makes default in delivering to the Registrar any document required by this section to be delivered to him, the company

shall be liable to a fine not exceeding fifty dollars for every day during which it is in default. R. S. 1897, c. 44, s. 21; [8 Edw. 7, c. 69, s. 9]; 1910, c. 7, s. 19.

Articles of Association.

Registration of articles.

20. (1.) There may, in the case of a company limited by shares, and there shall in the case of a company limited by guarantee or unlimited, be registered with the memorandum articles of association signed by the subscribers to the memorandum and prescribing regulations for the company.

(2.) A company may by its articles of association adopt all or any of the regulations contained in Table A in the First Schedule to this Act.

(3.) In the case of an unlimited company or a company limited by guarantee, the articles, if the company has a share capital, must state the amount of share capital with which the company proposes to be registered.

(4.) In the case of an unlimited company or a company limited by guarantee, if the company has not a share capital, the articles must state the number of members with which the company proposes to be registered, for the purpose of enabling the Registrar to determine the fees payable on registration. [25 & 26 Vict., c. 89, s. 14]; R. S. 1897, c. 44, s. 16; [8 Edw. 7, c. 69, s. 10]; 1910, c. 7, s. 20; 1911, c. 8, s. 6.

Application of Table A.

21. In the case of a company limited by shares and registered after the first day of July, 1910, if articles are not registered, or, if articles are registered, in so far as the articles do not exclude or modify the regulations in Table A in the First Schedule to this Act, those regulations shall, so far as applicable, be the regulations of the company in the same manner and to the same extent as if they were contained in duly registered articles. [25 & 26 Vict., c. 89, s. 15]; R. S. 1897, c. 44, s. 17; [8 Edw. 7, c. 69, s. 11]; 1910, c. 7, s. 21.

Form and signature of articles.

22. Articles must—

(*a.*) Be printed or typewritten:

(*b.*) Be divided into paragraphs numbered consecutively:

(*c.*) If registered with the memorandum, be signed by each subscriber of the memorandum of association in the presence of at least one witness, who must attest the signature. [25 & 26 Vict., c. 89, ss. 14, 16], R. S. 1897, c. 44, ss. 16, 18; [8 Edw. 7, c. 69, s. 12]; 1910, c. 7, s. 22; 1911, c. 8, s. 7.

Alteration of articles by special resolution.

23. (1.) Subject to the provisions of this Act and to the conditions contained in its memorandum, a company may by special resolution alter or add to its articles; and any alteration or addition so made shall

be as valid as if originally contained in the articles, and be subject in like manner to alteration by special resolution.

(2.) The power of altering articles under this section shall, in the case of an unlimited company, extend to altering any regulations relating to the amount of capital or its distribution into shares, notwithstanding that those regulations are contained in the memorandum. [25 & 26 Vict., c. 89, ss. 50 (*part*), 176, (*part*)]; R. S. 1897, c. 44, s. 99; [8 Edw. 7, c. 69, s. 13, sub-secs. (1), (2)]; 1910, c. 7, s. 23, subsecs. (1), (2).

General Provisions.

Effect of memorandum and articles.

24. (1.) The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member, his heirs, executors, and administrators, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act.

(2.) All money payable by any member to the company under the memorandum or articles shall be a debt due from him to the company of the nature of a specialty debt. [25 & 26 Vict., c. 89, ss. 11, 16]; R. S. 1897, c. 44, s. 16; [8 Edw. 7, c. 69, s. 14]; 1910, c. 7, s. 24.

Registration of memorandum and articles.

25. The memorandum and the articles (if any) shall be delivered to the Registrar, and he shall retain and register them. [25 & 26 Vict., c. 89, s. 17 (*part*;]) R. S. 1897, c. 44, s. 19 (*part*); [8 Edw. 7, c. 69, s. 15]; 1910, c. 7, s. 25.

Contents of certificate of registration.

26. (1.) On the registration of the memorandum of a company the Registrar shall issue a certificate under his seal of office, showing—

(*a.*) That the company is incorporated:

(*b.*) The amount of its capital (if any):

(*c.*) The number of shares into which it is divided:

(*d.*) In the case of a limited company, that the company is limited:

(*e.*) In the case of a mining company incorporated with non-personal liability, that the liability of the company and the shareholders therein is specially limited under Part V.:

(*f.*) The place where the registered office of the company is to be situate.

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(2.) From the date of incorporation mentioned in the certificate of incorporation the subscribers of the memorandum, together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, with power to hold lands, but with such liability on the part of the members to con-

tribute to the assets of the company in the event of its being wound up as is mentioned in this Act. [25 & 26 Vict., c. 89, s. 18]; R. S. 1897, c. 44, s. 20 ; [8 Edw. 7, c. 69, s. 16] ; 1910, c. 7, s. 26, sub-secs. (1), (2) ;] 1911, c. 8, s. 8.

Publication of certificate.

3. The Registrar shall, at the cost of the parties applying for registration of a memorandum of association, publish the certificate of incorporation and a statement showing the objects for which the company named in the certificate has been incorporated, for four weeks in the Gazette. 1900, c. 5, s. 4; 1910, c. 7, s. 26; sub-sec. (3).

Conclusiveness of certificate of incorporation.

27. (1.) A certificate of incorporation given by the Registrar in respect of any company shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with, and that the association is a company authorised to be registered and duly registered under this Act.

(2.) A statutory declaration by a solicitor of the Supreme Court engaged in the formation of the company, or by a person named in the articles as a director or secretary of the company, of compliance with all or any of the said requirements shall be produced to the Registrar, and the Registrar may accept such a declaration as sufficient evidence of compliance. [25 & 26 Vict., c. 89, s. 18]; R. S. 1897, c. 44, s. 20; [8 Edw. 7, c. 69, s. 17]; 1910, c. 7, s. 27.

Copies of memorandum and articles to be given to members.

28. (1.) Every company shall send to every member, at his request, and on payment of one dollar or such less sum as the company may prescribe, a copy of the memorandum and of the articles (if any).

(2.) If a company makes default in complying with the requirements of this section, it shall be liable for each offence to a fine not exceeding five dollars. [25 & 26 Vict., c. 89, s. 19]; R. S. 1897, c. 44, s. 23; [8 Edw. 7, c. 69, s. 18]; 1910, c. 7, s. 28.

Companies limited by Guarantee.

Provisions as to companies limited by guarantee.

29. (1.) In the case of a company limited by guarantee and not having a share capital, and registered after the first day of July, 1910, every provision in the memorandum or articles or in any resolution of the company purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member shall be void.

(2.) For the purpose of the provisions of this Act relating to the memorandum of a company limited by guarantee and of this section, every provision in the memorandum or articles, or in any resolution, of any company limited by guarantee and registered on or after the first day of July, 1910, purporting to divide the undertaking of the company into shares or interests shall be treated as a provision for a share capital, notwithstanding that the nominal amount or number of the shares or interests is not specified thereby. [8 Edw. 7, c. 69, s. 21]; 1910, c. 7, s. 29

PART III.

DISTRIBUTION AND REDUCTION OF SHARE CAPITAL, REGISTRATION OF UNLIMITED COMPANY AS LIMITED, AND UNLIMITED LIABILITY OF DIRECTORS.

Distribution of Share Capital.

Nature of Shares.

30. (1.) The shares or other interest of any member in a company shall be personal estate, transferable in manner provided by the articles of the company, and shall not be of the nature of real estate.

Numbering shares.

(2.) Each share in a company having a share capital shall be distinguished by its appropriate number. [25 & 26 Vict., c. 89, s. 22]; R. S. 1897, c. 44, s. 31; [8 Edw. 7, c. 69, s. 22]; 1910, c. 7, s. 30.

Certificate of shares or stock as evidence of title.

31. A certificate, under the common seal of the company, specifying any shares or stock held by any member, shall be prima facie evidence of the title of the member to the shares or stock. [25 & 26 Vict., c. 89, s. 31]; R. S. 1897, c. 44, s. 43; [8 Edw. 7, c. 69, s. 23]; 1910, c. 7, s. 31.

Definition of member.

32. (1.) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in its register of members.

(2.) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, shall be a member of the company. [25 & 26 Vict., c. 89, s. 23]; R. S. 1897, c. 44, s. 30; [8 Edw. 7, c. 69, s. 24]; 1910, c. 7, s. 32.

Register of members.

33. (1.) Every company shall keep in one or more books a register of its members, and enter therein the following particulars:—

(*a.*) The names and addresses and the occupations (if any) of the members, and, in the case of a company having a share capital, a statement of the shares held by each member, distinguishing each share by its number, and of the amount paid or agreed to be considered as paid on the shares of each member:

(*b.*) The date at which each person was entered in the register as a member:

(*c.*) The date at which any person ceased to be a member.

(2.) If a company fails to comply with this section it shall be liable to a fine not exceeding twenty-five dollars for every day during which the default continues; and every director and manager of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty. [25 & 26 Vict., c. 89, s. 25]; R. S. 1897, c. 44, s. 36; [8 Edw. 7, c. 69, s. 25]; 1910, c. 7, s. 33.

34. (1.) Every company having a share capital shall once at least in every year make a list of all persons who, on the fourteenth day after the first or only ordinary general meeting in the year, are members of the company, and of all persons who have ceased to be members since the date of the last return or (in the case of the first return) of the incorporation of the company.

Annual list of members and summary.

(2.) The list must state the names, addresses, and occupations of all the past and present members therein mentioned, and the number of shares held by each of the existing members at the date of the return, specifying shares transferred since the date of the last return, or (in the case of the first return) of the incorporation of the company, by persons who are still members and have ceased to be members respectively, and the dates of registration of the transfers, and must contain a summary distinguishing between shares issued for cash and shares issued as fully or partly paid up otherwise than in cash, and specifying the following particulars:—

(*a.*) The amount of the share capital of the company, and the number of the shares into which it is divided:

(*b.*) The number of shares taken from the commencement of the company up to the date of the return:

(*c.*) The amount called up on each share:

(*d.*) The total amount of calls received:

(*e.*) The total amount of calls unpaid:

(*f.*) The total amount of the sums (if any) paid by way of commission in respect of any shares or debentures, or allowed by way of discount in respect of any debentures, since the date of the last return:

(*g.*) The total number of shares forfeited:

(*h.*) The total amount of shares or stock for which share warrants are outstanding at the date of the return:

(*i.*) The total amount of share warrants issued and surrendered respectively since the date of the last return:

(*j.*) The number of shares or amount of stock comprised in each share warrant:

(*k.*) The names and addresses of the persons who at the date of the return are the directors of the company, or occupy the position of directors, by whatever name called; and

(*l.*) The total amount of debt due from the company in respect of all mortgages and charges which are required to be registered with the Registrar under this Act.

(3.) The summary must also (except where the company is a private company) include a statement, made up to such date as may be specified

in the statement, in the form of a balance-sheet, audited and signed by the company's auditors, and containing a summary of its share capital, its liabilities and its assets, giving such particulars as will disclose the general nature of those liabilities and assets, and how the values of the fixed assets have been arrived at, but the balance-sheet need not include a statement of profit and loss.

(4.) The above list and summary must be contained in a separate part of the register of members, and must be completed within seven days after the fourteenth day aforesaid, and the company must forthwith forward to the Registrar a copy signed by the manager, the secretary, or by some other officer of the company.

(5.) If a company makes default in complying with the requirements of this section it shall be liable to a fine not exceeding twenty-five dollars for every day during which the default continues, and every director and manager of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

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(6.) Every extra-provincial registered company shall, within the time hereinbefore mentioned, file with the Registrar a statement setting forth all the information with reference to such company required by sub-clauses (*k*) and (*l*) of sub-section (2) hereof and by sub-section (3) hereof, and such statement shall be certified by the auditors and by the president, vice-president, secretary, or other officer of such company; but, save as aforesaid, this section shall not apply to an extra-provincial company. [25 & 26 Vict., c. 89, ss. 26, 27 (*part*)]; R. S. 1897, c. 44, ss. 36, 37 (*part*); [8 Edw. 7, c. 69, s. 26]; 1910, c. 7, s. 34.

Trusts not to be entered on register.

35. No notice of any trust, expressed, implied, or constructive, shall be entered on the register, or be receivable by the Registrar, in the case of companies registered pursuant to this Act. [25 & 26 Vict., c. 89, s. 30]; R. S. 1897, c. 44, s. 41; [8 Edw. 7, c. 69, s. 27]; 1910, c. 7, s. 35.

Registration of transfer at request of transferor.

36. On the application of the transferor of any share or interest in a company, the company shall enter in its register of members the name of the transferee in the same manner and subject to the same conditions as if the application for the entry were made by the transferee. [30 & 31 Vict., c. 131, s. 26]; R. S. 1897, c. 44, s. 34; [8 Edw. 7, c. 69, s. 28]; 1910, c. 7, s. 36.

Transfer by personal representative.

37. A transfer of the share or other interest of a deceased member of a company made by his personal representative shall, although the personal representative is not himself a member, be as valid as if he had been a member at the time of the execution of the instrument of transfer. [95 & 26 Vict., c. 89, s. 24]; R. S. 1897, c. 44, s. 32; [8 Edw. 7, c. 69, s. 22; 1910, c. 7, s. 37.

Executors and pledgors voting.

38. Every executor, administrator, guardian, or trustee shall represent the shares or stock in his hands at all meetings of the company, and may

vote accordingly as a shareholder; and every person who pledges his stock may nevertheless represent the same at all such meetings, and may vote accordingly as a shareholder. R. S. 1897, c. 44, s. 33; 1910, c. 7, s. 38.

Trustees, etc.

39. No person holding shares, stock, or other interest in the company as executor, administrator, guardian, or trustee shall be personally subject to liability as a shareholder; but the estates and funds in the hands of such person shall be liable in like manner and to the same extent as the testator or intestate or the minor, ward, or person interested in the trust fund would be if living and competent to act and holding such shares, stock, or other interest in his own name. R. S. 1897, c. 44, s. 52; 1910, c. 7, s. 39.

Non-personal liability of mortgagee or pledgee of shares.

40. No person holding shares, stock, or other interest as collateral security shall be personally subject to liability as a shareholder; but the person pledging such shares, stock, or other interest as such collateral security shall be considered as holding the same, and shall be liable as a shareholder in respect thereof. R. S. 1897, c. 44, s. 53; 1910, c. 7, s. 40.

Inspection of register of members.

41. (1.) The register of members, commencing from the date of the registration of the company, shall be kept at the registered office of the company, and, except when closed under the provisions of this Act, shall during business hours (subject to such reasonable restrictions as the company in general meeting may impose, so that not less than two hours in each day be allowed for inspection) be open to the inspection of any member gratis, and to the inspection of any other person on payment of twenty-five cents, or such less sum as the company may prescribe, for each inspection.

(2.) Any member or other person may require a copy of the register, or of any part thereof, or of the list and summary required by this Act, or any part thereof, on payment of twenty-five cents, or such less sum as the company may prescribe, for every hundred words or fractional part thereof required to be copied.

(3.) If any inspection or copy required under this section is refused, the company shall be liable for each refusal to a fine not exceeding ten dollars, and to a further fine not exceeding ten dollars for every day during which the refusal continues, and every director and manager of the company who knowingly authorises or permits the refusal shall be liable to the like penalty; and any Judge of the Supreme Court may by order compel an immediate inspection of the register. [25 & 26 Vict., c. 89, s. 32]; R. S. 1897, c. 44, s. 44; [8 Edw. 7, c. 69, s. 30]; 1910, c. 7, s. 41.

Power to close register.

42. A company may, on giving notice by advertisement in some newspaper circulating in the district in which the registered office of the company is situate, close the register of members for any time or times not

exceeding in the whole thirty days in each year. [25 & 26 Vict., c. 89, s. 33]; R. S. 1897, c. 44, s. 45; [8 Edw. 7, c. 69, s. 31]; 1910, c. 7, s. 42.

Power of Court to rectify register.

43. (1.) If—

(*a*.) The name of any person is, without sufficient cause, entered in or omitted from the register of members of a company; or

(*b*.) Default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member,—

the person aggrieved, or any member of the company, or the company may apply to the Court for rectification of the register.

(2.) The application may be made to a Judge of the Supreme Court sitting in Chambers; and the Court may either refuse the application, or may direct rectification of the register, and payment by the company of any damages sustained by any party aggrieved.

(3.) On any application under this section the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand; and generally may decide any question necessary or expedient to be decided for rectification of the register.

(4.) In the case of a company required by this Act to send a list of its members to the Registrar, the Court, when making an order for rectification of the register, shall by its order direct notice of the rectification to be given to the Registrar. [25 & 26 Vict., c. 89, ss. 35, 36]; R. S. 1897, c. 44, ss. 47, 48; [8 Edw. 7, c. 69, s. 32]; 1910, c. 7, s. 43.

Register to be evidence.

44. The register of members shall be prima facie evidence of any matters by this Act directed or authorised to be inserted therein. [25 & 26 Vict., c. 89, s. 37]; R. S. 1897, c. 44, s. 49; [8 Edw. 7, c. 69, s. 33]; 1910, c. 7, s. 44.

Share Warrants.

Issue and effect of share warrants to bearer.

45. (1.) A company limited by shares, if so authorised by its articles, may, with respect to any fully paid-up shares, or to stock, issue under its common seal a warrant stating that the bearer of the warrant is entitled to the shares or stock therein specified, and may provide, by coupons or otherwise, for the payment of the future dividends on the shares or stock included in the warrant (in this Act termed "a share warrant").

(2.) A share warrant shall entitle the bearer thereof to the shares or stock therein specified, and the shares or stock may be transferred by delivery of the warrant.

(3.) The bearer of a share warrant shall, subject to the articles of the company, be entitled, on surrendering it for cancellation, to have his

name entered as a member in the register of members; and the company shall be responsible for any loss incurred by any person by reason of the company entering in its register the name of a bearer of a share warrant in respect of the shares or stock therein specified without the warrant being surrendered and cancelled.

(4.) The bearer of a share warrant may, if the articles of the company so provide, be deemed to be a member of the company within the meaning of this Act, either to the full extent or for any purposes defined in the articles; except that he shall not be qualified in respect of the shares or stock specified in the warrant for being a director or manager of the company, in cases where such a qualification is required by the articles.

(5.) On the issue of a share warrant the company shall strike out of the register of members the name of the member then entered therein as holding the shares or stock specified in the warrant as if he had ceased to be a member, and shall enter in the register the following particulars, namely:—

(*a.*) The fact of the issue of the warrant;

(*b.*) A statement of the shares or stock included in the warrant, distinguishing each share by its number; and

(*c.*) The date of the issue of the warrant.

(6.) Until the warrant is surrendered, the above particulars shall be deemed to be the particulars required by this Act to be entered in the register of members; and, on the surrender, the date of the surrender must be entered as if it were the date at which a person ceased to be a member. [30 & 31 Vict., c. 131, ss. 27 to 32]; R. S. 1897, c. 44, ss. 65 to 70; [8 Edw. 7, c. 69, s. 37]; 1910, c. 7, s. 45.

Differential Shares.

Power of company to arrange for different amounts being paid on shares

46. A company, if so authorised by its articles, may do any one or more of the following things, namely:—

(1.) Make arrangements on the issue of shares for a difference between the shareholders in the amounts and times of payment of calls on their shares:

(2.) Accept from any member who assents thereto the whole or a part of the amount remaining unpaid on any shares held by him, although no part of that amount has been called up:

(3.) Pay dividend in proportion to the amount paid up on each share where larger amount is paid up on some shares than on others. [30 & 31 Vict., c. 131, s. 24]; R. S. 1897, c. 44, s. 62; [8 Edw. 7, c. 69, s. 39]; 1910, c. 7, s. 46.

Reduction of Paid-up Capital out of Profits.

Power to return accumulated profits in reduction of paid-up share capital.

47. (1.) When a company has accumulated a sum of undivided profits, which with the sanction of the shareholders may be distributed among

the shareholders in the form of a dividend or bonus, it may, by special resolution, return the same, or any part thereof, to the shareholders in reduction of the paid-up capital of the company, the unpaid capital being thereby increased by a similar amount.

(2.) The resolution shall not take effect until a memorandum, showing the particulars required by this Act in the case of a reduction of share capital, has been produced to and registered by the Registrar, but the other provisions of this Act with respect to reduction of share capital shall not apply to a reduction of paid-up share capital under this section.

(3.) On a reduction of paid-up capital in pursuance of this section any shareholder, or any one or more of several joint shareholders, may, within one month after the passing of the resolution for the reduction, require the company to retain, and the company shall retain accordingly, the whole of the money actually paid on the shares held by him either alone or jointly with any other person, which, in consequence of the reduction, would otherwise be returned to him or them, and thereupon those shares shall, as regards the payment of dividend, be deemed to be paid up to the same extent only as the shares on which payment has been accepted by the shareholders in reduction of paid-up capital; and the company shall invest and keep invested the money so retained in such securities authorised for investment by trustees as the company may determine, and on the money so invested, or on so much thereof as from time to time exceeds the amount of calls subsequently made on the shares in respect of which it has been retained, the company shall pay the interest received from time to time on the securities.

(4.) The amount retained and invested shall be held to represent the future calls which may be made to replace the share capital so reduced on those shares, whether the amount obtained on sale of the whole or such proportion thereof as represents the amount of any call when made produces more or less than the amount of the call.

(5.) On a reduction of paid-up share capital in pursuance of this section, the powers vested in the directors of making calls on shareholders in respect of the amount unpaid on their shares shall extend to the amount of the unpaid share capital as augmented by the reduction.

(6.) After any reduction of share capital under this section the company shall specify in the annual list of members required by this Act the amounts retained at the request of any of the shareholders in pursuance of this section, and shall specify in the statements of account laid before any general meeting of the company the amount of undivided profits returned in reduction of paid-up share capital under this section. [43 Vict., c. 19, ss. 3 to 6; 8 Edw. 7, c. 69, s. 40]; 1910, c. 7, s. 47.

Alteration of Share Capital.

Power of company limited by shares to alter its share capital

48. (1.) A company limited by shares, if so authorised by its articles, may alter the conditions of its memorandum as follows; that is to say, it may—

(a.) Increase its share capital by the issue of new shares of such amount as it thinks expedient:

(b.) Consolidate and divide all or any of its share capital into shares of larger amount than its existing shares:

(c.) Convert all or any of its paid-up shares into stock, and reconvert that stock into paid-up shares of any denomination:

(d.) Subdivide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum, so, however, that in the subdivision the proportion between the amount paid and the amount (if any) unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived:

(e.) Cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled.

(2.) The powers conferred by this section with respect to subdivision of shares must be exercised by special resolution.

(3.) Where any alteration has been made under this section in the memorandum of a company, every copy of the memorandum issued after the date of the alteration shall be in accordance with the alteration.

If a company makes default in complying with this provision it shall be liable to a fine not exceeding five dollars for each copy in respect of which default is made; and every director and manager of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

(4.) A cancellation of shares in pursuance of this section shall not be deemed to be a reduction of share capital within the meaning of this Act. [25 & 26 Vict., c. 89, s. 12]; R. S. 1897, c. 44, s. 15; [30 & 31 Vict., c. 131, s. 21; 40 & 41 Vict., c. 26, s. 5; 63 & 64 Vict., c. 48, s. 29; 8 Edw. 7, c. 69, s. 41]; 1910, c. 7, s. 48.

Notice to Registrar of consolidation of saare capital, conversion of shares into stock, etc.

49. Where a company having a share capital has consolidated and divided its share capital into shares of larger amount than its existing shares, or converted any of its shares into stock, or reconverted stock into shares, it shall give notice to the Registrar of the consolidation, division, conversion, or reconversion, specifying the shares consolidated, divided, or converted, or the stock reconverted. [25 & 26 Vict., c. 89, s. 28]; R. S. 1897, c. 44, s. 39; [8 Edw. 7, c. 69, s. 42]; 1910, c. 7, s. 49.

Effect of conversion of saares into stock.

50. Where a company having a share capital has converted any of its shares into stock, and given notice of the conversion to the Registrar, all the provisions of this Act which are applicable to shares only shall cease as to so much of the share capital as is converted into stock; and

the register of members of the company, and the list of members to be forwarded to the Registrar, shall show the amount of stock held by each member instead of the amount of shares and the particulars relating to shares hereinbefore required by this Act. [25 & 26 Vict., c. 89, s. 29]; R. S. 1897, c. 44, s. 40; [8 Edw. 7, c. 69, s. 43]; 1910, c. 7, s. 50.

Notice of increase of share capital or of members.

51. (1.) Where a company having a share capital, whether its shares have or have not been converted into stock, has increased its share capital beyond the registered capital, and where a company not having a share capital has increased the number of its members beyond the registered number, it shall give to the Registrar, in the case of an increase of share capital, within fifteen days after the passing, or in the case of a special resolution the confirmation, of the resolution authorising the increase, and in the case of an increase of members within fifteen days after the increase was resolved on or took place, notice of the increase o fcapital or members, and the Registrar shall record the increase.

(2.) If a company makes default in complying with the requirements of this section it shall be liable to a fine not exceeding twenty-five dollars for every day during which the default continues; and every director and manager of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty. [25 & 26 Vict., c. 89, s. 34]; R. S. 1897, c. 44, s. 46; [8 Edw. 7, c. 69, s. 44]; 1910, c. 7, s. 51.

Reorganization of share capital.

52. (1.) A company limited by shares may, by special resolution confirmed by an order of the Court, modify the conditions contained in its memorandum so as to reorganize its share capital, whether by the consolidation of shares of different classes or by the division of its shares into shares of different classes:

Provided that no preference or special privilege attached to or belonging to any class of shares shall be interfered with except by a resolution passed by a majority in number of shareholders of that class holding three-fourths of the share capital of that class and confirmed at a meeting of shareholders of that class in the same manner as a special resolution of the company is required to be confirmed, and every resolution so passed, shall bind all shareholders of the class.

(2.) Where an order is made under this section an office copy thereof shall be filed with the Registrar within seven days after the making of the order, or within such further time as the Court may allow, and the resolution shall not take effect until such a copy has been so filed. [8 Edw. 7, c. 69, s. 45]; 1910, c. 7, s. 52.

Reduction of Share Capital.

Special resolution for reduction of share capital.

53. (1.) Subject to confirmation by the Court, a company limited by shares, if so authorised by its articles, may by special resolution re-

duce its share capital in any way, and in particular (without prejudice to the generality of the foregoing power) may—

(*a*.) Extinguish or reduce the liability on any of its shares in respect of share capital not paid up; or

(*b*.) Either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets; or

(*c*.) Either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company;

and may, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

(2.) A special resolution under this section is in this Act called "a resolution for reducing share capital." [30 & 31 Vict., c. 131, s. 9; 40 & 41 Vict., c. 26, s. 3; 8 Edw. 7, c. 69, s. 46]; R. S. 1897, c. 44, s. 71; 1910, c. 7, s. 53.

Application to Court for confirming order.

54. Where a company has passed and confirmed a resolution for reducing share capital it may apply to the Court for an order confirming the reduction. [30 & 31 Vict., c. 131, s. 11 (*part*)]; R. S. 1897, c. 44, s. 73 (*part*); [8 Edw. 7, c. 69, s. 47]; 1910, c. 7, s. 54.

Addition to name of Company of "and reduced."

55. On and from the confirmation by a company of a resolution for reducing share capital, or where the reduction does not involve either the diminution of any liability in respect of unpaid share capital, or the payment to any shareholder of any paid-up share capital, then on and from the presentation of the petition for confirming the reduction, the company shall add to its name, until such date as the Court may fix, the words "and reduced," as the last words in its name, and those words shall, until that date, be deemed to be part of the name of the company:

Provided that, where the reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, the Court may, if it thinks expedient, dispense altogether with the addition of the words "and reduced." [30 & 31 Vict., c. 131, s. 10; 40 & 41 Vict., c. 26, s. 4 (*part*)]; R. S. 1897, c. 44, s. 73 (*part*); [8 Edw. 7, c. 69, s. 48]; 1910, c. 7, s. 55.

Objections by creditors, and settlement of list of objecting creditors.

56. (1.) Where the proposed reduction of share capital involves either diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, and in any other case if the Court so directs, every creditor of the company, who at the date fixed by the Court is entitled to any debt or claim which, if that date were the commencement of the winding-up of the company, would be admissible in proof against the company, shall be entitled to object to the reduction.

(2.) The Court shall settle a list of creditors so entitled to object, and for that purpose shall ascertain, as far as possible without requiring an application from any creditor, the names of those creditors and the nature and amount of their debts or claims, and may publish notices fixing a day or days within which creditors not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction.

(3.) Where a creditor entered on the list whose debt or claim is not discharged or determined does not consent to the reduction, the Court may, if it thinks fit, dispense with the consent of that creditor, on the company securing payment of his debt or claim by appropriating, as the Court may direct, the following amount, that is to say:—

(*a.*) If the company admits the full amount of his debt or claim, or, though not admitting it, is willing to provide for it, then the full amount of the debt or claim:

(*b.*) If the company does not admit or is not willing to provide for the full amount of the debt or claim, or if the amount is contingent or not ascertained, then an amount fixed by the Court after the like inquiry and adjudication as if the company were being wound up by the Court. [30 & 31 Vict., c. 131, ss. 13, 14]; R. S. 1897, c. 44, ss. 74, 75; [8 Edw. 7, c. 69, s. 49]; 1910, c. 7, s. 56.

Order confirming reduction.

57. The Court, if satisfied, with respect to every creditor of the company who under this Act is entitled to object to the reduction, that either his consent to the reduction has been obtained or his debt or claim has been discharged or has determined, or has been secured, may make an order confirming the reduction on such terms and conditions as it thinks fit. [30 & 31 Vict., c. 131, s. 11 (*part*)]; R. S. 1897, c. 44, s. 73 (*part*); [8 Edw. 7, c. 69, s. 50]; 1910, c. 7, s. 57.

Registration of order and minute of reduction

58. (1.) The Registrar, on production to him of an order of the Court confirming the reduction of the share capital of a company, and the delivery to him of a copy of the order and of a minute (approved by the Court), showing with respect to the share capital of the company, as altered by the order, the amount of the share capital, the number of shares into which it is to be divided, and the amount of each share, and the amount (if any) at the date of the registration deemed to be paid up on each share, shall register the order and minute.

(2.) On the registration, and not before, the resolution for reducing share capital as confirmed by the order so registered shall take effect.

(3.) Notice of the registration shall be published in such manner as the Court may direct.

(4.) The Registrar shall certify under his hand the registration of the order and minute, and his certificate shall be conclusive evidence

that all the requirements of this Act with respect to reduction of share capital have been complied with, and that the share capital of the company is such as is stated in the minute. [30 & 31 Vict., c. 131, ss. 9, 15]; R. S. 1897, c. 44, s. 76; [8 Edw. 7, c. 69, s. 51]; 1910, c. 7, s. 58.

Minute to form part of memorandum.

59. (1.) The minute when registered shall be deemed to be substituted for the corresponding part of the memorandum of the company, and shall be valid and alterable as if it had been originally contained therein, and must be embodied in every copy of the memorandum issued after its registration.

(2.) If a company makes default in complying with the requirements of this section it shall be liable to a fine not exceeding five dollars for each copy in respect of which default is made; and every director and manager of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty. [30 & 31 Vict., c. 131, ss. 16, 18]; R. S. 1897, c. 44, s. 77; [8 Edw. 7, c. 69, s. 52]; 1910, c. 7, s. 59.

Liability of members in respect of reduced shares.

60. A member of the company, past or present, shall not be liable in respect of any share to any call or contribution exceeding in amount the difference (if any) between the amount paid, or (as the case may be) the reduced amount (if any) which is to be deemed to have been paid, on the share and the amount of the share as fixed by the minute:

Provided that if any creditor, entitled in respect of any debt or claim to object to the reduction of share capital, is, by reason of his ignorance of the proceedings for reduction, or of their nature and effect with respect to his claim, not entered on the list of creditors, and, after the reduction, the company is unable, within the meaning of the provisions of this Act with respect to winding-up by the Court, to pay the amount of his debt or claim, then—

(*a*.) Every person who was a member of the company at the date of the registration of the order for reduction and minute shall be liable to contribute for the payment of that debt or claim an amount not exceeding the amount which he would have been liable to contribute if the company had commenced to be wound up on the day before that registration; and

(*b*.) If the company is wound up, the Court, on the application of any such creditor, and proof of his ignorance as aforesaid, may, if it thinks fit, settle accordingly a list of persons so liable to contribute, and make and enforce calls and orders on the contributories settled on the list as if they were ordinary contributories in a winding-up.

Nothing in this section shall affect the rights of the contributories among themselves. 30 & 31 Vict., c. 131, ss. 16, 17]; R. S. 1897, c. 44, s. 78; [8 Edw. 7, c. 69, s. 53]; 1910, c. 7, s. 60.

Concealing name of creditor entitled to object.

61. If any director, manager, or officer of the company wilfully conceals the name of any creditor of the company entitled to object to the reduction, or wilfully misrepresents the nature or amount of the debt or claim of any creditor, or if any director or manager of the company aids or abets in or is privy to any such concealment or misrepresentation as aforesaid, every such director, manager, or officer shall, for every such violation of this Act, upon summary conviction, be liable to a fine not, exceeding five hundred dollars. [30 & 31 Vict., c. 131, s. 19; 8 Edw. 7 c. 69, s. 54]; 1910, c. 7, s. 61.

Publication of reasons for reduction.

62. In any case of reduction of share capital, the Court may require the company to publish as the Court directs the reasons for reduction, or such other info mation in regard thereto as the Court may think expedient with a view to give proper information to the public, and, if the Court thinks fit, the causes which led to the reduction. [40 & 41 Vict., c. 26, s. 4 (*part*); 8 Edw. 7, c. 69, s. 55]; 1910, c. 7, s. 62.

Increase and reduction of share capital in case of a company limited by guarantee having a share capital.

63. A company limited by guarantee and registered after the first day of July, 1910, may, if it has a share capital and is so authorised by its articles, increase or reduce its share capital in the same manner and subject to the same conditions in and subject to which a company limited by shares may increase or reduce its share capital under the provisions of this Act. [63 & 64 Vict., c. 48, s. 27 (*part*); 8 Edw. 7, c. 69, s. 56]; 1910, c. 7, s. 63.

Reduction of Capital by certain Limited Companies.

Certain land companies empowered to pay dividends out of the net proceeds of sales of land.

64. (1.) In addition to the aforesaid power of reducing its share capital, it shall be lawful for companies incorporated under this or any former Act of the Province, whose principal and main business is to acquire tracts of land with the object of subdividing the same into lots and selling such lots when so subdivided as aforesaid, to declare and pay dividends out of the moneys being the net proceeds of the sale of their lands so subdivided as aforesaid; and all such dividends and payments shall be taken and considered as a reduction of the capital of such company:

Provided such companies have paid all debts legally owing by them, or have made ample provision for the payment of the same, testified by a statutory declaration made by the secretary of the company, who shall also exhibit and file with the Registrar a full, true, and correct account of the liabilities and assets of the company.

(2.) A resolution passed by the shareholders holding at least two-thirds in value of the paid-up capital stock of the company, at any general meeting of shareholders, shall be necessary for the declaration and payment of such dividends; and such resolution shall only be passed after the expiration of ten days from the filing of the statutory declaration hereinbefore required to be filed with the Registrar.

(3.) A copy of every such resolution, under the seal of the company, and certified to by the secretary of the company, shall be filed in the office of the Registrar within ten days after the passing of the resolution, and ten days shall elapse after the filing thereof before payment out of any such dividends to the shareholders shall be made.

(4.) After the filing of every such resolution with the Registrar, the said Registrar shall, by a notice published in four issues of the Gazette, declare to what sum the capital of any such company, by such payment of dividends, stands reduced; and the company shall pay the Registrar the costs of such publication. 1900, c. 5, s. 14; 1910, c. 7, s. 64.

Registration of Unlimited Company as Limited.

Registration of unlimited company as limited.

65. (1.) Subject to the provisions of this section, any company registered as unlimited may register under this Act as limited, but the registration of an unlimited company as a limited company shall not affect any debts, liabilities, obligations, or contracts incurred or entered into by, to, with, or on behalf of the company before the registration, and those debts, liabilities, obligations, and contracts may be enforced in manner provided by Part XI. of this Act in the case of a company registered in pursuance of that Part.

(2.) On registration in pursuance of this section the Registrar shall close the former registration of the company, and may dispense with the delivery to him of copies of any documents with copies of which he was furnished on the occasion of the original registration of the company; but, save as aforesaid, the registration shall take place in the same manner and shall have effect as if it were the first registration of the company under this Act, and as if the provisions of the Acts under which the company was previously registered and regulated had been contained in different Acts from those under which the company is registered as a limited company. [42 & 43 Vict., c. 76, ss. 4, 9; 8 Edw. 7, c. 69, s. 57]; 1910, c. 7, s. 65.

Power of unlimited company to provide for reserve share capital on registration.

66. An unlimited company having a share capital may, by its resolution for registration as a limited company in pursuance of this Act, do either or both of the following things, namely:—

(*a.*) Increase the nominal amount of its share capital by increasing the nominal amount of each of its shares, but subject to the condition that no part of the increased capital shall be capable of being called up except in the event and for the purposes of the company being wound up:

(*b.*) Provide that a specified portion of its uncalled share capital shall not be capable of being called up except in the event and for the purposes of the company being wound up. [42 & 43 Vict., c. 76, s. 5 (*part*); 8 Edw. 7, c. 69, s. 58]; 1910, c. 7, s. 66.

Reserve Liability of Limited Company.

Reserve liability of limited company.

67. A limited company may by special resolution determine that any portion of its share capital which has not been already called up shall not be capable of being called up, except in the event and for the purposes of the company being wound up, and thereupon that portion of its share capital shall not be capable of being called up except in the event and for the purposes aforesaid. [42 & 43 Vict., c. 76, s. 5 (*part*); 8 Edw. 7, c. 69, s. 59]; 1910, c. 7, s. 67.

Unlimited Liability of Directors.

Limited company may have directors with unlimited liability.

68. (1.) In a limited company the liability of the directors or managers, or of the managing director, may, if so provided by the memorandum, be unlimited.

(2.) In a limited company in which the liability of a director or manager is unlimited, the directors or managers of the company (if any), and the member who proposes a person for election or appointment to the office of director or manager, shall add to that proposal a statement that the liability of the person holding that office will be unlimited, and the promoters, directors, managers, and secretary (if any) of the company, or one of them, shall, before the person accepts the office or acts therein, give him notice in writing that his liability will be unlimited.

(3.) If any director, manager, or proposer makes default in adding such a statement, or if any promoter, director, manager, or secretary makes default in giving such a notice, he shall be liable to a fine not exceeding five hundred dollars, and shall also be liable for any damage which the person so elected or appointed may sustain from the default, but the liability of the person elected or appointed shall not be affected by the default. [30 & 31 Vict., c. 131, ss. 4, 7; 8 Edw. 7, c. 69, s. 60]; 1910, c. 7, s. 68.

Special resolution of limited company making liability of directors unlimited.

69. (1.) A limited company, if so authorised by its articles, may, by special resolution, alter its memorandum so as to render unlimited the liability of its directors, or managers, or of any managing director.

(2.) Upon the confirmation of any such special resolution the provisions thereof shall be as valid as if they had been originally contained in the memorandum; and a copy thereof shall be embodied in or annexed to every copy of the memorandum issued after the confirmation of the resolution.

(3.) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding five dollars for each copy in respect of which default is made; and every director or manager of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty. [30 & 31 Vict., c. 131, s. 8; 8 Edw. 7, c. 69, s. 61]; 1910, c. 7, s. 69.

PART IV.

MANAGEMENT AND ADMINISTRATION.

Office and Name

70. (1.) Every company shall have a registered office in British Columbia to which all communications and notices may be addressed and may from time to time change the location of its registered office.

Registered office of company

(2.) Notice of the situation of the registered office of such company shall be delivered to the Registrar with the memorandum of association, and notice of any change therein shall be given to the Registrar, who shall record the same respectively.

(3.) If a company carries on business without complying with the requirements of this section it shall be liable to a fine not exceeding twenty-five dollars for every day during which it so carries on business. [25 & 26 Vict., c. 89, ss. 39, 40]; R. S. 1897, c. 44, ss. 84, 85; [8 Edw. 7, c. 69, s. 62]; 1910, c. 7, s. 70; 1912, c. 3, s. 9.

71. (1.) Every limited company—

Publication of name by a limited company.

(*a.*) Shall paint or affix, and keep painted or affixed, its name on the outside of every office or place in which its business is carried on, in a conspicuous position, in letters easily legible:

(*b.*) Shall have its name engraven in legible characters on its seal:

(*c.*) Shall have its name mentioned in legible characters in all notices, advertisements, and other official publications of the company, and in all bills of exchange, promissory notes, indorsements, cheques, and orders for money or goods purporting to be signed by or on behalf of the company, and in all bills of parcels, invoices, receipts, and letters of credit of the company.

(2.) If a limited company does not paint or affix, and keep painted or affixed, its name in manner directed by this Act, it shall be liable to a fine not exceeding twenty-five dollars for not so painting or affixing its name, and for every day during which its name is not so kept painted or affixed; and every director and manager of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

(3.) If any director, manager, or officer of a limited company, or any person on its behalf, uses or authorises the use of any seal purporting to be a seal of the company whereon its name is not so engraven as aforesaid, or issues or authorises the issue of any notice, advertisement, or other official publication of the company, or signs or authorises to be signed on behalf of the company any bill of exchange, promissory note, indorsement, cheque, order for money or goods, or issues or authorises

to be issued any bill of parcels, invoice, receipt, or letter of credit of the company, wherein its name is not mentioned in manner aforesaid, he shall be liable, upon summary conviction, to a fine not exceeding two hundred and fifty dollars, and shall further be personally liable to the holder of any such bill of exchange, promissory note, cheque, or order for money or goods for the amount thereof, unless the same is duly paid by the company. [25 & 26 Vict., c. 89, ss. 41, 42]; R. S. 1897, c. 44, ss. 86, 87; [8 Edw. 7, c. 69, s. 63]; 1910, c. 7, s. 71.

Meetings and Proceedings.

Annual general meeting.

72. (1.) A general meeting of every company shall be held once at the least in every calendar year, and not more than fifteen months after the holding of the last preceding general meeting, and, if not so held, the company and every director, manager, secretary, and other officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding two hundred and fifty dollars

(2.) When default has been made in holding a meeting of the company in accordance with the provisions of this section, the Court may, on the application of any member of the company, call or direct the calling of a general meeting of the company.

(3.) Every general meeting of the company shall be held within the Province.

(4.) This section shall not apply to any extra-provincial company [8 Edw. 7, c. 69, s. 64]; 1910, c. 7, s. 72; 1912, c. 3, s. 10.

First statutory meeting of the company.

73. (1.) Every company limited by shares registered after the first day of July, 1910, shall, within a period of not less than one month nor more than three months from the date at which the company is entitled to commence business, hold a general meeting of the members of the company, which shall be called "the statutory meeting."

(2.) The directors shall, at least seven days before the day on which the meeting is held, forward a report (in this Act called "the statutory report") to every member of the company and to every other person entitled under this Act to receive it.

(3.) The statutory report shall be certified by not less than two directors of the company, or, where there are less than two directors, by the sole director and manager, and shall state—

(*a*.) The total number of shares allotted, distinguishing shares allotted as fully or partly paid up otherwise than in cash, and stating in the case of shares partly paid up the extent to which they are so paid up, and in either case the consideration for which they have been allotted:

(*b*.) The total amount of cash received by the company in respect of all the shares allotted, distinguished as aforesaid:

(*c*.) An abstract of the receipts of the company on account of its

capital, whether from shares or debentures, and of the payments made thereout, up to a date within seven days of the date of the report, exhibiting under distinctive headings the receipts of the company from shares and debentures and other sources, the payments made thereout, and particulars concerning the balance remaining in hand, and an account or estimate of the preliminary expenses of the company

(*d.*) The names addresses, and description of the directors, auditors (if any), managers (if any), and secretary of the company; and

(*e.*) The particulars of any contract, the modification of which is to be submitted to the meeting for its approval, together with the particulars of the modification or proposed modification.

(4.) The statutory report shall, so far as it relates to the shares allotted by the company, and to the cash received in respect of such shares, and to the receipts and payments of the company on capital account, be certified as correct by the auditors (if any) of the company.

(5.) The directors shall cause a copy of the statutory report, certified as by this section required, to be filed with the Registrar forthwith after the sending thereof to the members of the company.

(6.) The directors shall cause a list showing the names, descriptions, and addresses of the members of the company, and the number of shares held by them respectively, to be produced at the commencement of the meeting, and to remain open and accessible to any member of the company during the continuance of the meeting.

(7.) The members of the company present at the meeting shall be at liberty to discuss any matter relating to the formation of the company, or arising out of the statutory report, whether previous notice has been given or not, but no resolution of which notice has not been given in accordance with the articles may be passed.

(8.) The meeting may adjourn from time to time, and at any adjourned meeting any resolution of which notice has been given in accordance with the articles, either before or subsequently to the former meeting, may be passed, and the adjourned meeting shall have the same powers as an original meeting.

(9.) If a petition is presented to the Court in manner provided by Part VIII. of this Act for winding up the company on the ground of default in filing the statutory report or in holding the statutory meeting, the Court may, instead of directing that the company be wound up, give directions for the statutory report to be filed or a meeting to be held, or make such other order as may be just.

(10.) The provisions of this section as to the forwarding and filing of the statutory report shall not apply in the case of a private company, or to an extra-provincial company.

(11.) If a company limited by shares makes default in complying with the requirements of this section which apply to it, such company shall be liable, on summary conviction, to a fine not exceeding twenty-five dollars for each day during which such default continues; and every director, manager, or other officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like fine: Provided that where default has been made in holding the statutory meeting or filing the statutory report in this section mentioned, the company, or any person liable for the default, may apply to the Court for relief, and the Court, if satisfied that such default was accidenta or due to inadvertence, or that it is just and equitable to grant re ief, may make an order extending the time for compliance with this section for such period as the Court may think proper. [8 Edw. 7, c. 69, s. 65]; 1910, c. 7, s. 73; 1912, c. 3, s. 11.

Convening of extraordinary general meeting on requisition.

74. (1.) Notwithstanding anything in the articles of a company, the directors of a company shall, on the requisition of the holders of not less than one-tenth of the issued share capital of the company upon which all calls or other sums then due have been paid, forthwith proceed to convene an extraordinary general meeting of the company.

(2.) The requisition must state the objects of the meeting, and must be signed by the requisitionists and deposited at the registered office of the company, and may consist of several documents in like form, each signed by one or more requisitionists.

(3.) If the directors do not proceed to cause a meeting to be held within twenty-one days from the date of the requisition being so deposited, the requisitionists, or a majority of them in value, may themselves convene the meeting, but any meeting so convened shall not be held after three months from the date of the deposit.

(4.) If at any such meeting a resolution requiring confirmation at another meeting is passed, the di ectors shall for hwith convene a further extraordinary general meeting for the purpose of considering the resolution and, if thought fit, of confirming it as a special resolution; and, if the directors do not convene the meeting within seven days from the date of the passing of the first resolution, the requisitionists, or a majority of them in value, may themselves convene the meeting.

(5.) Any meeting convened under this section by the requisitionists shall be convened in the same manner, as nearly as possible, as that in which meetings are to be convened by directors. 1903-04, c. 12, s. 2; [8 Edw. 7, c. 69, s. 66]; 1910, c. 7, s. 74.

Provisions as to meetings and votes.

75. In default of and subject to any regulations in the articles,—

(*a*.) A meeting of a company may be called by seven days' notice in writing, served on every member in manner in which notices are required to be served by Table A in the First Schedule to this Act:

(*b*.) Five members may call a meeting:

(*c*.) Any person elected by the members present at a meeting may be chairman thereof:

(*d*.) Every member shall have one vote in respect of each share held by him. [25 & 26 Viet., c. 89, s. 52]; R. S. 1897, c. 44, s. 101; [8 Edw. 7, c. 69, s. 67]; 1910, c. 7, s. 75.

Representation of companies at meetings of other companies of which they are members.

76. A company which is a member of another company may, by resolution of the directors, authorise any of its officials or any other person to act as its representative at any meeting of that other company, and the person so authorised shall be entitled to exercise the same powers on behalf of the company which he represents as if he were an individual shareholder of that other company. [8 Edw. 7, c. 69, s. 68]; 1910, c. 7, s. 76.

Definitions of extraordinary and special resolution.

77. (1.) A resolution shall be an extraordinary resolution when it has been passed by a majority of not less than three-fourths of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given.

(2.) A resolution shall be a special resolution when it has been—

(*a*.) Passed in manner required for the passing of an extraordinary resolution; and

(*b*.) Confirmed by a majority of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at a subsequent general meeting, of which notice has been duly given, and held after an interval of not less than fourteen days, nor more than one month, from the date of the first meeting.

(3.) At any meeting at which an extraordinary resolution is submitted to be passed or a special resolution is submitted to be passed or confirmed, a declaration of the chairman that the resolution is carried shall, unless a poll is demanded, be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

(4.) At any meeting at which an extraordinary resolution is submitted to be passed or a special resolution is submitted to be passed or confirmed a poll may be demanded, if demanded by three persons for the time being entitled according to the articles to vote, unless the articles of the company require a demand by such number of such persons, not in any case exceeding five, as may be specified in the articles.

(5.) When a poll is demanded in accordance with this section, in computing the majority on the poll reference shall be had to the number of votes to which each member is entitled by the articles of the company.

(6.) For the purposes of this section notice of a meeting shall be d emed to be duly given and the meeting to be duly held when the notice is given and the meeting held in manner provided by the articles. [25 & 26 Vict., c. 89, s. 51]; R. S. 1897, c. 44, s. 100; [8 Edw. 7, c. 69, s. 69]; 1910, c. 7, s. 77.

Registration and copies of special resolutions.

78. (1.) A copy of every special and extraordinary resolution duly authenticated as in Section 124 of this Act provided shall, within fifteen days from the confirmation of the sp cial resolution or from the passing of an extraordinary resolution, as the case may be, be filed with the Registrar of Companies.

(2.) Where articles have been registered, a copy of every special resolution for the time being in force shall be embodied in or annexed to every copy of the articles issued after the confirmation of the resolution.

(3.) Where articles have not been registered, a copy of every special resolution shall be forwarded to any member at his request, on payment of twenty-five cents, or such less sum as the company may direct.

(4.) If a company makes default in forwarding a copy of a special or extraordinary resolution to the Registrar, it shall be liable to a fine not exceeding ten dollars for every day during which the default continues.

(5.) If a company makes default in embodying in or annexing to a copy of its articles or in forwarding to a member when required by this section a copy of a special resolution, it shall be liable to a fine not exceeding five dollars for each copy in respect of which default is made.

(6.) Every director and manager of a company who knowingly and wilfully authorises or permits any default by the company in complying with the requirements of this section shall be liable to the like penalty as is imposed by this section on the company for that default. [25 & 26 Vict., c. 89, ss. 53, 54]; R. S. 1897, c. 44, ss. 102, 103; [8 Edw. 7, c. 69, s. 70]; 1910, c. 7, s. 78, sub-secs. (2), (3), (4), (5), (6); 1911, c. 8, ss. 9, 10.

Minutes of proceedings of meetings and directors.

79. (1.) Every company shall cause minutes of all proceedings of general meetings and (where there are directors or managers) of its directors or managers to be entered in books kept for that purpose.

(2.) Any such minute if purporting to be signed by the chairman of the meeting at which the proceedings were had, or by the chairman of the next succeeding meeting, shall be evidence of the proceedings.

(3.) Until the contrary is proved, every general meeting of the company or meeting of directors or managers in respect of the proceedings whereof minutes have been so made shall be deemed to have been duly held and convened, and all proceedings had thereat to have been duly had, and all appointments of directors, managers, or liquidators shall be deemed to be valid. [25 & 26 Vict., c. 89, s. 67]; R. S. 1897 c. 44, s. 113; [8 Edw. 7, c. 69, s. 71]; 1910, c. 7, s. 79.

Appointment, Qualification, etc., of Directors.

80. (1.) A person shall not be capable of being appointed director of a company by the articles, and shall not be named as a director or proposed director of a company in any prospectus issued by or on behalf of the company, unless, before the registration of the articles or the publication of the prospectus, as the case may be, he has, by himself or by his agent authorised in writing,—

Restrictions on appointment or advertisement of director.

(*a*.) Signed and filed with the Registrar a consent in writing to act as such director; and

(*b*.) Either signed the memorandum for a number of shares not less than his qualification (if any), or signed and filed with the Registrar a contract in writing to take from the company and pay for his qualification shares (if any).

(2.) On the application for registration of the memorandum and articles of a company the applicant shall deliver to the Registrar a list of the persons who have consented to be directors of the company, and, if this list contains the name of any person who has not so consented, the applicant shall be liable to a fine not exceeding two hundred and fifty dollars.

(3.) This section shall not apply to a private company nor to a prospectus issued by or on behalf of a company after the expiration of one year from the date at which the company is entitled to commence business. [8 Edw. 7, c. 69, s. 72]; 1910, c. 7, s. 80.

81. (1.) Without prejudice to the restrictions imposed by the last preceding section, it shall be the duty of every director who is by the regulations of the company required to hold a specified share qualification, and who is not already qualified, to obtain his qualification within two months after his appointment, or such shorter time as may be fixed by the regulations of the company.

Qualification of director.

(2.) The office of director of a company shall be vacated if the director does not within two months from the date of his appointment, or within such shorter time as may be fixed by the regulations of the company, obtain his qualification, or if after the expiration of such period or shorter time he ceases at any time to hold his qualification; and a person vacating office under this section shall be incapable of being reappointed director of the company until he has obtained his qualification.

(3.) If after the expiration of the said period or shorter time any unqualified person acts as a director of the company, he shall be liable to a fine not exceeding twenty-five dollars for every day between the expiration of the said period or shorter time and the last day on which it is proved that he acted as a director. [8 Edw. 7, c. 69, s. 73]; 1910, c. 7, s. 81.

82. The acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or

Validity of acts of directors.

qualification. [25 & 26 Vict., c. 89, s. 67; 8 Edw. 7, c. 69, s. 74]; 1910, c. 7, s. 82.

List of directors to be sent to Registrar.

83. (1.) Every company shall keep at its registered office a register containing the names and addresses and the occupations of its directors or managers, and send to the Registrar a copy thereof, and from time to time notify to the Registrar any change among its directors or managers.

(2.) If default is made in compliance with this section, the company shall be liable to a fine not exceeding twenty-five dollars for every day during which the default continues; and every director and manager of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty. [25 & 26 Vict., c. 89, ss. 45, 46]; R. S. 1897, c. 44, ss. 89, 90; [8 Edw. 7, c. 69, s. 75]; 1910, c. 7, s. 83.

Contracts, etc.

Form of contracts.

84. (1.) Contracts on behalf of a company may be made as follows, that is to say:—

(*a*.) Any contract which if made between private persons would be by law required to be in writing, and if made according to the law of the Province or of the Dominion to be under seal, may be made on behalf of the company in writing under the common seal of the company, and may in the same manner be varied or discharged:

(*b*.) Any contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied, and may in the same manner be varied or discharged:

(*c*.) Any contract which if made between private persons would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied, and may in the same manner be varied or discharged.

(2.) All contracts made according to this section shall be effectual in law, and shall bind the company and its successors and all other parties thereto, their heirs, executors, or administrators, as the case may be. [30 & 31 Vict., c. 131, s. 37]; R. S. 1897, c. 44, s. 25; [Edw. 7, c. 69, s. 76]; 1910, c. 7, s. 84.

Bills of exchange and promissory notes.

85. A bill of exchange or promissory note shall be deemed to have been made, accepted, or indorsed on behalf of a company if made, accepted, or indorsed in the name of, or by or on behalf, or on account of, the company by any person acting under its authority. [25 & 26 Vict., c. 89, s. 47]; R. S. 1897, c. 44, s. 26; [8 Edw. 7, c. 69, s. 77]; 1910, c. 7, s. 85.

86. Every contract, agreement, engagement, or bargain made, and every bill of exchange drawn, accepted, or indorsed, and every promissory note and cheque made, drawn, or indorsed on behalf of the company by any agent, officer, or servant of the company, in general accordance with his powers as such under the regulations of the company, shall be binding upon the company; and in no case shall it be necessary to have the seal of the company affixed to any such contract, agreement, engagement, bargain, bill of exchange, promissory note, or cheque, or to prove that the same was made, drawn, accepted, or indorsed, as the case may be, in pursuance of any regulations or special resolution or order; nor shall the party so acting as agent, officer, or servant of the company be thereby subjected individually to any liability whatsoever to any third party therefor. R. S. 1897, c. 44, s. 27; 1910, c. 7, s. 86.

Contracts generally, when made by company, etc.

87. A company may, by writing under its common seal, empower any person, either generally or in respect of any specified matters as its attorney, to execute deeds on its behalf in any place situate within or without the limits of the Province; and every deed signed by such attorney, on behalf of the company and under his seal, shall bind the company and have the same effect as if it were under the common seal of the company. [25 & 26 Vict., c. 89, s. 55]; R. S. 1897, c. 44, s. 104; [8 Edw. 7, c. 69, s. 78]; 1910, c. 7, s. 87.

Power of attorney by company.

88. (1.) A company whose objects require or comprise the transaction of business in foreign countries may, if authorised by its articles, have for use in any territory, district, or place not situate in the Province, an official seal, which shall be a facsimile of the common seal of the company, with the addition on its face of the name of every territory, district, or place where it is to be used.

Power for company to have official seal for use abroad.

(2.) A company having such an official seal may, by writing under its common seal, authorise any person appointed for the purpose in any territory, district, or place not situate in the Province to affix the same to any deed or other document to which the company is party in that territory, district, or place.

(3.) The authority of any such agent shall, as between the company and any person dealing with the agent, continue during the period (if any) mentioned in the instrument conferring the authority; or if no period is there mentioned, then until notice of the revocation or determination of the agent's authority has been given to the person dealing with him.

(4.) The person affixing any such official seal shall, by writing under his hand, on the deed or other document to which the seal is affixed, certify the date and place of affixing the same.

(5.) A deed or other document to which an official seal is duly affixed shall bind the company as if it had been sealed with the common seal of the company. [8 Edw. 7, c. 69, s. 79]; 1910, c. 7, s. 88.

Filing of prospectus.

89. (1.) Every prospectus which relates to any company or intended company, and is issued by or on behalf of any such company or intended company or by or on behalf of any person interested in any such company or intended company, shall be dated, and that date shall, unless the contrary be proved, be taken as the date of publication of the prospectus.

(2.) A copy of every such prospectus, signed by every person who is a director or proposed director of the company on the date mentioned in the last preceding subsection hereof, or, where such prospectus is issued by or on behalf of any person interested as aforesaid, signed by such person, or in any case signed by an agent of such director or proposed director or person, duly authorised in writing, shall be filed with the Registrar on or before the date of its publication, and no such prospectus shall be issued until a copy thereof has been so filed and registered.

(3.) The Registrar shall not file any prospectus unless it is dated, and the copy thereof signed, in manner required by this section.

(4.) Every prospectus shall state on the face of it that a copy has been filed as required by this section.

(5.) If a prospectus is issued without a copy thereof being so filed, the company, and every person who is knowingly a party to the issue of the prospectus, shall be liable to a fine not exceeding twenty-five dollars for every day from the date of the issue of the prospectus until a copy thereof is so filed. [8 Edw. 7, c. 69, s. 80]; 1910, c. 7, s. 89; 1911, c. 8, s. 11; 1912, c. 3, s. 12, 13.

Specific requirements as to particulars of prospectus.

90. (1.) Every prospectus issued as mentioned in the last preceding section hereof must state—

(*a.*) The contents of the memorandum, with the names, descriptions, and addresses of the signatories, and the number of shares subscribed for them respectively; and the number of founders or management or deferred shares (if any), and the nature and extent of the interest of the holders in the property and profits of the company:

(*b.*) The number of shares (if any) fixed by the articles as the qualification of a director, and any provision in the articles as to the remuneration of the directors:

(*c.*) The names, descriptions, and addresses of the directors or proposed directors:

(*d.*) The minimum subscription on which the directors may proceed to allotment, and the amount payable on the application and allotment on each share; and in the case of a second or subsequent offer of shares, the amount offered for subscription on each previous allotment made within the two preceding years, and the amount actually allotted, and the amount (if any) paid on shares so allotted:

(*e.*) The number and amount of shares and debentures which, within the two preceding years have been issued, or agreed to be issued,

as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which those shares or debentures have been issued or are proposed or intended to be issued:

(*f.*) The names and addresses of the vendors of any property purchased or acquired by the company, or proposed so to be purchased or acquired, which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus, or the purchase or acquisition of which has not been completed at the date of issue of the prospectus, and the amount payable in cash, shares, or debentures to the vendor, and where there is more than one separate vendor, or the company is a sub-purchaser, the amount so payable to each vendor: Provided that where the vendors or any of them are a firm the members of the firm shall not be treated as separate vendors:

(*g.*) The amount (if any) paid or payable as purchase money in cash, shares, or debentures for any such property as aforesaid, specifying the amount (if any) payable for goodwill:

(*h.*) The amount (if any) paid within the last two preceding years, or payable as commission for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions, for any shares in or debentures of the company, or the rate of any such commission: Provided that it shall not be necessary to state the commission payable to sub-underwriters:

(*i.*) The amount or estimated amount of preliminary expenses:

(*j.*) The amount paid within the last two preceding years or intended to be paid to any promoter, and the consideration for any such payment:

(*k.*) The dates of and parties to every material contract, and a reasonable time and place at which any material contract or a copy thereof may be inspected: Provided that this requirement shall not apply to a contract entered into in the ordinary course of the business carried on or intended to be carried on by the company, or to any contract entered into more than two years before the date of issue of the prospectus:

(*l.*) The names and addresses of the auditors (if any) of the company:

(*m.*) Full particulars of the nature and extent of the interest (if any) of every director in the promotion of, or in the property proposed to be acquired by, the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares or otherwise by any person either to induce him to become,

or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company; and

(*n*.) Where the company is a company having shares of more than one class, the right of voting at meetings of the company conferred by the several classes of shares respectively.

(2.) For the purposes of this section every person shall be deemed to be a vendor who has entered into any contract, absolute or conditional, for the sale or purchase, or for any option of purchase, of any property to be acquired by the company, in any case where—

(*a*.) The purchase money is not fully paid at the date of issue of the prospectus; or

(*b*.) The purchase money is to be paid or satisfied wholly or in part out of the proceeds of the issue offered for subscription by the prospectus; or

(*c*.) The contract depends for its validity or fulfilment on the result of that issue.

(3.) Where any of the property to be acquired by the company is to be taken on lease, this section shall apply as if the expression "vendor" included the lessor, and the expression "purchase money" included the consideration for the lease, and the expression "sub-purchaser" included a sub-lessee.

(4.) Any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirement of this section, or purporting to affect him with notice of any contract, document, or matter not specifically referred to in the prospectus, shall be void.

(5.) Where such prospectus as is mentioned in this section is published as a newspaper advertisement, it shall not be necessary in the advertisement to specify the contents of the memorandum or the signatories thereto, and the number of shares subscribed for by them.

(6.) In the event of non-compliance with any of the requirements of this section, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance, if he proves that—

(*a*.) As regards any matter not disclosed, he was not cognizant thereof; or

(*b*.) The non-compliance arose from an honest mistake of fact on his part:

Provided that, in the event of non-compliance with the requirements contained in paragraph (*m*) of subsection (1) of this section, no director or other person shall incur any liability in respect of the non-compliance unless it be proved that he had knowledge of the matters not disclosed.

(7.) This section shall not apply to a circular or notice inviting existing members or debenture-holders of a company to subscribe either for shares or for the debentures of the company, whether with or without

the right to renounce in favour of other persons; but, subject as aforesaid, this section shall apply to any prospectus whether issued on or with reference to the formation of a company or subsequently.

(8.) The requirements of this section as to the memorandum and the qualification, remuneration, and interest of directors, the names, descriptions, and addresses of directors or proposed directors, and the amount or estimated amount of preliminary expenses, shall not apply in the case of a prospectus issued more than one year after the date at which the company is entitled to commence business.

(9.) Nothing in this section shall limit or diminish any liability which any person may incur under the general law or this Act apart from this section. [8 Edw. 7, c. 69, s. 81]; 1910, c. 7, s. 90; 1912, c. 3, s. 14.

Obligations of companies where no prospectus is issued.

91. (1.) A company which does not issue a prospectus on or with reference to its formation shall not allot any of its shares or debentures unless before the first allotment of either shares or debentures there has been filed with the Registrar a statement in lieu of prospectus signed by every person who is named therein as a director or a proposed director of the company or by his agent authorised in writing, in the form and containing the particulars set out in the Second Schedule to this Act.

(2.) This section shall not apply to a private company or to a company which has allotted any shares or debentures before the fifteenth day of March, 1912. [8 Edw. 7, c. 69, s. 82] ; 1912, c. 3, s. 15.

Restriction on alteration of terms of contract mentioned in prospectus.

92. A company shall not previously to the statutory meeting vary the terms of a contract referred to in the prospectus, except subject to the approval of the statutory meeting. [8 Edw. 7, c. 69, s. 83]; 1910, c. 7, s. 91.

Liability for statements in prospectus.

93. (1.) Where a prospectus invites persons to subscribe for shares in or debentures of a company, every person who is director of the company at the time of the issue of the prospectus, and every person who has authorised the naming of him and is named in the prospectus as a director or as having agreed to become a director either immediately or after an interval of time, and every promoter of the company, and every person who has authorised the issue of the prospectus, shall be liable to pay compensation to all persons who subscribe for any shares or debentures on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement therein, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith, unless it is proved—

(*a.*) With respect to every untrue statement not purporting to be made on the authority of an expert, or of a public official document or statement, that he had reasonable ground to believe, and did up to the time of the allotment of the shares or deben-

tures, as the case may be, believe, that the statement was true; and

(*b.*) With respect to every untrue statement purporting to be a statement by or contained in what purports to be a copy of or extract from a report or valuation of an expert, that it fairly represented the statement, or was a correct and fair copy of or extract from the report or valuation: Provided that the director, person named as director, promoter, or person who authorised the issue of the prospectus, shall be liable to pay compensation as aforesaid if it is proved that he had no reasonable ground to believe that the person making the statement, report, or valuation was competent to make it; and

(*c.*) With respect to every untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, that it was a correct and fair representation of the statement or copy of or extract from the document;

or unless it is proved—

(*d.*) That having consented to become a director of the company he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent; or

(*e.*) That the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue he forthwith gave reasonable public notice that it was issued without his knowledge or consent; or

(*f.*) That after the issue of the prospectus and before allotment thereunder, he, on becoming aware of any untrue statement therein, withdrew his consent thereto, and gave reasonable public notice of the withdrawal, and of the reason therefor.

(2.) Where an existing company has issued shares or debentures, and for the purpose of obtaining further capital by subscriptions for shares or debentures issues a prospectus, a director shall not be liable in respect of any statement therein, unless he has authorised the issue of the prospectus, or has adopted or ratified it.

(3.) Where the prospectus contains the name of a person as a director of the company, or as having agreed to become a director thereof, and he has not consented to become a director, or has withdrawn his consent before the issue of the prospectus, and has not authorized or consented to the issue thereof, the directors of the company, except any without whose knowlege or consent the prospectus was issued, and any other person who authorised the issue thereof, shall be liable to indemnify the person named as aforesaid against all damages, costs, and expenses to which he may be made liable by reason of his name having been inserted in the prospectus, or in defending himself against any action or legal proceedings brought against him in respect thereof.

(4.) Every person who by reason of his being a director, or named as a director or as having agreed to become a director, or of his having authorised the issue of the prospectus, becomes liable to make any payment under this section may recover contribution, as in cases of contract, from any other person who, if sued separately, would have been liable to make the same payment, unless the person who has become so liable was, and that other person was not guilty, of fraudulent misrepresentation.

(5.) For the purposes of this section—

The expression "promoter" means a promoter who was a party to the preparation o the prospectus, or of th portion thereof containing the untrue statement, but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company:

The expression "expert" includes engineer, valuer, accountant, and any other person whose profession gives authority to a statement made by him. [8 Edw. 7, c. 69, s. 84]; 1910, c. 7, s. 92.

Allotment.

Restriction as to allotment.

94. (1.) No allotment shall be made of any share capital of a company offered to the public for subscription, unless the following conditions have been complied with, namely:—

(*a*.) The amount (if any) fixed by the memorandum or articles and named in the prospectus as the minimum subscription upon which the directors may proceed to allotment; or

(*b*.) If no amount is so fixed and named, then the whole amount of the share capital so offered for subscription,—

has been subscribed, and the sum payable on application for the amount so fixed and named, or for the whole amount offered for subscription, has been paid to and received by the company.

(2.) The amount so fixed and named and the whole amount aforesaid shall be reckoned exclusively of any amount payable otherwise than in cash, and is in this Act referred to as "the minimum subscription."

(3.) The amount payable on application on each share shall not be less than five per cent. of the nominal amount of the share.

(4.) If the conditions aforesaid have not been complied with on the expiration of forty days after the first issue of the prospectus, all money received from applicants for shares shall be forthwith repaid to them without interest; and if any such money is not so repaid within forty-eight days after the issue of the prospectus, the directors of the company shall be jointly and severally liable to repay that money with interest at the rate of five per centum per annum from the expiration of the forty-eighth day:

Provided that a director shall not be liable if he proves that the loss of the money was not due to any misconduct or negligence on his part.

(5.) Any condition requiring or binding any applicant for shares to waive compliance with any requirement of this section shall be void.

(6.) This section, except subsection (3) thereof, shall not apply to any allotment of shares subsequent to the first allotment of shares offered to the public for subscription.

(7.) In the case of the first allotment of share capital payable in cash of a company which does not issue any invitation to the public to subscribe for its shares, no allotment shall be made unless the minimum subscription, that is to say,—

(*a.*) The amount (if any) fixed by the memorandum or articles as the minimum subscription upon which the directors may proceed to allotment; or

(*b.*) If no amount is so fixed and named, then the whole amount of the share capital other than that issued or agreed to be issued as fully or partly paid up otherwise than in cash,—

has been subscribed, and an amount not less than five per cent. of the nominal amount of each share payable in cash has been paid to and received by the company.

This subsection shall not apply to a private company or to a company which has allotted any shares or debentures before the first day of July, 1910. [8 Edw. 7, c. 69, s. 85]; 1910, c. 7, s. 93.

Effect of irregular allotment.

95. (1.) An allotment made by a company to an applicant in contravention of the provisions of the last preceding section shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company and not later, and shall be so voidable notwithstanding that the company is in course of being wound up.

(2.) If any director of a company knowingly contravenes or permits or authorises the contravention of any of the provisions of the last preceding section with respect to allotment, he shall be liable to compensate the company and the allottee respectively for any loss, damages, or costs which the company or the allottee may have sustained or incurred thereby: Provided that proceedings to recover any such loss, damages, or costs shall not be commenced after the expiration of two years from the date of the allotment. [8 Edw. 7, c. 69, s. 86]; 1910, c. 7, s. 94.

Restrictions on commencement of business.

96. (1.) A company shall not commence any business or exercise, any borrowing-powers unless—

(*a.*) Shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription; and

(*b.*) Every director of the company has paid to the company on each of the shares taken or contracted to be taken by him, and for which he is liable to pay in cash, a proportion equal to the

proportion payable on application and allotment on the shares offered for public subscription; and [1913 Act.

(c.) There has been filed with the Registrar a statutory declaration by the secretary or one of the directors, in the prescribed form, that the aforesaid conditions have been complied with.

(2.) The Registrar shall, on the filing of this statutory declaration, certify that the company is entitled to commence business, and that certificate shall be conclusive evidence that the company is so entitled. Provided that in case of a company which does not issue a prospectus inviting the public to subscribe for its shares, the Registrar shall not give such a certificate unless a statement in lieu of prospectus has been filed with him.

(3.) Any contract made by a company before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding.

(4.) Nothing in this section shall prevent the simultaneous offer for subscription or allotment of any shares and debentures or the receipt of any money payable on application for debentures.

(5.) If any company commences business or exercises borrowing-powers in contravention of this section, every person who is responsible for the contravention shall, without prejudice to any other liability, be liable to a fine not exceeding two hundred and fifty dollars for every day during which the contravention continues.

(6.) Nothing in this section shall apply to a private company or to a company registered before the 15th day of March, 1912, or to a company incorporated under the "Revised Statutes, 1897," chapter 44, section 56, or to a company incorporated under section 131 of the "Companies Act, 1910," or hereafter incorporated under Part V. of this Act or to an extra-provincial company. [8 Edw. 7, c. 69, s. 87]; 1910, c. 7, s. 95; 1911, c. 8, s. 12; 1912, c. 3, s. 16, 17.

Return as to allotments.

97. (1.) Whenever a company limited by shares makes any allotment of its shares, the company shall within one month thereafter file with the Registrar—

(a.) A return of the allotments, stating the number and nominal amount of the shares comprised in the allotment, the names, addresses, and descriptions of the allottees, and the amount (if any) paid or due and payable on each share; and

(b.) In the case of shares allotted as fully or partly paid up otherwise than in cash, a contract in writing constituting the title of the allottee to the allotment, together with any contract of sale, or for services or other consideration in respect of which that allotment was made, and a return stating the number and

nominal amount of shares so allotted, the extent to which they are to be treated as paid up, and the consideration for which they have been allotted.

(2.) Where such a contract as above mentioned is not reduced to writing, the company shall within one month after the allotment file with the Registrar the prescribed particulars of the contract.

(3.) If default is made in complying with the requirements of this section, every director, manager, secretary, or other officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding two hundred and fifty dollars for every day during which the default continues.

Provided that, in case of default in filing with the Registrar within one month after the allotment any document required to be filed by this section, the company, or any person liable for the default, may apply to the Court for relief, and the Court, if satisfied that the omission to file the document was accidental or due to inadvertence or that it is just and equitable to grant relief, may make an order extending the time for the filing of the document for such period as the Court may think proper.

(4.) This section shall not apply to an extra-provincial company which is not required to comply with section 33 of this Act [8 Ed v. 7, c. 69, s. 88]; 1910, c. 7, s. 96; 1912, c. 3, s. 18.

Commissions and Discounts.

Power to pay certain commissions, and prohibition of payment of all other commissions, discounts etc.

98. (1.) It shall be lawful for a company to pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, if the payment of the commission is authorised by the memorandum or articles, and the commission paid or agreed to be paid does not exceed the amount or rate so authorised, and if the amount or rate per cent of the commission paid or agreed to be paid is, in the case of shares offered to the public for subscription disclosed in the prospectus.

(2.) Save as aforesaid, no company shall apply any of its shares or capital money either directly or indirectly in payment of any commission, discount, or allowance to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, whether the shares or money be so applied by being added to the purchase money of any property acquired by the company or to the contract price of any work to be executed for the company, or the money be paid out of the nominal purchase money or contract price, or otherwise.

(3.) Nothing in this section shall affect the power of any company to pay such brokerage as it has heretofore been lawful for a company to pay, and a vendor to, promoter of, or other person who receives payment in money or shares from, a company shall have and shall be deemed always to have had power to apply any part of the money or shares so received in payment of any commission, the payment of which, if made directly by the company, would have been legal under this section. [8 Edw. 7, c. 69, s. 89]; 1910, c. 7, s. 97.

Statement in balance-sheet as to commissions and discounts.

99. Where a company has paid any sums by way of commission in respect of any shares or debentures, or allowed any sums by way of discount in respect of any debentures, the total amount so paid or allowed, or so much thereof as has not been written off, shall be stated in every balance-sheet of the company until the whole amount thereof has been written off. [8 Edw. 7, c. 69, s. 90]; 1910, c. 7, s. 98.

Payment of Interest out of Capital.

Power of company to pay interest out of capital in certain cases.

100. Where any shares of a company are issued for the purpose of raising money to defray the expenses of the construction of any works or buildings or the provision of any plant which cannot be made profitable for a lengthened period, the company may pay interest on so much of that share capital as is for the time being paid up for the period and subject to the conditions and restrictions in this section mentioned, and may charge the same to capital as part of the cost of construction of the work or building, or the provision of plant:

Provided that

(1.) No such payment shall be made unless the same is authorised by the articles or by special resolution:

(2.) No such payment, whether authorised by the articles or by special resolution, shall be made without the previous sanction of the Lieutenant-Governor in Council:

(3.) Before sanctioning any such payment the Lieutenant-Governor in Council may, at the expense of the company, appoint a person to inquire and report to them as to the circumstances of the case, and may, before making the appointment, require the company to give security for the payment of the costs of the inquiry:

(4.) The payment shall be made only for such period as may be determined by the Lieutenant-Governor in Council, and such period shall in no case extend beyond the close of the half-year next after the half-year during which the works or buildings have been actually completed or the plant provided:

(5.) The rate of interest shall be that agreed upon, and if there shall be no such agreement, shall be the rate provided by Statute

in cases where interest is by law payable and the rate is not agreed upon:

(6.) The payment of the interest shall not operate as a reduction of the amount paid up on the shares in respect of which it is paid:

(7.) The accounts of the company shall show the share capital on which, and the rat at which, interest has been paid out of capital during the period to which the accounts relate. [8 Edw. 7, c. 69, s. 91]; 1910, c. 7, s. 99.

Certificate of Shares, etc.

Limitation of time for issue of certificates.

101. (1.) Every company shall within two months after the allotment of any of its shares, debentures, or debenture stock, and within two months after the registration of the transfer of any such shares, debentures, or debenture stock, complete and have ready for delivery the certificates of all shares, the debentures, and the certificates of all debenture stock allotted or transferred, unless the conditions of issue of the shares, debentures, or debenture stock otherwise provide.

(2.) If default is made in complying with the requirements of this section, the company, and every director, manager, secretary, and other officer of the company who is knowingly a party to the default, shall be liable to a fine not exceeding twenty-five dollars for every day during which the default continues. [8 Edw. 7, c. 69, s. 92]; 1910, c. 7, s. 100.

Information as to Mortgages, Charges, etc.

Registration of mortgages and charges.

102. (1.) Every mortgage or charge created by a company after the first day of July, 1910, and being either—

(*a.* A mortgage or charge for the purpose of securing any issue of debentures; or

(*b.*) A mortgage or charge on uncalled share capital of the company; or

(*c.*) A mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; or

(*d.*) A mortgage or charge on any land, wherever situate, or any interest therein; or

(*e.*) A mortgage or charge on any book debts of the company; or

(*f.*) A floating charge on the undertaking or property of the company,—

shall, so far as any security on the company's property or undertaking is thereby conferred, be void against bona-fide purchasers and mortgagees for valuable consideration, and the liquidator and any creditor of the

company, unless the instrument, or a true copy thereof, by which the mortgage or charge is created or evidenced, is registered by filing the same with the Registrar within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured; and when a mortgage or charge becomes void under this section the money secured thereby shall immediately become payable:

Provided that—

(*g.*) The time for registration of a mortgage or charge created outside the Province and requiring registration under this Act, shall be thirty days from the creation of such mortgage or charge.

(*h.*) Where the mortgage or charge is created in the Province, but comprises property outside the Province, the instrument creating or purporting to create the mortgage or charge may be registered notwithstanding that further proceedings may be necessary to make the mortgage or charge valid or effectual according to the law of the country in which the property is situate; and

(*i.*) Where a negotiable instrument has been given to secure the payment of any book debts of a company, the deposit of the instrument for the purpose of securing an advance to the company shall not, for the purposes of this section, be treated as a mortgage or charge on those book debts; and

(*j.*) The holding of debentures entitling the holder to a charge on land shall not be deemed to be an interest in land.

(2.) The Registrar shall keep a register of all mortgages and charges requiring registration under this section, and shall, on payment of the prescribed fee, enter in the register, with respect to every such mortgage or charge, the date of the same, the amount secured by it, short particulars of the property mortgaged or charged, the names of the mortgagors, and the names of the mortgagees or other persons entitled to the charge.

(3.) Where a series of debentures containing, or giving by reference to any other instrument, any charge to the benefit of which the debenture-holders of that series are entitled pari passu is created by a company, it shall be sufficient if there are delivered to and filed with the Registrar within twenty-one days after the execution of the deed containing the charge, or, if there is no such deed, after the execution of any debentures of the series, the following particulars:—

(*a.*) The total amount secured by the whole series; and

(*b.*) The dates of the resolutions authorising the issue of the series and the date of the covering deed (if any) by which the security is created or defined; and

(*c.*) A general description of the property charged; and

(*d.*) The names of the trustees (if any) for the debenture-holders,—

together with the deed containing the charge, or a true copy thereof,

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Provided that, where more than one issue is made of debentures in the series, there shall be sent to the Registrar for entry in the register particulars of the date and amount of each issue, but an omission to do this shall not affect the validity of the debentures issued.

(4.) Where any commission, allowance, or discount has been paid or made either directly or indirectly by the company to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any debentures of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any such debentures, the particulars required to be sent for registration under this section shall include particulars as to the amount or rate per cent. of the commission, discount, or allowance so paid or made, but an omission to do this shall not affect the validity of the debentures issued:

Provided that the deposit of any debentures as security for any debt of the company shall not for the purposes of this provision be treated as the issue of the debentures at a discount.

(5.) The Registrar shall give a certificate under his hand of the registration of any mortgage or charge registered in pursuance of this section, stating the amount thereby secured, and the certificate shall be conclusive evidence that the requirements of this section as to registration have been complied with.

(6.) The company shall cause a copy of every certificate of registration given under this section to be indorsed on every debenture or certificate of debenture stock which is issued by the company, and the payment of which is secured by the mortgage or charge so registered:

Provided that nothing in this subsection shall be construed as requiring a company to cause a certificate of registration of any mortgage or charge so given to be indorsed on any debenture or certificate of debenture stock which has been issued by the company before the mortgage or charge was created.

(7.) It shall be the duty of the company to register every mortgage or charge and every series of debentures created or issued by it requiring registration under this section, but registration of any such mortgage or charge may be effected on the application of any person interested therein. Where the registration is effected on the application of some person other than the company, that person shall be entitled to recover from the company the amount of any fees properly paid by him to the Registrar on the registration.

(8.) The register kept in pursuance of this section shall be open to inspection by any person on payment of the prescribed fee, not exceeding twenty-five cents for each inspection.

(9.) Every company shall cause a copy of every instrument creating any mortgage or charge requiring registration under this section to be kept at the registered office of the company: Provided that, in the case of a series of uniform debentures, a copy of one such debenture shall be sufficient. 1906, c. 10, s. 2 (*part*); 8 [8 Edw. 7, c. 69, s. 93]; 1910, c. 7, s. 101, subsecs. (1) (*part*), (3), (4), (5), (6), (7), (8), (9) ; 1911, c. 8, ss. 13, 14, 15; 1912, c. 3, s. 19, 20, 21, 22.

Registration of enforcement of security.

103. (1.) If any person obtains an order for the appointment of a receiver or manager of the property of a company, or appoints such a receiver or manager under any powers contained in any instrument, he shall, within seven days from the date of the order or of the appointment under the powers contained in the instrument, give notice of the fact to the Registrar, and the Registrar shall, on payment of the prescribed fee, enter the fact in the register of mortgages and charges.

(2.) If any person makes default in complying with the requirements of this section he shall be liable to a fine not exceeding twenty-five dollars for every day during which the default continues. [8 Edw. 7, c. 69, s. 94]; 1910, c. 7, s. 102.

Filing of accounts of receivers and managers.

104. (1.) Every receiver or manager of the property of a company who has been appointed under the powers contained in any instrument, and who has taken possession, shall, once in every half-year while he remains in possession, andalso on ceasing to act as receiver or manager, file with the Registrar an abstract in the prescribed form of his receipts and payments during the period to which the abstract relates, and shall also on ceasing to act as receiver or manager file with the Registrar notice to that effect, and the Registrar shall enter the notice in the register of mortgages and charges.

(2.) Every receiver or manager who makes default in complying with the provisions of this section shall be liable to a fine not exceeding two hundred and fifty dollars. [8 Edw. 7, c. 69, s. 95]; 1910, c. 7, s. 103.

Rectification of register of mortgages.

105. A Judge of the Supreme Court, on being satisfied that the omission to register a mortgage or charge within the time hereinbefore required, or that the omission or misstatement of any particular with respect to any such mortgage or charge, was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested, and on such terms and conditions as seem to the Judge just and expedient, order that the time for registration be extended, without prejudice to the rights of parties acquired prior to the actual date of registration, or, as the case may be, that the omission or misstatement be rectified. 1906, c. 10, s. 2 (*part*); [8 Edw. 7, c. 69, s. 96]; 1910, c. 7, s. 104; 1912, c. 3, s. 23.

Entry of satisfaction.

106. The Registrar may, on evidence being given to his satisfaction that the debt for which any registered mortgage or charge was given has been paid or satisfied, order that a memorandum of satisfaction be entered on the register, and shall, if required, furnish the company with a copy thereof. 1906, c. 10, s. 2 (*part*); [8 Edw. 7, c. 69, s. 97]; 1910, c. 7, s. 105.

Penalties.

107. (1.) If default be made in the registration of any mortgage or charge or of the issues of debentures of a series requiring registration under this Act, then every company, and every director, manager, or secretary of a company, and every person knowingly a party to the default shall, on conviction, be liable to a fine not exceeding two hundred and fifty dollars for every day during which the default continues.

(2.) If any person knowingly and wilfully authorises or permits the delivery of any debenture or certificate of debenture stock requiring registration with the Registrar under the foregoing provisions of this Act without a copy of the certificate of registration being indorsed upon it, he shall, without prejudice to any other liability, be liable to a fine not exceeding five hundred dollars. 1906, c. 10, s. 2 (*part*); [8 Edw. 7, c. 69, s. 99]; 1910, c. 7, s. 107, subsec. (3); 1911, c. 8, ss. 17, 18.

Company's register of mortgages.

108. (1.) Every limited company shall keep a register of mortgages and enter therein all mortgages and charges specifically affecting property of the company, giving in each case a short description of the property mortgaged or charged, the amount of the mortgage or charge, and (except in the case of securities to bearer) the names of the mortgagees or persons entitled thereto.

(2.) If any director, manager, or other officer of the company knowingly and wilfully authorises or permits the omission of any entry required to be made in pursuance of this section, he shall be liable to a fine not exceeding two hundred and fifty dollars. [25 & 26 Vict., c. 89, s. 43 (*part*)]; R. S. 1897, c. 44, s. 88; [8 Edw. 7, c. 69, s. 100]; 1910, c. 7, s. 108.

Right to inspect copies of instruments creating mortgages and charges and company's register of mortgages.

109. (1.) The copies of instruments creating any mortgage or charge requiring registration under this Act with the Registrar, and the register of mortgages kept in pursuance of the last preceding section, shall be open at all reasonable times to the inspection of any creditor or member of the company without fee, and the register of mortgages shall also be open to the inspection of any other person on payment of such fee, not exceeding twenty-five cents for each inspection, as the company may prescribe.

(2.) If inspection of the said copies or register is refused, any officer of the company refusing inspection, and every director and manager of the company authorising or knowingly and wilfully permitting the refusal, shall be liable to a fine not exceeding twenty-five dollars, and a further

fine not exceeding ten dollars for every day during which the refusal continues; and, in addition to the above penalty, any Judge of the Supreme Court sitting in Chambers may by order compel an immediate inspection of the copies or register. [25 & 26 Vict., c. 89, s. 43 (*part*)]; R.S. 1897 c. 44, s. 88 (*part*); [8 Edw. 7, c. 69, s. 101]; 1910, c. 7, s. 109.

Right of debenture-holders to inspect the register of debenture-holders and to have copies of trust deed.

110. (1.) Every register of holders of debentures of a company shall, except when closed in accordance with the articles during such period or periods (not exceeding in the whole thirty days in any year) as may be specified in the articles, be open to the inspection of the registered holder of any such debentures, and of any holder of shares in the company, but subject to such reasonable restrictions as the company may in general meeting impose, so that at least two hours in each day are appointed for inspection, and every such holder may require a copy of the register or any part thereof on payment of ten cents for every one hundred words required to be copied.

(2.) A copy of any trust deed for securing any issue of debentures shall be forwarded to every holder of any such debentures at his request on payment in the case of a printed trust deed of the sum of twenty-five cents or such less sum as may be prescribed by the company, or, where the trust deed has not been printed, on payment of ten cents for every one hundred words required to be copied.

(3.) If inspection is refused, or a copy is refused or not forwarded, the company shall be liable to a fine not exceeding twenty-five dollars, and to a further fine not exceeding ten dollars for every day during which the refusal continues; and every director, manager, secretary, or other officer of the company who knowingly authorises or permits the refusal shall incur the like penalty. [8 Edw. 7, c. 69, s. 102]; 1910, c. 7, s. 110.

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Debentures and Floating Charges.

Perpetual debentures.

111. A condition contained in any debentures or in any deed for securing any debentures, whether issued or executed before or after the commencement of this Act, shall not be invalid by reason only that thereby the debentures are made irredeemable or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long, any rule of equity to the contrary notwithstanding. [Edw. 7, c. 69, s. 103]; 1910, c. 7, s. 113.

Power to re-issue redeemed debentures in certain cases.

112. (1.) Where either before or after the commencement of this Act a company has redeemed any debentures previously issued, the company, unless the articles or the conditions of issue expressly otherwise provide, or unless the debentures have been redeemed in pursuance of any obligation on the company so to do (not being an obligation enforceable only by the person to whom the redeemed debentures were issued or his assigns), shall have power, and shall be deemed to always have had power, to keep

the debentures alive for the purposes of reissue; and where a company has purported to exercise such a power the company shall have power, and shall be deemed always to have had power, to reissue the debentures either by reissuing the same debentures or by issuing other debentures in their place, and upon such a reissue the person entitled to the debentures shall have, and shall be deemed always to have had, the same rights and priorities as if the debentures had not previously been issued.

(2.) Where with the object of keeping debentures alive for the purpose of reissue they have either before or after the commencement of this Act been transferred to a nominee of the company, a transfer from that nominee shall be deemed to be a reissue for the purposes of this section.

(3.) Where a company has either before or after the commencement of this Act deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the company having ceased to be in debit whilst the debentures remained so deposited.

(4.) The reissue of a debenture or the issue of another debenture in its place under the power of this section given to or deemed to have been possessed by a company, whether the reissue or issue was made before or after the commencement of this Act, shall not be treated as the issue of a new debenture for the purposes of any provision limiting the amount or number of debentures to be issued.

(5.) Nothing in this section shall prejudice—

(*a*.) The operation of any judgment or order of a Court of competent jurisdiction pronounced or made before the first day of July, 1910, as between the parties to the proceedings in which the judgment was pronounced or the order made, and any appeal from any such judgment or order shall be decided as if this Act had not been passed; or

(*b*.) Any power to issue debentures in the place of any debentures paid off or otherwise satisfied or extinguished, reserved to a company by its debentures or the securities for the same. [8 Edw. 7, c. 69, s. 104]; 1910, c. 7, s. 114.

Specific performance of contract to subscribe for debentures.

113. A contract with a company to take up and pay for any debentures of the company may be enforced by an order for specific performance. [8 Edw. 7, c. 69, s. 105]; 1910, c. 7, s. 115.

Payments of certain debts out of assets subject to floating charge in priority to claims under the charge.

114. (1.) Where, in the case of a company registered under this Act, either a receiver is appointed on behalf of the holders of any debentures of the company secured by a floating charge, or possession is taken by or on behalf of those debenture-holders of any property comprised in or subject to the charge, then, if the company is not at the time in course of being wound up, the debts which in every winding-up are, under the pro-

visions of Part VIII. of this Act relating to preferential payments, to be paid in priority to all other debts shall be paid forthwith out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures.

(2.) The periods of time mentioned in the said provisions of Part VIII. of this Act shall be reckoned from the date of the appointment of the receiver or of possession being taken as aforesaid, as the case may be.

(3.) Any payments made under this section shall be recouped as far as may be out of the assets of the company available for payment of general creditors. [8 Edw. 7, c. 69, s. 107]; 1910, c. 7, s. 116.

Statement to be published by Insurance and Certain other Companies.

Certain companies to publish statement in Schedule.

115. (1.) Every company being an insurance company subject to the legislative jurisdiction of the Province to which this Act applies, or any association or society formed under any of the Statutes of the Province, shall, before it commences business, and also on the first Monday in February and the first Monday in August in every year during which it carries on business, make a statement in the Form F in the Second Schedule to this Act, or as near thereto as circumstances will admit.

(2.) A copy of the statement shall be put up in a conspicuous place in the registered or head office of the company or society, and in every branch office where the business of the company or society is carried on.

(3.) Every member and every creditor of the company or society shall be entitled to a copy of the statement on payment of a sum not exceeding ten cents.

(4.) If default is made in compliance with this section, the company, association, or society shall be liable to a fine not exceeding twenty-five dollars for every day during which the default continues; and every director and manager of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty. [8 Edw. 7, c. 69, s. 108]; 1910, c. 7, s. 117.

Inspection and Audit.

Investigation of affairs of company by Government inspectors.

116. (1.) The Lieutenant-Governor in Council may appoint one or more competent inspectors to investigate the affairs of any company and to report thereon in such manner as he directs—

(*a.*) In the case of a company having a share capital, on the application of members holding not less than one-tenth of the shares issued:

(*b.*) In the case of a company not having a share capital, on the application of not less than one-fifth in number of the persons on the company's register of members.

(2.) The application shall be supported by such evidence as the Lieutenant-Governor in Council may require for the purpose of showing that the applicants have good reason for, and are not actuated by malicious motives in requiring the investigation; and the Lieutenant-Governor in Council may, before appointing an inspector, require the applicants to give security or payment of the costs of the inquiry.

(3.) It shall be the duty of all officers and agents of the company to produce to the inspectors all books and documents in their custody or power.

(4.) An inspector may examine on oath the officers and agents of the company in relation to its business, and may administer an oath accordingly.

(5.) If any officer or agent refuses to produce any book or document which under this section it is his duty to produce, or to answer any question relating to the affairs of the company, he shall be liable to a fine not exceeding twenty-five dollars in respect of each such refusal.

(6.) On the conclusion of the investigation the inspectors shall report their opinion to the Lieutenant-Governor in Council, and a copy of the report shall be forwarded by the Provincial Secretary to the registered office of the company, and a further copy shall, at the request of the applicants for the investigation, be delivered to them.

(7.) The report shall be written or printed, as the Lieutenant-Governor in Council may direct.

(8.) The Lieutenant-Governor in Council may make such order as to the costs and expenses incidental to such investigation as may be deemed proper. [25 & 26 Vict., c. 89, ss. 56 to 59]; R. S. 1897, c. 44, ss. 105 to 108; [8 Edw. 7, c. 69, s. 109]; 1910, c. 7, s. 118.

Power of company to appoint inspectors.

117. (1.) A company may by special resolution appoint inspectors to investigate its affairs.

(2.) Inspectors so appointed shall have the same powers and duties as inspectors appointed by the Lieutenant-Governor in Council, except that, instead of reporting to the Lieutenant-Governor in Council, they shall report in such manner and to such persons as the company in general meeting may direct.

(3.) Officers and agents of the company shall incur the like penalties in case of refusal to produce any book or document required to be produced to inspectors so appointed, or to answer any question, as they would have incurred if the inspectors had been appointed by the Lieutenant-Governor in Council. [25 & 26 Vict., c. 89, s. 60]; R. S. 1897, c. 44, s. 109; [8 Edw. 7, c. 69, s. 110]; 1910, c. 7, s. 119.

Report of inspectors to be evidence.

118. A copy of the report of any inspectors appointed under this Act, authenticated by the seal of the company whose affairs they have investi-

gated, shall be admissible in any legal proceeding as evidence of the opinion of the inspectors in relation to any matter contained in the report. [25 & 26 Vict., c. 89, s. 61]; R. S. 1897, c. 44, s. 110; [8 Edw. 7, c. 69, s. 111]; 1910, c. 7, s. 120.

Appointment and remuneration of auditors.

119. (1.) Every company shall at each annual general meeting appoint an auditor or auditors to hold office until the next annual general meeting.

(2.) If an appointment of auditors is not made at an annual general meeting, the Lieutenant-Governor in Council may, on the application of any member of the company, appoint an auditor of the company for the current year, and fix the remuneration to be paid to him by the company for his services.

(3.) A director or officer of the company shall not be capable of being appointed auditor of the company.

(4.) A person, other than a retiring auditor, shall not be capable of being appointed auditor at an annual general meeting unless notice of an intention to nominate that person to the office of auditor has been given by a shareholder to the company not less than fourteen days before the annual general meeting; and the company shall send a copy of any such notice to the retiring auditor, and shall give notice thereof to the shareholders, either by advertisement or in any other mode allowed by the articles, not less than seven days before the annual general meeting:

Provided that if, after notice of the intention to nominate an auditor has been so given, an annual general meeting is called for a date fourteen days or less after the notice has been given, the notice, though not given within the time required by this provision, shall be deemed to have been properly given for the purposes thereof, and the notice to be sent or given by the company may, instead of being sent or given within the time required by this provision, be sent or given at the same time as the notice of the annual general meeting.

(5.) The first auditors of the company may be appointed by the directors before the statutory meeting, and if so appointed shall hold office until the first annual general meeting, unless previously removed by a resolution of the shareholders in general meeting, in which case the shareholders at that meeting may appoint auditors.

(6.) The directors may fill any casual vacancy in the office of auditor, but while any such vacancy continues the surviving or continuing auditor or auditors (if any) may act.

(7.) The remuneration of the auditors of a company shall be fixed by the company in general meeting, except that the remuneration of any auditors appointed before the statutory meeting or to fill any casual vacancy, may be fixed by the directors. 1903-04, c. 12, s. 3; [8 Edw. 7, c. 69, s. 112]; 1910, c. 7, s. 121.

Powers and duties of auditors.

120. (1.) Every auditor of a company shall have a right of access at all times to the books and accounts and vouchers of the company, and

shall be entitled to require from the directors and officers of the company such information and explanation as may be necessary for the performance of the duties of the auditors.

(2.) The auditors shall make a report to the shareholders on the accounts examined by them, and on every balance sheet laid before the company in general meeting during their tenure of office, and the report shall state—

(*a.*) Whether or not they have obtained all the information and explanations they have required; and

(*b.*) Whether, in their opinion, the balance sheet referred to in the report is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them, and as shown by the books of the company.

(3.) The balance-sheet shall be signed on behalf of the board by two of the directors of the company, or if there is only one director, by that director, and the auditors' report shall be attached to the balance sheet, or there shall be inserted at the foot of the balance sheet a reference to the report, and the report shall be read before the company in general meeting, and shall be open to inspection by any shareholder.

Any shareholder shall be entitled to be furnished with a copy of the balance-sheet and auditors' report at a charge not exceeding ten cents for every hundred words.

(4.) If any copy of a balance sheet which has not been signed as required by this section is issued, circulated, or published, or if any copy of a balance sheet is issued, circulated, or published without either having a copy of the auditors' report attached thereto or containing such reference to that report as is required by this section, the company, and every director, manager, secretary, or other officer of the company who is knowingly a party to the default, shall on conviction be liable to a fine not exceeding two hundred and fifty dollars. 1903-04, c. 12, s. 5; [8 Edw. 7, c. 69, s. 113]; 1910, c. 7, s. 122.

Rights of preference shareholders, etc., as to receipt and inspection of reports, etc.

121. (1.) Holders of preference shares and debentures of a company shall have the same right to receive and inspect the balance sheets of the company and the reports of the auditors and other reports as is possessed by the holders of ordinary shares in the company.

(2.) This section shall not apply to a private company nor to a company registered before the first day of July, 1910. [8 Edw. 7, c. 69, s. 114]; 1910, c. 7, s. 123.

Carrying on Business with Less than the Legal Minimum of Members.

Prohibition of carrying on business with fewer than five or, in the case

122. If at any time the number of members of a company is reduced, in the case of a private company, below two, or, in the case of any other company, below five, and it carries on business for more than six months

while the number is so reduced, every person who is a member of the company during the time that it so carries on business after those six months, and is cognizant of the fact that it is carrying on business with fewer than two members, or five members, as the case may be, shall be severally liable for the payment of the whole debts of the company contracted during that time, and may be sued for the same, without joinder in action of any other member. [25 & 26 Vict., c. 89, s. 48]; R. S. 1897, c. 44, s. 91; [8 Edw. 7, c. 69, s. 115]; 1910, c. 7, s. 124.

of a private company, two members.

Service and Authentication of Documents.

123. A document may be served on a company by leaving it at or sending it by post to the registered office of the company, or by serving the president, chairman, secretary, or any director of the company, or by leaving the same at the residence of either of them, or with any adult person of his family or in his employ; or, if the company has no registered office, and has no known president, chairman, secretary, or director, the Court may order such publication as it deems requisite to be made in the premises, and such publication shall be held to be due service upon the company. 1900, c. 5, s. 7; [25 & 26 Vict., c. 89, s. 62]; R. S. 1897, c. 44, s. 116; [8 Edw. 7, c. 69, s. 116]; 1910, c. 7, s. 125.

Service of documents on company.

124. A document or proceeding requiring authentication by a company may be signed by a director, secretary, or other authorised officer of the company, and need not be under its common seal. [25 & 26 Vict., c. 89, s. 63]; R. S. 1897, c. 44, s. 118; [8 Edw. 7, c. 69, s. 117]; 1910, c. 7, s. 126.

Authentication of documents.

Tables and Forms.

125. The forms in the Second Schedule to this Act, or forms as near thereto as circumstances admit, shall be used in all matters to which those forms refer. 25 & 26 Vict., c. 89, s. 71 (*part*)]; R. S. 1897, c. 44, s. 121 (*part*); [8 Edw. 7, c. 69, s. 118 (*part*)]; 1910, c. 7, s. 127 (*part*).

Application and alteration of tables and forms.

126. The Lieutenant-Governor in Council may alter any of the tables and forms in the First Schedule to this Act, so that it does not increase the amount of fees payable to the Registrar in the said Schedule mentioned, and may alter or add to the forms in the said Second Schedule. [25 & 26 Vict., c. 89, s. 71 (*part*)]; R. S. 1897, c. 44, s. 121 (*part*); [8 Edw.7, c. 69, s. 118 (*part*)]; 1910, c. 7, s. 127 (*part*).

Lieut.-Governor in Council may alter tables and forms.

127. Any such table or form, when altered, shall be published in the Gazette, and thenceforth shall have the same force as if it were included in one of the Schedules to this Act; but no alteration made by the Lieutenant-Governor in Council in Table A in the said First Schedule shall affect any company registered before the alteration, or repeal, as respects that company, any portion of such table. [25 & 26 Vict., c. 89, s. 71

Alterations to be published in Gazette.

(*part*)]; R. S. 1897, c. 44, s. 121 (*part*); [8 Edw. 7, c. 69, s. 118 (*part*)]; 1910, c. 7, s. 127 (*part*).

Arbitrations.

Arbitration between companies and others.

128. (1.) A company may, by writing under its common seal, agree to refer and may refer to arbitration, in accordance with the "Arbitration Act," any existing or future difference between itself and any other company or person.

(2.) Companies parties to the arbitration may delegate to the arbitrator power to settle any terms or to determine any matter capable of being lawfully settled or determined by the companies themselves, or by their directors or other managing body.

(3.) Subject to any express provisions on the subject, all the provisions of the "Arbitration Act" shall apply to arbitrations between companies and persons in pursuance of th's Act. [25 & 26 Vict., c. 89, ss. 72, 73]; R. S. 1897, c. 44, ss. 119, 120; [8 Edw. 7, c. 69, s. 119]; 1910, c. 7, s. 128.

Power to Compromise.

Power to compromise creditors and members

129. (1.) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may, on the application in a summary way of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the Court directs.

(2.) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of directors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

[1913 Act.]

(3.) In this section the expression "company" means any company liable to be wound up under this Act. [8 Edw. 7, c. 69, s. 120]; 1910, c. 7, s. 129.

Meaning of " P iuate Company,"

Meaning "private company.'

130. (1.) For the purposes of this Act the expression "private company" means a company which by its memorandum or articles—

(*a.*) Restricts the right to transfer its shares; and

(*b.*) Limits the number of its members (exclusive of persons who are in the employment of the company) to fifty; and

(*c.*) Prohibits any invitation to the public to subscribe for any shares or debentures of the company.

(2.) A private company may, subject to anything contained in the memorandum or articles, by passing a special resolution and by filing with the Registrar such a statutory declaration as the company, if a public company, would have had to file before commencing business, turn itself into a public company.

(3.) Where two or more persons hold one or more shares in a company jointly they shall, for the purposes of this section, be treated as a single member. [8 Edw. 7, c. 69, s. 121]; 1910, c. 7, s. 130.

PART V.

INCORPORATION OF MINING COMPANIES WITHOUT ANY PERSONAL LIABILITY

Mining companies with specially limited liability in shares.

131. (1.) The memorandum of a company incorporated or reincorporated under this Act, the objects whereof are restricted to acquiring, managing, developing, working, and selling mines (including coal-mines), mineral claims, and mining properties and petroleum claims, and the winning, getting, treating, refining, and marketing of mineral coal or oil therefrom, may contain a provision that no personal liability shall attach to any subscriber or holder of shares in a company so incorporated, and the certificate of incorporation issued under section 26 of this Act shall state that the company is specially limited under this section.

Powers of non-personal liability mining companies.

(2.) Every company, the objects whereof are restricted as aforesaid shall be deemed to have the following, but, except as in this Act otherwise expressed, no greater powers, that is to say:—

(*a.*) To obtain by purchase, lease, hire, discovery, location, or otherwise, and hold, within the Province, mines, mineral claims, mineral leases, prospects, mining lands, and mining rights of every description, and to work, develop, operate, and turn the same to account, and to sell or otherwise dispose of the same or any of them, or any interest therein:

(*b.*) To dig for, raise, crush, wash, smelt, assay, analyse, reduce, amalgamate, and otherwise treat gold, silver, coal, copper, lead ores or deposits, and other minerals and metallic substances and compounds of all kinds, whether belonging to the company, or not, and to render the same merchantable, and to buy, sell, and deal in the same or any of them:

(*c.*) To carry on the business of a mining, smelting, milling, and refining company in all or any of its branches:

(*d.*) To acquire by purchase, lease, hire, exchange, or otherwise such timber lands or leases, timber claims, licences to cut timber, surface rights and rights-of-way, water rights and privileges, mills, factories, furnaces for smelting and treating ores and refining metals, buildings, machinery, plant, or other real or personal property as may be necessary for or conducive to the proper carrying out of any of the objects of the company:

(*e.*) To construct, maintain, alter, make, work, and operate on the property of the company, or on property controlled by the company, any canals, trails, roads, ways, tramways, bridges, and reservoirs, dams, flumes, race and other ways, water-courses, aqueducts, wells, wharves, piers, furnaces, sawmills, crushing-works,smelting-works, concentrating-works,hydraulic works, coke-ovens, electrical works and appliances, warehouses, buildings, machinery, plant, stores, and other works and conveniences which may seem conducive to any of the objects of the company, and, with the consent of the shareholders in general meeting, to contribute to, subsidize, or otherwise aid or take part in any such operation, though constructed and maintained by any other company or persons outside of the property of the company; and to buy, sell, manufacture, and deal in all kinds of goods stores, implements, provisions, chattels, and effects required by the company or its workmen and servants:

(*f.*) To build, acquire, own, charter, navigate, and use steam and other vessels for the purposes of the company:

(*g.*) To take, acquire, and hold as the consideration for ores, metals, or minerals sold or otherwise disposed of, or for goods supplied or for work done by contract or otherwise, shares, debentures, bonds, or other securities of or in any other company the objects of which are restricted as herein aforesaid, and to sell or otherwise dispose of the same:

(*h.*) To enter into any arrangement for sharing profits, union of interests, or co-operation with any other person or company carrying on, or about to carry on, any business or transaction which a company especially limited under this section is authorised to carry on:

(*i.*) To purchase or otherwise acquire and undertake all or any of the assets, business, property, privileges, contracts, rights, obligations, and liabilities of any person or company carrying on any part of the business which a company specially limited under this section is authorised to carry on, or possessed of property suitable for the purposes thereof:

(*j.*) To borrow or raise money for the purposes of the company, but so that the amount so borrowed or raised shall not, without

the sanction of a general meeting of the company, exceed one-quarter of the amount of the paid-up capital for the time being, and for the purpose of securing such money and interest, or for any other purpose, to mortgage or charge the undertaking or all or any part of the property of the company, present or after acquired; and to create, issue, make, draw, accept, and negotiate perpetual or redeemable debentures or debenture stock, promissory notes, bills of exchange, bills of lading, warrants, obligations, and other negotiable and transferable instruments: Provided however, that the restriction in this subsection contained as to borrowing without the sanction of a general meeting shall not be deemed to be imperative, and shall in nowise limit, control, or affect any power of borrowing vested in the board of directors of the company or of the company under the memorandum, articles, or by-laws of the company:

(*k.*) To distribute any of the property of the company among the members in specie:

(*l.*) To sell, improve, manage, develop, exchange, lease, mortgage, dispose of, turn to account, or otherwise deal with the undertaking or the whole or any part of the property and rights of the company, with power to accept as the consideration any shares, stocks, or obligations of any company: Provided, however, that in case of a sale for shares in a company other than a non-personal liability company, such shares shall be fully paid up:

(*m.*) To do all such other things as are incidental or conducive to the attainment of the foregoing objects. R. S. 1897, c. 44, s. 56; 1900, c. 5, s. 6; 1908, c. 11, s. 3; 1910, c. 7, s. 131; 1912, c.3, s. 24.

Shares to be specially marked.

132. Where a certificate of incorporation incorporating any such company, or a licence or certificate of registration to any extra-provincial company, has been issued containing the provisions mentioned in section 131 of this Act, every certificate of shares or stock issued by the company shall bear upon the face thereof, distinctly written or printed in red ink, after the name of the company, the words "Issued under section 131, respecting mining companies, of the 'Companies Act,' " and where such shares or stock are issued subject to further assessments the word "assessable," or if not subject to further assessment the word "non-assessable," as the case may be. R. S. 1897, c. 44, s. 57; 1910, c. 7, s. 132.

Charter, prospectuses, and other documents of such company to be specially marked.

133. Every company, the objects whereof are restricted as aforesaid, shall have written or printed on its charter, prospectuses, stock certificates, bonds, contracts, agreements, notices, advertisements, and other official publications, and in all bills of exchange, promissory notes, indorsements, cheques, and orders for money or goods purporting to be signed by or on

behalf of the company, and in all bills of parcels, invoices, receipts, and letter-heads of the company, immediately after or under the name of such company, and shall have engraved upon its seal the words "Non-Personal Liability," and such words shall be the last words of its name; and every such company which refuses, or knowingly neglects to comply with this section shall incur a penalty of twenty dollars for every day during which such name is not so kept written or printed, recoverable upon summary conviction; and every director and manager, secretary, and officer of the company who knowingly and wilfully authorises or permits such default shall be liable to the like penalty. R. S. 1897, c. 44, s. 58; 1910, c. 7, s. 133.

Penalty.

Enforcement of payment of assessment on such shares.

134. In the event of any call or calls on assessable shares in a company, the objects whereof are restricted as aforesaid, remaining unpaid by the subscriber thereto, or holder thereof, for a period of sixty days after notice and demand of payment, such shares may be declared by the directors to be in default, and the secretary of the company may advertise such shares for sale at public auction to the highest bidder for cash, by giving notice of such sale in some newspaper published or circulating in the city or district where the principal office of the company is situated, for a period of one month; and said notice shall contain the number of the certificate or certificates of such shares, and the number of shares, the amount of the assessment due and unpaid, and the time and place of sale; and in addition to the publication of the notice aforesaid, notice shall be personally served upon such subscriber or holder by registered letter mailed to his last-known address; and if the subscriber or holder of such shares shall fail to pay the amount due upon such shares, with interest upon the same at the rate provided by the articles, by-laws, or regulations of the company, or, where no rate is so fixed, at the same rate as is provided by Statute in other cases where interest is by law payable and the rate is not agreed upon, and cost of advertising, before the time fixed for such sale, the secretary shall proceed to sell the same or such portion thereof as shall suffice to pay such assessment, together with such interest and cost of advertising: Provided that if the price of the shares so sold exceeds the amount due with said interest and cost thereon, the excess thereof shall be paid to the defaulting subscriber or holder. R. S. 1897, c. 44, s. 59; 1910, c. 7, s. 134.

Liability of shareholder on such shares.

135. No shareholder or subscriber for shares in any company, the objects whereof are restricted as aforesaid, shall be personally liable for non-payment of any calls made upon his shares, nor shall such shareholder or subscriber be personally liable for any debt contracted by the company, or for any sum payable by the company. R. S. 1897, c. 44, s. 60; 1910, c. 7, s. 135.

Existing companies before revision of 1897

136. Wherever any shares have been, prior to the eighth day of May, 1897, issued by any company duly incorporated under any Act as fully

paid-up shares, either at a discount or in payment for any mine, mineral claim, or mining property purchased or acquired by such company, or for the acquiring whereof such company has been incorporated, all such shares shall, except as to any debts contracted by the company before the eighth of May, 1897 (in regard to which the liability on such shares shall be the same as if this Act had not been passed), be deemed and held to be fully paid up, and the holder thereof shall be subject to no personal liability thereon, in the same manner as if the memorandum of association of the company had contained the provision aforesaid. R. S. 1897, c. 44, s. 61; 1910, c. 7, s. 136.

Shares in companies incorporated under ss. 56-61 of "Companies Act, 1897," to be at all times fully paid and non-assessable.

137. Any company with specially limited liability on shares heretofore incorporated under sections 56 to 61 of the "Companies Act, 1897," and the powers, rights, and liabilities of any such company and of its shareholders, shall be and remain specially limited as provided in those sections, and all shares of any such company heretofore issued, or that may hereafter be issued, as full-paid and non-assessable, as therein provided, shall at all times be deemed to be full-paid and non-assessable. 1910, c. 7, s. 137.

Reincorporation as an ordinary limited company.

138. In case a resolution authorising reincorporation and registration under the provisions of this Act, and authorising the execution by the directors on behalf of the shareholders of the company of a memorandum of association for the objects specified in such resolution, is passed at a general meeting of the shareholders of the company duly called specially for the purpose, at which meeting at least two-thirds in value of all the shares of the company are represented by the holders thereof in person or by proxy and vote in favour of such resolution, any company heretofore incorporated, or hereafter incorporated, subject to the provisions contained in section 131 of this Act, or to the like provisions of any former Act, and being at the time of registration a subsisting and valid company, and upon payment to the Registrar of a fee of ten dollars, and no more (except where the capital is increased), shall be entitled to receive from the Registrar a certificate of the reincorporation and registration of the company under this Act as an unlimited company, or as a company limited by shares, or as a company limited by guarantee, for the objects and purposes to be set out in the memorandum of association executed in pursuance of such resolution, and thereupon the old company shall, as such company, cease to exist, and all the rights, property and obligations of the former company shall thereby be and be deemed ipso facto to have been transferred to the new company, and all proceedings may be continued or commenced by or against the new company that might have been continued or commenced by or against the old company, and it shall not be necessary in the certificate of reincorporation or registration to set out the names of the shareholders, and after such reincorporation and

registration the company shall be governed in all respects by the provisions of this Act, except that the liabilities of the shareholders to creditors of the old company shall remain as at the time of reincorporation; and of such reincorporation the certificate aforesaid shall be conclusive evidence, as well as conclusive evidence of the due registration and observance of all statutory requirements with respect to registration or incorporation in force prior to the passing of this Act:

(*a.*) Where an existing company applies for registration under this section, the directors may, in and by the memorandum of association executed pursuant to and conforming to the resolution of the company authorising the execution thereof, extend, vary, or limit the powers and objects of the company, and the certificate of registration under this section shall be to the new company by a different name than that of the old company:

(*b.*) Where the existing company is registered under this section, the capital of the company may be increased or decreased to any amount which may be fixed by the resolution of the company authorising such registration; but where increased the fees for increase of capital mentioned in Table B to this Act shall be paid to the Registrar:

(*c.*) The said resolution shall prescribe the manner in which the shares in the new company are to be allotted to holders of shares in the old company, and shall prescribe to what amount (if any) the shares in the new company shall be assessable, and generally the terms upon which the new shares shall be deliverable to the allottees: Provided, however, that no shareholder in the old company shall be liable upon any shares in the new company unless he accepts the allotment to him of the same:

(*d.*) The memorandum of association may be accompanied by articles of association, in accordance with section 20 of this Act, and such articles of association must be authorised by the resolution authorising registration under the provisions of this section:

(*e.*) Whenever the Registrar considers that public notice of an intended application for reincorporation and registration under this section should be given, he shall require notice to be published in the Gazette, or otherwise, as he thinks proper:

(*f.*) The Registrar may, in any case where he thinks it proper so to do, refuse reincorporation and registration: Provided that the company may appeal from the decision of the Registrar under this section to the Supreme Court, or a Judge thereof in Chambers, by summons or motion:

(*g.*) Every certificate of registration issued under this section shall be published in one issue of the Gazette and in one issue of a

newspaper circulating in the city or district in which the registered office of the company is situate. 1901, c. 10, s. 6; 1910, c. 7, s. 138.

PART VI.

LICENSING AND REGISTRATION OF EXTRA-PROVINCIAL COMPANIES.

General.

Extra-provincial companies required to become licensed or registered.

139. Every extra-provincial company having gain for its purpose and object within the scope of this Act is hereby required to be licensed or registered under this or some former Act, and no company, firm, broker, or other person shall, as the representative or agent of or acting in any other capacity for any such extra-provincial company, carry on any of the business of an extra-provincial company within the Province until such extra-provincial company shall have been licensed or registered as aforesaid.

Extra-provincial companies heretofore registered.

This section shall apply to an extra-provincial company notwithstanding that it was heretofore registered as a foreign company under the provisions of any Act, but shall not apply to an extra-provincial investment and loan society duly licensed under the "Extra-provincial Investment and Loan Societies Act." R. S. 1897, c. 44, s. 123; 1898, c. 13, s. 5; 1910, c. 7, s. 139.

Registrar's power to dispense with filing of documents

140. The Registrar may for good cause shown dispense with the filing by an extra-provincial company, proceeding to obtain a licence or registration under the provisions of this Part of this Act, of one or more of the documents which compose its charter and regulations, and may allow to be substituted therefor a list of the documents so dispensed with, accompanied by a statement of the reasons for dispensing with the originals, and (if he so require) by such memorandum of the contents of such originals as he may deem sufficient. 1898, c. 13, s. 6; 1910, c. 7, s. 140.

Rights of such company to sue, hold lands, etc.

141. Any extra-provincial company licensed or registered under this or some former Act may sue and be sued in its corporate name, and, if authorised so to do by its charter and regulations, may acquire and hold lands in the Province by gift, purchase, or as mortgagees or otherwise, as fully and freely as private individuals, and may sell, lease, mortgage, or otherwise alienate the same. R. S. 1897, c. 44, s. 138; 1910, c. 7, s. 141.

Rights and duties of registered companies.

142. Every extra-provincial company registered as a company under this or some former Act shall, subject to the provisions of its charter and regulations, and of this Act, have and may exercise all the rights, powers,

and privileges by this Act granted to and conferred upon companies incorporated thereunder and every such extra-provincial company and the directors, officers, and members thereof shall, save as in this Act otherwise provided, be subject to and shall, subject as aforesaid, observe, carry out, and perform every act, matter, obligation, and duty by this Act prescribed and imposed upon companies incorporated thereunder, or upon the directors, officers, and members thereof. R. S. 1897, c. 44, s. 139; 1910, c. 7, s. 142; 1912, c. 3, s. 25.

Power to issue and transfer shares. [1913 Act.]

143. Every extra-provincial company registered under this Part of this Act shall, in and by the power of attorney hereinafter prescribed, empower its attorney to issue and transfer shares of the company.

Register.

Every such extra-provincial company shall, at its head office or chief place of business in the Province, provide and keep, in form and manner provided by section 33 of this Act, a register of all shares issued at such head office or chief place of business, and of all transfers of shares in the company made within the Province and presented for record at such head office or chief place of business; and every lawful transfer of shares made by a member shall, upon entry and record on such register, be valid and binding to all intents and purposes; and every act, matter, or thing lawfully done by the attorney of the company pursuant to this section shall be as valid and binding in all respects as if done by the company or the directors, managers, or officers of the company, pursuant to the provisions of the charter and regulations of the company and of this Act in that behalf. R. S. 1897, c. 44, s. 140; 1910, c. 7, s. 143.

[1913 Act.]

Surrender of certificate of registration for licence. [1913 Act.]

144. Every extra-provincial company duly incorporated under the laws of the United Kingdom, or of the Dominion, or of the late Province of Canada, or of any of the Provinces of Canada, registered prior to the eighth day of May, 1899, in the Province as a foreign company under the provisions of any Act, may surrender to the Registrar the certificate of registration of the company issued under such Act and obtain from him a licence under the provisions of this Part of this Act; and for the purpose of obtaining such licence the surrender of such certificate of registration and the filing of the power of attorney prescribed by clause (*d*) of section 153 of this Act shall be deemed to be a sufficient compliance with the requirements of this Part. R. S. 1897, c. 44, s. 141; 1898, c. 13, s. 10; 1910, c. 7, s. 144.

What certificate of registration or licence to extra-provincial companies to contain.

145. The licence issued in pursuance of the last preceding section of this Act to an extra-provincial company heretofore registered as a foreign company need not contain in detail the objects of the company, but may incorporate them by reference to the former certificate of registration of the company. 1898, c. 13, s. 11; 1910, c. 7, s. 149.

What extra-provincial companies subject to the Act.

146. Every extra-provincial company registered in the Province before the passage of the "Companies Act, 1897," as a foreign company under

the provisions of any Act in that behalf (other than a company entitled to obtain, and which has obtained, a licence under some former Act, or may obtain a licence under this Part of this Act), and the directors, officers, and members thereof, shall be subject to and shall observe, carry out, and perform every act, matter, obligation, and duty by this Act prescribed and imposed upon companies incorporated thereunder, or upon the directors officers, and members thereof. 1898, c. 13, s. 12; 1910, c. 7, s. 145.

Security for costs by extra-provincial company.

147. In case of any suit or other proceeding being commenced by any extra-provincial company against any person or corporation residing or carrying on business in the Province, such extra-provincial company shall furnish security for costs, if demanded. R. S. 1897, c. 44, s. 144; 1910, c. 7, s. 146.

Chinese company.

148. Nothing contained in this Part of this Act shall authorise the registration of any Chinese or Japanese company or association. 1897, c. 2, s. 145; 1910, c. 7, s. 147.

Lieut.-Governor's power to suspend or revoke licence.

149. The Lieutenant-Governor in Council may, by an order to be published in three consecutive issues of the Gazette, suspend or revoke and make null and void any licence granted or any registration effected under this or some former Act to any company which refuses or fails to keep a duly appointed attorney within the Province, or to comply with any of the provisions of this Part of this Act; and, notwithstanding such suspension or revocation, the rights of creditors of the company shall remain as at the time of such suspension or revocation. R. S. 1897, c. 44, ss. 131, 137; 1910, c. 7, s. 148.

[1913 Act.]

Application of certain sections to extra-provincial companies.

150. Sections 102 to 110, both inclusive, of this Act, shall apply to every extra-provincial company. (*New.*)

Extra-provincial companies may obtain benefit of non-personal liability.

151. The licence or certificate of registration to any extra-provincial company (the objects whereof are restricted as mentioned in section 131 subsection (1), of this Act) may, if so applied for in the application for such licence, or in the petition for such registration, contain the provision that the company is specially limited as in that section expressed; and in such case the provisions of sections 131, 132, 133, 134, and 135 of this Act shall apply to such extra-provincial company. 1897, c. 2, s. 56; 1910, c. 7, s. 131, subsec. (2).

Licensing of Extra-provincial Companies.

Companies entitled to licence.

152. Any extra-provincial company duly incorporated under the laws of—

(*a.*) The United Kingdom;

(*b.*) The Dominion;

(*c.*) The former Province of Canada;

(*d.*) Any of the Provinces of the Dominion; and

(*e.*) Any insurance company to which this Act applies;

duly authorised by its charter and regulations to carry out or effect any of the purposes or objects to which the legistive authority of the legislature extends, may obtain a licence from the Registrar authorising it to carry on business within the Province on compliance with the provisions of this Act, and on payment to the Registrar in respect of the several matters mentioned in the Table B in the First Schedule hereto the several fees therein specified, and shall, subject to the provisions of the charter and regulations of the company, and to the terms of the licence, thereupon have the same powers and privileges in the Province as if incorporated under this Act. R. S. 1897, c. 44, s. 124; 1910, c. 7, s. 153.

[1913 Act.]

Proceedings to obtain such licence.

153. Before the issue of a licence to any such extra-provincial company the company shall file in the office of the Registrar—

(*a.*) A true copy of the charter and regulations of the company, verified in manner satisfactory to the Registrar, and showing that the company by its charter has authority to carry on business in the Province; and if any instrument included in the aforesaid is not written in the English language, a notarially certified translation thereof:

(*b.*) An affidavit or statutory declaration that the company is still in existence and legally authorised to transact business under its charter:

(*c.*) In the case of an insurance company a copy of the last balance sheet and auditor's report thereon:

(*d.*) A duly executed power of attorney, under its common seal empowering some person therein named, and residing in the city or place where the head office of the company in the Province is situate, to act as its attorney and to sue and be sued plead or be impleaded, in any Court, and generally, on behalf of such company and within the Province, to accept service of process and to receive all lawful notices and to do all acts and to execute all deeds and other instruments relating to the matters within the scope of the power of attorney and of the company to give to its attorney; and such company may from time to time, by a new or other power of attorney executed and filed as aforesaid, appoint another attorney within the Province for the purposes aforesaid to replace the attorney formerly appointed. The power of attorney may be according to a form approved of and provided by the Registrar:

[1913 Act.]

(*e.*) Notice of the place where the head office without the Province is situate:

(*f*.) Notice of the city, town, district, or county in the Province where the head office of the company is proposed to be situate:

(*g*.) The amount of the capital of the company:

(*h*.) The number of shares into which it is divided. R. S. 1897, c. 44, s. 127; 1910, c. 7, s. 154.

154. The licence shall set forth— Contents of licence.

(*a*.) The corporate name of the company:

(*b*.) The place where the head office of the company is situate:

(*c*.) The place where the head office of the company in the Province is situate:

(*d*.) The name, address, and occupation of the attorney of the company:

(*e*.) The amount of the capital of the company:

(*f*.) The number of shares into which it is divided:

(*g*.) The time of the existence of the company, if incorporated for a limited period:

(*h*.) In the case of a limited company, that the company is limited:

(*i*.) In the case of a mining company, to which the non-personal liability sections in Part V. of this Act apply, that the liability of the members is so specially limited:

and such certificate, together with a statement by the Registrar of the objects for which the company has been established and licensed, shall be published at the expense of the company for four weeks in the Gazette; and such licence shall be conclusive evidence of compliance with all the requirements of this Act. Evidence.

Notice of the appointment of a new attorney, or of the company ceasing to carry on business in the Province, shall likewise be published for the time and in manner aforesaid. R. S. 1897, c. 44, s. 128; 1910, c. 7, s. 155; 1911, c. 8, s. 21.

155. The licence, or a copy thereof certified under the hand and seal of the Registrar, or a copy of the Gazette containing such licence, shall be sufficient evidence in any proceeding in any Court in the Province of the due licensing of the company aforesaid. R. S. 1897, c. 44, s. 129; 1910, c. 7, s. 156. Evidence of licence.

156. If the power of attorney hereinbefore prescribed becomes invalid or ineffectual from any reason, or if other service cannot readily be effected the Court or Judge may order substitutional service of any process or proceeding upon the company to be made by such publication as is deemed requisite to be made in the premises, for at least three weeks in at least one newspaper; and such publication shall be held to be due service upon Substitutional service.

the company of such process or proceeding. R. S. 1897, c. 44, s. 130; 1910, c. 7, s. 157.

Registration of Extra-provincial Companies.

Power for extra-provincial company to register.

157. Any other extra-provincial company, other than an insurance company, duly authorised by its charter and regulations to carry out or effect any of the purposes or objects to which the legislative authority of the Legislature extends, may register the company as a company under this Act on compliance with the provisions of this Part, and on payment to the Registrar in respect of the several matters mentioned in the Table B in the First Schedule hereto the several fees therein specified, and such company shall, subject to the provisions of the charter and regulations of the company and of this Act, thereupon have the same powers and privileges in the Province as if incorporated under the provisions of this Act. R.S. 1897, c. 44, s. 132; 1910, c. 7, s. 159; 1912, c. 3, s. 26.

Proceedings by such company to obtain registration.

[1913 Act.]

158. Any extra-provincial company desiring to become registered as a company under this Act as aforesaid may petition therefor under the common seal of the company, and with such petition shall file in the office of the Registrar—

(*a*.) A true copy of the charter and regulations of the company verified in manner satisfactory to the Registrar, and showing that the company by its charter has authority to carry on business in the Province; and if any instrument included in the aforesaid is not written in the English language, a notarially certified translation thereof:

(*b*.) An affidavit or statutory declaration that the said company is still in existence and legally authorised to transact business under its charter:

(*c*.) (Repealed):

(*d*.) A duly executed power of attorney, under its common seal empowering some person therein named, and residing in the city or place where the head office of the company in the Province is situate, to act as its attorney and to sue and be sued, plead or be impleaded, in any Court, and generally, on behalf of such company and within the Province, to accept service of process and to receive all lawful notices, to issue and transfer shares or stock, and to do all acts and to execute all deeds and other instruments relating to the matters within the scope of the power of attorney and of the company to give to its attorney; and such company may from time to time, by a new or other power of attorney executed and deposited as aforesaid, appoint another attorney within the Province for the purposes aforesaid to replace the attorney formerly appointed. The power of attorney

may be according to a form approved of and provided by the Registrar

(*e*.) Notice of the place where the head office of the company without the Province is situate:

(*f*.) Notice of the city, town, district, or county in the Province where the head office of the company is proposed to be situate:

(*g*.) The amount of the capital of the company; and

(*h*.) The number of shares into which it is divided. R. S. 1897, c. 44, s. 133; 1910, c. 7, s. 160; 1912, c. 3, s. 27.

Powers of attorney by extra-provincial companies seeking registration.

[1913 Act.]

159. (1.) The Registrar may accept from any extra-provincial company, proceeding to obtain registration under the provisions of section 158 of this Act, a power of attorney which varies in substance from that called for by clause (*d*) of said section, in that it omits to empower the attorney named therein to issue and transfer shares or stock, upon its being shown to his satisfaction either that the company is not a public company, the shares or stock whereof are upon the market, or that although the company is a public company, and the shares or stock thereof are upon the market, yet that, either owing to the small quantity of the shares or stock of the company held in the Province, and to the fact that the company does not propose to place any of the shares or stock upon the market in the Province, or to the fact that the consent of the holders of shares or stock within the Province has been obtained, the preponderance of convenience is in favor of exempting the company from empowering their attorney in the manner specified:

(*a*.) The certificate of registration issued to the company under the provisions of section 160 shall state, after the name, address, and occupation of the attorney, that such attorney is not empowered to issue or transfer shares or stock:

(*b*.) The company shall thereupon be relieved from compliance with section 143 of this Act.

(2.) Any company which has heretofore filed a power of attorney empowering its attorney to issue and transfer shares and stock may have such power of attorney amended on summary application to the Registrar, and on satisfying him as aforesaid, and shall thereafter be relieved in manner aforesaid. The Registrar may direct the amendment to be given publicity in such manner as he may deem necessary. 1898, c. 13, s. 8; 1910, c. 7, s. 161.

Contents of certificate.

160. The Registrar shall issue to any extra-provincial company registered under this Act a certificate of registration which shall set forth—

(*a*.) The corporate name of the company:

(*b*.) The place where the head office of the company is situate:

(*c*.) The place where the head office of the company in the Province is situate:

(*d*.) The name, address, and occupation of the attorney of the company:

(*e*.) The amount of the capital of the company:

(*f*.) The number of shares into which it is divided, and the amount of each share:

(*g*.) The time of the existence of the company, if incorporated for a limited period:

(*h*.) In the case of a limited company, that the company is limited:

(*i*.) In the case of a mining company, to which the non-personal liability sections in Part V. of this Act apply, that the liability of the members of the company is so specially limited:

and such certificate, together with a statement by the Registrar of the objects for which the company has been established and registered, shall be published at the expense of the company for four weeks in the Gazette; and such certificate shall be conclusive evidence of compliance with a the requirements of this Act.

Publication.

Notice of the appointment of a new attorney, or of the company ceasing to carry on business in the Province, shall likewise be published for the time and in manner aforesaid. R. S. 1897, c. 44, s. 134; 1898, c. 13, s. 9; 1900, c. 5, s. 10; 1910, c. 7, s. 162; 1911, c. 8, s. 23.

Evidence of such registration.

161. The certificate of registration, or any copy thereof certified under the hand and seal of the Registrar, or a copy of the Gazette containing such certificate of registration, shall be sufficient evidence in any proceeding in any Court in the Province of the due registration of the company aforesaid. R. S. 1897, c. 44, s. 135; 1910, c. 7, s. 163.

Substitutional service on such company.

162. If the power of attorney hereinbefore prescribed becomes invalid or ineffectual from any reason, or if other service cannot readily be effected, the Court or Judge may order substitutional service of any process or proceeding upon the company to be made by such publication as is deemed requisite to be made in the premises, for at least three weeks in at least one newspaper; and such publication shall be held to be due service upon the company of such process or proceeding. R. S. 1897, c. 44, s. 136; 1910, c. 7, s. 164.

Provision requiring all transactions of an unregistered company to conform to the laws of the Province.

163. No act, matter, disposition, or thing affecting the corporate rights and property of the company within the Province, made, done, or executed by any extra-provincial company entitled to registration only under this Part of this Act, although valid by the laws of the country or State under which such company is incorporated, or permissible under its original corporate powers, shall be of any force or effect, or enforceable

by the company or any one on its behalf by action in any Court in the Province, unless such act, matter, disposition, or thing be valid and permissible by the laws of the Province. R. S. 1897, c. 44, s. 143; 1910, c. 7, s. 165.

Special Provisions relating to Insurance Companies

Extra-provincial insurance companies must obtain licence

164. (1.) The business of every extra-provincial insurance company to which this Act applies, whether joint stock, mutual, or assessment, shall, for the purposes of this Part of this Act, be deemed to be within the scope of this Act; and no such extra-provincial insurance company shall undertake or effect, or offer to undertake or effect, any contract of insurance without having taken out a licence, or been registered under this or some former Act, and in all other respects complying with the provision of this Part of this Act.

Licence fee.

(2.) The fee to be paid by such extra-provincial company for such licence or registration shall be two hundred and fifty dollars. 1905, c. 11, s. 2; 1910, c. 7, s. 150; 1911, c. 8, s. 20.

Annual statements to be filed by extra-provincial insurance companies.

165. Every such extra-provincial insurance company shall, on or before the first day of March in each and every year, file with the Registrar a sworn statement of the financial condition and affairs of the company and also showing their gross income in the Province; and any such extra-provincial insurance company refusing or neglecting to file the statement by this section required, or to make prompt and explicit answer to any inquiries put by the Registrar touching the company's contracts or finances, or failing to take out a licence or become registered as required by this Act, shall be liable to a penalty of two hundred and fifty dollars for each and every day during which it carries on business after failing to comply with the provisions of this section; and proof of compliance with this section shall at all times be upon the company. 1905, c. 11, s. 4; 1910, c. 7 s. 151.

Disabilities and Penalties.

Penalty for carrying on business without licence.

166. If any promoter, organizer, office-bearer, manager, director, officer, collector, agent, broker, employee, or any other person whatsoever, undertakes or effects, or offers or agrees to undertake or effect, any contract of insurance for any extra-provincial insurance company to which this Act applies, whether joint stock, mutual, or assessment, unless such company has taken out a licence or become registered under this Act, he shall be liable to a penalty of fifty dollars, and in default of payment shall be imprisoned, with or without hard labour, for a term not exceeding three months and not less than one month, and on a second or any subsequent conviction he shall be imprisoned with hard labour for a term not exceeding twelve months and not less than three months. 1905, c. 11, s. 5; 1910, c. 7, s. 152.

Penalty for doing business without licence

167. If any extra-provincial company, other than an insurance company, shall, without being licensed or registered pursuant to this or some former Act, carry on in the Province any part of its business, such extra-provincial company shall be liable to a penalty of fifty dollars for every day upon which it so carries on business.

Unlicensed company not capable of maintaining action.

168. So long as any extra-provincial company remains unlicensed or unregistered under this or some former Act, it shall not be capable of maintaining any action, suit, or other proceeding in any Court in the Province in respect of any contract made in whole or in part within the Province in the course of or in connection with its business, contrary to the requrements of this Part of this act:

Proviso.

Provided, however, that upon the granting or restoration of the licence or the issuance or restoration of the certificate of registration or the removal of any suspension of either the licence or the certificate, any action, suit, or other proceeding may be maintained as if such licence or certificate had been granted or restored or such suspension removed before the institution of any such action, suit, or other proceedings. 1910, c. 7, s. 166

Cannot hold land.

169. No extra-provincial company required by this Act to be licensed or registered shall be capable of acquiring or holding lands or any interest therein in the Province, or registering any title thereto under the "Land Registry Act," unless duly licensed or registered under this or some former Act:

Proviso.

Provided, however, that the granting of a licence or certificate of registration shall operate as a removal of any disability under this section. 1910, c. 7, s. 167.

Penalty for agent of unlicensed or unregistered company carrying on business.

170. If any company, firm, broker, or other person acting as the agent or representative of or in any other capacity for an extra-provincial company not licensed or registered under this or some former Act shall carry on any of its business contrary to the requirements of this Part of this Act, such company, firm, broker, agent, or other person shall be liable to a penalty of twenty dollars for every day it, he, or they shall so carry on such business. 1910, c. 7, s. 168.

Power to remit penalties.

171. The Lieutenant-Governor in Council may, when or after a licence has been granted or a certificate issued, remit in whole or part any penalty incurred under this Act by the company receiving the licence or the certificate, or by any representative or agent thereof, and may also remit in whole or part the costs of any action or proceeding commenced for the recovery of any such penalty, and thereupon the whole or such part of the costs, as the case may be, shall not be recoverable. 1910, c. 7, s. 169.

Penalties only recoverable by or with consent of Attorney-General.

172. The penalties imposed by this Part of this Act shall be recoverable only by action at the suit of or brought with the written consent of the Attorney-General, and any action or proceeding to recover any such penalty.

shall be commenced within six months after the liability for such penalty has been incurred, and not afterwards: Provided that in any action to recover any such penalty the onus of proving that a company is duly licensed or registered under this or some former Act shall be upon the defendant. 1910, c. 7, s. 170; 1911, c. 8, s. 24.

173. No act, matter, contract, agreement, undertaking, or proceeding of an extra-provincial company carrying on business in the Province prior to the passage of the "Companies Act, 1897," shall be attacked, nor shall the same be invalidated, nullified, or held so to be by reason only of the fact that the company, or the directors, officers, or members thereof, or any of them, have since the passage thereof or may hereafter become liable to a penalty for neglect to observe any provision of the said Act or of this Act. 1898, c. 13, s. 18; 1910, c. 7, s. 306.

Acts of former companies not invalidated by default of directors.

PART VII.

PROCESS AGAINST UNREGISTERED EXTRA-PROVINCIAL COMPANIES.

174. In this Part of this Act the word "company" shall be construed to mean any unlicensed and unregistered extra-provincial company which has done, entered into, or made any act, matter, contract, or disposition giving to any person or company a right of action in any Court in the Province. R. S. 1897, c. 44, s. 146; 1910, c. 7, s. 171.

Definition of "company" in this Part.

175. Any writ or summons, plaint, injunction, or other legal proceeding duly issued at the instance or suit of any person by any competent Court of the Province, or officer of such Court, may be served as against the company by delivering the same at Victoria to the District Registrar of the Supreme Court. R. S. 1897, c. 44, s. 147; 1910, c. 7, s. 172.

Service of process on unregistered company.

176. It shall be the duty of such Registrar to cause to be inserted in the four regular issues of the Gazette, consecutively, following the delivery of such process to him, a notice of such process with a memorandum of the date of delivery, stating generally the nature of the relief sought and the time limited and the place mentioned for entering an appearance. R. S. 1897, c. 44, s. 148; 1910, c. 7, s. 173.

Publication of such process.

177. After such advertisement shall have appeared in such four issues, the delivery of such process to such Registrar as aforesaid shall be deemed, as against the defendant company, to be good and valid service of such process. R. S. 1897, c. 44, s. 149; 1910, c. 7, s. 174.

When such service valid.

Procedure on entering up judgment against company.

178. In entering up, applying for, or obtaining a judgment by default, or for the purpose of taking any proceeding consequent or following on such service, it shall not be necessary, so far as such service is concerned, to file any affidavit, but the plaintiff shall, instead thereof, file a copy of each of the four issues of the Gazette in which the advertisements shall have appeared: Provided always that when service of process shall have been effected as hereinbefore mentioned, the plaintiff shall and he is hereby required to prove the amount of the debt or damages claimed by him in manner following, that is to say: If the action shall have been brought in the Supreme Court, then before a jury, or before a Judge, or before the Registrar, as a Judge of the said Court may direct, or if the action shall have been brought in the County Court, before the County Court Judge; and the making of such proof shall be a condition precedent to the plaintiff obtaining judgment. R. S. 1897, c. 44, s. 150; 1910, c. 7, s. 175.

Averment in action against company.

179. In any action, suit, or proceeding against the company, it shall not be necessary to aver in any pleading, or to adduce any evidence, that the company was organized or incorporated under the laws of any foreign State or jurisdiction, or that the company had power under its organization or incorporation to make the contract or incur the liability in respect of which the action, suit, or proceeding against the company shall be brought. R. S. 1897, c. 44, s. 151; 1910, c. 7, s. 176.

Act not to affect remedies against companies.

180. Nothing in this Part of this Act contained shall be deemed to limit, abridge, or take away any legal right, recourse, or remedy against a company not therein enacted or recognized, nor to absolve or lessen any obligation, rule, or duty imposed by law on a company. R. S. 1897, c. 44, s. 152; 1910, c. 7, s. 177.

PART VIII.

WINDING-UP.

Preliminary.

Modes of winding-up.

181. (1.) The winding-up of a company may be either—

(*a.*) By the Court; or

(*b.*) Voluntary; or

(*c.*) Subject to the supervision of the Court.

(2.) The provisions of this Act with respect to winding-up apply, unless the contrary appears, to the winding-up of a company in any of those modes.

(3.) The following sections of this Part shall apply to the winding-up of all companies or associations incorporated by or under the authority

of the Legislature, except those companies or associations wound up on the ground of the bankruptcy or insolvency of such company or association. [8 Edw. 7, c. 69, s. 1221; 1910, c. 7, s. 178; 1912, c. 3, s. 28.

Contributories.

Liability as contributories of present and past members.

182. (1.) In the event of a company being wound up, every present and past member shall, subject to the provisions of this section, be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities and the costs, charges, and expenses of the winding-up, and for the adjustment of the rights of the contributories among themselves, with the qualifications following, that is to say:—

(*a.*) A past member shall not be liable to contribute if he has ceased to be a member for one year or upwards before the commencement of the winding-up:

(*b.*) A past member shall not be liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member:

(*c.*) A past member shall not be liable to contribute unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act:

(*d.*) In the case of a company limited by shares, no contribution shall be required from any member exceeding the amount (if any) unpaid on the shares in respect of which he is liable as a present or past member:

(*e.*) In the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up:

(*f.*) Nothing in this Act shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members on the policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of the policy or contract:

(*g.*) A sum due to any member of a company, in his character of a member, by way of dividends, profits, or otherwise, shall not be deemed to be a debt of the company, payable to that member in a case of competition between himself and any other creditor not a member of the company; but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves.

(2.) In the winding-up of a limited company, any director or manager, whether past or present whose liability is, in pursuance of this Act, un-

limited, shall, in addition to his liability (if any) to contribute as an ordinary member, be liable to make a further contribution as if he were, at the commencement of the winding-up, a member of an unlimited company. Provided that—

(*a*.) A past director or manager shall not be liable to make such further contribution if he has ceased to hold office for a year or upwards before the commencement of the winding-up:

(*b*.) A past director or manager shall not be liable to make such further contribution in respect of any debt or liability of the company contracted after he ceased to hold office:

(*c*.) Subject to the articles of the company, a director or manager shall not be liable to make such further contribution unless the Court deems it necessary to require that contribution in order to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up.

(3.) In the winding-up of a company limited by guarantee which has a share capital, every member of the company shall be liable, in addition to the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up, to contribute to the extent of any sums unpaid on any shares held by him. [8 Edw. 7, c. 69, s. 123;] 1910, c. 7, s. 179.

Definition of contributory.

183. The term "contributory" means every person liable to contribute to the assets of a company in the event of its being wound up, and, in all proceedings for determining and in all proceedings prior to the final determination of the persons who are to be deemed contributories, includes any person alleged to be a contributory. [8 Edw. 7, c. 69, s. 124]; 1910, c. 7, s. 180.

Nature of liability of contributory.

184. The liability of a contributory shall create a debt, of the nature of a specialty, accruing due from him at the time when his liability commenced, but payable at the times when calls are made for enforcing the liability. [8 Edw. 7, c. 69, s. 125]; 1910, c. 7, s. 181.

Contributories in case of death of member.

185. (1.) If a contributory dies either before or after he has been placed on the list of contributories, his personal representatives and his heirs and devisees shall be liable in a due course of administration to contribute to the assets of the company in discharge of his liability, and shall be contributories accordingly.

(2.) Where the personal representatives are placed on the list of contributories, the heirs or devisees need not be added, but they may be added as and when the Court thinks fit.

(3.) If the personal representatives make default in paying any money ordered to be paid by them, proceedings may be taken for administering

the personal and real estates of the deceased contributory, or either of them, and of compelling payment thereout of the money due. [8 Edw. 7, c. 69, s. 126]; 1910, c. 7, s. 182.

Winding-up by Court.

Application of Part.

186. (Repealed). 1910, c. 7, s. 183; 1912, c. 3, s. 29.

Circumstances in which company may be wound up by Court.

187. A company may be wound up by the Court—

(*a.*) If the company has by special resolution resolved that the company be wound up by the Court:

(*b.*) If default is made in filing the statutory report or in holding the statutory meeting

(*c.*) If the company does not commence its business within a year from its incorporation, or suspends its business for a whole year:

(*d.*) If the number of members is reduced, in the case of a private company, below two, or, in the case of any other company, below five:

(*e.*) If the Court is of opinion that it is just and equitable that the company should be wound up. [8 Edw. 7, c. 69, s. 129]; 1910, c. 7, s. 184.

Provisions as to applications for winding-up

188. (1.) An application to the Court for the winding-up of a company shall be by petition, presented subject to the provisions of this section either by the company, or by any contributory or contributories, or either of those parties, together or separately: Provided that—

(*a.*) A contributory shall not be entitled to present a petition for winding-up a company unless—

(1.) Either the number of members is reduced, in the case of a private company, below two, or, in the case of any other company, below five; or

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

(*b.*) A petition for winding up a company on the ground of default in filing the statutory report or in holding the statutory meeting shall not be presented by any person except a shareholder, nor before the expiration of fourteen days after the last day on which the meeting ought to have been held.

(2.) Where a company is being wound up voluntarily or subject to supervision, a petition may be presented by the liquidator, as well as by

any other person authorised in that behalf under the other provisions of this section, but the Court shall not make a winding-up order on the petition unless it is satisfied that the voluntary winding-up or winding-up subject to supervision cannot be continued with due regard to the interests of the creditors or contributories. [8 Edw. 7, c. 69, s. 137]; 1910, c. 7, s. 185.

Effect of winding-up order.

189. An order for winding up a company shall operate in favour of all the creditors and of all the contributories of the company. [8 Edw. 7, c. 69, s. 138]; 1910, c. 7, s. 186.

Commencement of winding-up by Court

190. A winding-up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding-up. 8 Edw. 7, c. 69, s. 139]; 1910, c. 7, s. 187.

Power to stay or restrain proceedings against company.

191. At any time after the presentation of a petition for winding-up and before a winding-up order has been made, the company, or any contributory, may—

(*a.*) Where any action or proceeding against the company is pending in the Supreme Court or Court of Appeal, apply to the Court in which the action or proceeding is pending for a stay of proceedings therein: and

(*b.*) Where any other action or proceeding is pending against the company, apply to the Court having jurisdiction to wind up the company to restrain further proceedings in the action or proceeding;

and the Court to which application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit. [8 Edw. 7, c. 69, s. 140]; 1910, c. 7, s. 188.

Powers of Court on hearing petition.

192. (1.) On hearing the petition the Court may dismiss it with or without costs, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it deems just, but the Court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.

(2.) Where the petition is presented on the ground of default in filing the statutory report or in holding the statutory meeting, the Court may order the costs to be paid by any persons who, in the opinion of the Court, are responsible for the default. [8 Edw. 7, c. 69, s. 141]; 1910, c. 7, s. 189.

Actions stayed on winding-up order.

193. When a winding-up order has been made, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court, and subject to such terms as the Court may impose [8 Edw. 7, c. 69, s. 142]; 1910, c. 7, s. 190.

194. On the making of a winding-up order, a copy of the order must forthwith be forwarded by the company to the Registrar, who shall make a minute thereof in his books relating to the company. [8 Edw. 7, c. 69, s. 143]; 1910, c. 7, s. 191.

Copy of order to be forwarded to Registrar.

195. The Court may at any time after an order for winding-up, and on 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 proceedings, either altogether or for a limited time, on such terms and conditions as the Court thinks fit. [8 Edw. 7, c. 69, s. 144]; 1910, c. 7, s. 192.

Power of Court to stay winding-up.

196. The Court may, as to all matters relating to a winding-up, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence. [8 Edw. 7, c. 69, s. 145]; 1910, c. 7, s. 193.

Court may have regard to wishes of creditors or contributories.

Liquidators.

197. (1.) For the purpose of conducting the proceedings in winding up a company and performing such duties in reference thereto as Court may impose, the Court may appoint a liquidator or liquidators.

Appointment, remuneration, and title of liquidators.

(2.) The Court may make such an appointment provisionally at any time after the presentation of a petition and before the making of an order for winding-up:

(*a*.) If a provisional liquidator is appointed before the making of a winding-up order, any fit person may be appointed:

(*b*.) Such provisional liquidator shall promptly give notice of his appointment to the Registrar and give security in such amount as the Court may direct, to the satisfaction of the District Registrar of the Court:

(*c*.) When any person other than the provisional liquidator is afterwards appointed liquidator, he shall not be capable of acting as liquidator until he has notified his appointment to the Registrar and given security in the prescribed manner to the satisfaction of the District Registrar of the Court.

(3.) If more than one liquidator is appointed by the Court, the Court shall declare whether any act by this Act required or authorised to be done by the liquidator is to be done by all or any one or more of the persons appointed.

(4.) A liquidator appointed by the Court may resign, or, on cause shown, be removed by the Court.

(5.) A vacancy in the office of a liquidator appointed by the Court shall be filled by the Court.

(6.) The liquidator shall receive such salary or remuneration by way of percentage or otherwise as the Court may direct; and, if more such

persons than one are appointed liquidators, their remuneration shall be distributed among them in such proportions as the Court directs.

(7.) A liquidator shall be described by the style of the liquidator of the particular company in respect of which he is appointed and not by his individual name.

(8.) The acts of a liquidator shall be valid notwithstanding any defects that may afterwards be discovered in his appointment or qualification. [8 Edw. 7, c. 69, s. 149]; 1910, c. 7, s. 194.

Custody of company's property.

198. (1.) In a winding-up by the Court the liquidator shall take into his custody, or under his control, all the property and things in action to which the company is or appears to be entitled.

(2.) In a winding-up by the Court, if and so long as there is no liquidator, all the property of the company shall be deemed to be in the custody of the Court. [8 Edw. 7, c. 69, s. 150]; 1910, c. 7, s. 195.

Powers of liquidator.

199. (1.) The liquidator in a winding-up by the Court shall have power with the sanction either of the Court or of the committee of inspection (if any),—

(*a.*) To bring or defend any action or other legal proceeding in the name and on behalf of the company:

(*b.*) To carry on the business of the company, so far as may be necessary for the beneficial winding-up thereof:

(*c.*) To employ a solicitor or other agent to take any proceedings or do any business which the liquidator is unable to take or do himself; but the sanction in this case must be obtained before the employment, except in cases of urgency, and in those cases it must be shown that no undue delay took place in obtaining the sanction.

(2.) The liquidator in a winding-up by the Court shall have power—

(*a.*) To sell the real and personal property and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels:

(*b.*) To do all acts and to execute, in the name and on behalf of the company, all deeds, receipts, and other documents, and for that purpose to use, when necessary, the company's seal:

(*c.*) To prove, rank, and claim in the distribution of the estate of any contributory, for any balance against his estate, and to receive dividends in such distribution in respect of that balance, as a separate debt due from the estate of the contributory, and rateably with the other separate creditors:

(*d.*) To draw, accept, make, and indorse any bill of exchange or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if the bill or note had been drawn, accepted, made, or indorsed by or on behalf of the company in the course of its business:

(*e.*) To raise on the security of the assets of the company any money requisite:

(*f.*) To take out in his official name letters of administration to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company; and in all such cases the money due shall, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, be deemed to be due to the liquidator himself:

(*g.*) To do all such other things as may be necessary for winding up the affairs of the company and distributing its assets.

(3.) The exercise by the liquidator of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

(4.) Where a liquidator is provisionally appointed by the Court, the Court may limit and restrict his powers by the order appointing him. [8 Edw. 7, c. 69, s. 151]; 1910, c. 7, s. 196.

Meetings of creditors and contributories in winding-up.

200. (1.) When a winding-up order has been made by the Court, the liquidator shall summon separate meetings of the creditors and contributories of the company for the purpose of—

(*a.*) Determining whether or not an application is to be made to the Court for the appointment of a committee of inspection to act with the liquidator, and who are to be the members of the committee if appointed.

(2.) The Court may make an appointment and order required to give effect to any such determination, and, if there is a difference between the determinations of the meetings of the creditors and contributories in respect of any of the matters mentioned in the foregoing provisions of this section the Court shall decide the difference and make such order thereon as the Court may think fit. [8 Edw. 7, c. 69, s. 152]; 1910, c. 7, s. 197.

Payments of liquidator in winding-up into bank.

201. (1.) Every liquidator of a company which is being wound up by the Court shall, in such manner and at such times as the Court may direct pay the money received by him into some chartered bank..

(2.) If any such liquidator at any time retains for more than ten days a sum exceeding two hundred and fifty dollars, or such other amount as

the Court in any particular case authorises him to retain, then, unless he explains the retention to the satisfaction of the Court, he shall pay interest on the amount so retained in excess at the lawful rate per annum, and shall be liable to disallowance of all or such part of his remuneration as the Court may think just, and to be removed from his office by the Court, and shall pay any expenses occasioned by reason of his default.

(3.) A liquidator of a company which is being wound up by the Court shall not pay any sums received by him as liquidator into his private banking account. [8 Edw. 7, c. 69, s. 154]; 1910, c. 7, s. 198.

Audit of liquidator's accounts in winding-up.

202. (1.) Every liquidator of a company which is being wound up by the Court shall, at such times as may be prescribed, but not less than twice in each year during his tenure of office, send to the District Registrar of the Court an account of his receipts and payments as liquidator.

(2.) The account shall be in a prescribed form, shall be made in duplicate, and shall be verified by a statutory declaration in the prescribed form.

(3.) The Court shall cause the account to be audited, and for the purpose of the audit the lquidator shall furnish the auditor with such vouchers and information as he may require, and the auditor may at any time require the production of and inspect any books or accounts kept by the liquidator.

(4.) When the account has been audited, one copy thereof shall be filed with the Court, and such copy shall be open to the inspection of any creditor, or of any person interested.

(5.) The auditor shall cause the account when audited or a summary thereof to be printed, and shall send a printed copy of the account or summary by post to every creditor and contributory. [8 Edw. 7, c. 69, s. 155]; 1910, c. 7, s. 199.

Books to be kept by liquidator in winding-up.

203. Every liquidator of a company which is being wound up by the Court shall keep, in manner prescribed, proper books in which he shall cause to be made entries or minutes of proceedings at meetings, and of such other matters as may be prescribed, and any creditor or contributory may, subject to the control of the Court, personally or by his agent inspect any such books. [8 Edw. 7, c. 69, s. 156]; 1910, c. 7, s. 200.

Release of liquidators.

204. (1.) When the liquidator of a company which is being wound up by the Court has realized all the property of the company, or so much thereof as can, in his opinion, be realized without needlessly protracting the liquidation, and has distributed a final dividend (if any) to the creditors and adjusted the rights of the contributories among themselves, and made a final return (if any) to the contributories, or has resigned, or has been removed from his office, the Court shall, on his application, cause a report

on his accounts to be prepared, and, on his complying with all the requirements of this Act, shall take into consideration the report, and any objection which may be urged by any creditor, or contributory, or person interested against the release of the liquidator, and shall either grant or withhold the release accordingly.

(2.) Where the release of a liquidator is withheld, the Court may, on the application of any creditor or contributory, or person interested, make such order as it thinks just, charging the liquidator with the consequences of any act or default which he may have done or made contrary to his duty.

(3.) An order of the Court releasing the liquidator shall discharge him from all liability in respect of any act done or default made by him in the administration of the affairs of the company, or otherwise in relation to his conduct as liquidator, but any such order may be revoked on proof that it was obtained by fraud or by suppression or concealment of any material fact, or may be reversed on appeal to the Court of Appeal.

(4.) Where the liquidator has not previously resigned or been removed, his release shall operate as a removal of him from his office. [8 Edw. 7, c. 69, s. 157]; 1910, c. 7, s. 201.

Exercise and control of liquidator's powers.

205. (1.) Subject to the provisions of this Act, the liquidator of a company which is being wound up by the Court shall, in the administration of the assets of the company and in the distribution thereof among its creditors, have regard to any directions that may be given by resolution of the creditors or contributories at any general meeting, or by the committee of inspection; and any directions given by the creditors or contributories at any general meeting shall, in case of conflict, be deemed to override any directions given by the committee of inspection.

(2.) The liquidator may summon general meetings of the creditors or contributories for the purpose of ascertaining their wishes, and it shall be his duty to summon meetings at such times as the creditors or contributories, by resolution, either at the meeting appointing the liquidator or otherwise, may direct, or whenever requested in writing to do so by one-tenth in value of the creditors or contributories, as the case may be.

(3.) The liquidator may apply to the Court in manner prescribed for directions in relation to any particular matter arising under the winding-up.

(4.) Subject to the provisions of this Act, the liquidator shall use his own discretion in the management of the estate and its distribution among the creditors.

(5.) If any person is aggrieved by any act or decision of the liquidator, that person may apply to the Court, and the Court may confirm, reverse, or modify the act or decision complained of, and make such order in the premises as it thinks just. [8 Edw. 7, c. 69, s. 158]; 1910, c. 7, s. 202.

Control of Court over liquidators.

206. (1.) The Court shall take cognizance of the conduct of liquidators of companies which are being wound up by the Court, and, if a liquidator does not faithfully perform his duties and duly observe all the requirements imposed on him by Statute, rules, or otherwise with respect to the performance of his duties, or if any complaint is made to the Court by any creditor or contributory in regard thereto, the Court shall inquire into the matter, and take such action thereon as it may be deemed expedient.

(2.) The Court may at any time require any liquidator of a company which is being wound up by the Court to answer any inquiry in relation to any winding-up in which he is engaged, and may, if thought fit, order his examination on oath before the District Registrar of the Court or any special examiner appointed by the Court concerning the winding-up.

(3.) The Court may also direct a local investigation to be made of the books and vouchers of the liquidator. [8 Edw. 7, c. 69, s. 159]; 1910, c. 7, s. 203.

Committee of Inspection, Special Manager, Receiver.

Committee of inspection in winding-up.

207. (1.) A committee of inspection appointed in pursuance of this Act shall consist of creditors and contributories of the company or persons holding general powers of attorney from creditors or contributories in such proportions as may be agreed on by the meetings of creditors and contributories, or as, in case of difference, may be determined by the Court.

(2.) The committee shall meet at such times as they from time to time appoint, and, failing such appointment, at least once a month; and the liquidator or any member of the committee may also call a meeting of the committee as and when he thinks necessary.

(3.) The committee may act by a majority of their members present at a meeting, but shall not act unless a majority of the committee are present.

(4.) Any member of the committee may resign by notice in writing signed by him and delivered to the liquidator.

(5.) If a member of the committee becomes insolvent, compounds or arranges with his creditors, or is absent from five consecutive meetings of the committee without the leave of those members who together with himself represent the creditors or contributories, as the case may be, his office shall thereupon become vacant.

(6.) Any member of the committee may be removed by an ordinary resolution at a meeting of creditors (if he represents creditors) or of contributories (if he represents contributories), of which seven days' notice has been given, stating the object of the meeting.

(7.) On a vacancy occurring in the committee the liquidator shall forthwith summon a meeting of creditors or of contributories, as the case may require, to fill the vacancy, and the meeting may, by resolution, reappoint the same or appoint another creditor or contributory to fill the vacancy.

(8.) The continuing members of the committee, if not less than two, may act notwithstanding any vacancy in the committee.

(9.) If there is no committee of inspection, any act or thing or any direction or permission by this Act authorised or required to be done or given by the committee may be done or given by the Court on the application of the liquidator. [8 Edw. 7, c. 69, s. 160]; 1910, c. 7, s. 204.

Power to appoint special manager.

208. (1.) The liquidator of a company, whether provisionally or otherwise, may, if satisfied that the nature of the estate or business of the company, or the interests of the creditors or contributories generally, require the appointment of a special manager of the estate or business of the company other than himself, apply to the Court to, and the Court may on such application, appoint a special manager thereof to act during such time as the Court may direct, with such powers, including any of the powers of a receiver or manager, as may be intrusted to him by the Court.

(2.) The special manager shall give such security and account in such manner as the Court may direct:

(3.) And shall receive such remuneration as may be fixed by the Court. [8 Edw. 7, c. 69, s. 161]; 1910, c. 7, s. 205.

Ordinary Powers of Court.

Settlement of list of contributories and application of assets.

209. (1.) As soon as may be after making a winding-up order, the Court shall settle a list of contributories, with power to rectify the register of members in all cases where rectification is required in pursuance of this Act, and shall cause the assets of the company to be collected and applied in discharge of its liabilities.

(2.) In settling the list of contributories, the Court shall distinguish between persons who are contributories in their own right and persons who are contributories as being representatives of or liable to the debts of others. [8 Edw. 7, c. 69, s. 163]; 1910, c. 7, s. 206.

Power to require delivery of property.

210. The Court may, at any time after making a winding-up order, require any contributory for the time being settled on the list of contributories, and any trustee, receiver, banker, agent, or officer of the company, to pay, deliver, convey, surrender, or transfer forthwith, or within such times as the Court directs, to the liquidator any money, property, or books and papers in his hands to which the company is prima facie entitled. [8 Edw. 7, c. 69, s. 164]; 1910, c. 7, s. 207.

Power to order payment of debts by contributory

211. (1.) 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 to pay, in manner directed by the order, any money due from him or from the estate of the person whom he represents to the company, exclusive o any money payable by him or the estate by virtue of any call in pursuance of this A t.

(2.) The Court in making such an order may, in the case of an unlimited company, allow to the contributory by way of set-off any money due to him, or to the estate which he represents, from the company on any independent dealing or contract with the company, but not any money due to him as a member of the company in respect of any dividend or profit; and may, in the case of a limited company, make to any director or manager whose liability is unlimited or to his estate the like allowance.

(3.) But in the case of any company, whether limited or unlimited, when all the creditors are paid in full, any money due on any account whatever to a contributory from the company may be allowed to him by way of set-off against any subsequent call. [8 Edw. 7, c. 69, s. 165]; 1910, c. 7, s. 208.

Power of Court to make calls.

212. (1.) 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 the contributories to the extent of their liability, for payment of any money which the Court considers necessary to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding-up, and for the adjustment of the rights of the contributories among themselves.

(2.) In making a call the Court may take into consideration the probability that some of the contributories may partly or wholly fail to pay the call. [8 Edw. 7, c. 69, s. 166]; 1910, c. 7, s. 209.

Power to order payment into bank.

213. (1.) 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 to the account of the liquidator instead of to the liquidator, and any such order may be enforced in the same manner as if it had directed payment to the liquidator.

(2.) All moneys and securities paid or delivered into any bank or any branch thereof in the event of a winding-up by the Court shall be subject in all respects to the orders of the Court. [8 Edw. 7, c. 69, s. 167]; 1910, c. 7, s. 210.

Order on contributory conclusive evidence

214. (1.) An order made by the Court on a contributory shall (subject to any right of appeal) be conclusive evidence that the money (if any) thereby appearing to be due or ordered to be paid is due.

(2.) All other pertinent matters stated in the order shall be taken to be truly stated as against all persons, and in all proceedings, except proceedings against the real estate of a deceased contributory, in which case the order shall be only prima facie evidence for the purpose of charging his real estate, unless his heirs or devisees were on the list of contributories at the time of the order being made. [8 Edw. 7, c. 69, s. 168]; 1910, c. 7, s. 211.

215. The Court may fix a time or times within which creditors are to prove their debts or claims, or to be excluded from the benefit of any distribution made before those debts are proved. [8 Edw. 7, c. 69, s. 169]; 1910, c. 7, s. 212.

Power to exclude creditors not proving in time.

216. The Court shall adjust the rights of the contributories among themselves, and distribute any surplus among the persons entitled thereto. [8 Edw. 7, c. 69, s. 170]; 1910, c. 7, s. 213.

Adjustment of rights of contributories.

217. The Court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the costs, charges, and expenses incurred in the winding-up in such order of priority as the Court thinks just. [8 Edw. 7, c. 69, s. 171]; 1910, c. 7, s. 214.

Power to order costs.

218. (1.) When the affairs of a company have been completely wound up, the Court shall make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly.

Dissolution of company.

(2.) The order shall be reported by the liquidator to the Registrar, who shall make in his books a minute of the dissolution of the company.

(3.) If the liquidator makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding twenty-five dollars for every day during which he is in default. [8 Edw. 7, c. 69, s. 172]; 1910 c. 7. s. 215.

219. General rules may be made for enabling or requiring all or any of the powers and duties conferred and imposed on the Court by this Act, in respect of the matters following, to be exercised or performed by the liquidator as an officer of the Court and subject to the control of the Court; that is to say, the powers and duties of the Court in respect of—

Delegation to liquidator of certain powers of Court.

(a.) Holding and conducting meetings to ascertain the wishes of creditors and contributories:

(b.) Settling lists of contributories and rectifying the register of members where required, and collecting and applying the assets:

(c.) Requiring delivery of property or documents to the liquidator:

(d.) Making calls:

(e.) Fixing a time within which debts and claims must be proved:

Provided that the liquidator shall not, without the special leave of the Court, rectify the register of members, and shall not make any call without either the special leave of the Court or the sanction of the committee of inspection. [8 Edw. 7, c. 69, s. 173]; 1910, c. 7, s. 216.

Extraordinary Powers of Court.

220. (1.) The Court may, after it has made a winding-up order, summon before it any officer of the company or person known or suspected to have

Power to summon persons suspected of

having property of company. in his possession any property 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, affairs, or property of the company.

(2.) The Court may examine him on oath concerning the same, either by word of mouth or on written interrogatories, and may reduce his answers to writing and require him to sign them.

(3.) The Court may require him to produce any books and papers in his custody or power relating to the company; but, where he claims any lien on books or papers produced by him, the production shall be without prejudice to that lien, and the Court shall have jurisdiction in the winding-up to determine all questions relating to that lien.

(4.) If any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed, not having a lawful impediment (made known to the Court at the time of its sitting, and allowed by it), the Court may cause him to be apprehended and brought before the Court for examination. [8 Edw. 7, c. 69, s. 174]; 1910, c. 7, s. 217.

Power to order public examination of promoters, directors, etc.

221. (1.) When an order has been made for winding up a company by the Court, and the liquidator has made report under this Act stating that in his opinion a fraud has been committed by any person in the promotion or formation of the company, or by any director or other officer of the company in relation to the company since its formation, the Court may, after consideration of the report, direct that any person who has taken any part in the promotion or formation of the company, or has been a director or officer of the company, shall attend before the Court on a day appointed by the Court for that purpose and be publicly examined as to the promotion or formation or the conduct of the business of the company, or as to his conduct and dealings as director or officer thereof.

(2.) The liquidator and any creditor or contributory may take part in the examination, either personally or by solicitor or counsel.

(3.) The Court may put such questions to the person examined as the Court thinks fit.

(4.) The person examined shall be examined on oath, and shall answer all such questions as the Court may put or allow to be put to him.

(5.) A person ordered to be examined under this section shall at his own cost, before his examination, be furnished with a copy of the liquidator's report, and may at his own cost employ a solicitor with or without counsel, who shall be at liberty to examine him for the purpose of enabling him to explain or qualify any answers given by him: Provided that if he is, in the opinion of the Court, exculpated from any charges made or suggested against him, the Court may allow him such costs as in its discretion it may think fit.

(6.) Notes of the examination shall be taken down either in shorthand or in writing, and if in writing shall be read over to or by, and signed by, the person examined, and may thereafter be used in evidence against him, and shall be open to the inspection of any creditor or contributory at all reasonable times.

(7.) The Court may, if it thinks fit, adjourn the examination from time to time.

(8.) An examination under this section may, if the Court so directs, and subject to general rules, be held before any officer of the Court being a District Registrar of the Court named for the purpose, and the powers of the Court under this section as to the conduct of the examination, but not as to costs, may be exercised by the person before whom the examination is held. [8 Edw. 7, c. 69, s. 175]; 1910, c. 7, s. 218.

Power to arrest absconding contributory.

222. The Court, at any time either before or after making a winding-up order, on proof of probable cause for believing that a contributory is about to quit the Province, or otherwise to abscond or to remove or conceal any of his property for the purpose of evading payment of calls or of avoiding examination respecting the affairs of the company, may cause the contributory to be arrested, and his books and papers and movable personal property to be seized, and him and them to be safely kept until such time as the Court may order. [8 Edw. 7, c. 69, s. 176]; 1910, c. 7, s. 219.

Powers of Court cumulative.

223. Any powers by this Act conferred on the Court shall be in addition to and not in restriction of any existing powers of instituting proceedings against any contributory or debtor of the company, or the estate of any contributory or debtor, for the recovery of any call or other sums. [8 Edw. 7, c. 69, s. 177]; 1910, c. 7, s. 220.

Enforcement of and Appeal from Orders.

Power to enforce orders.

224. Orders made by the Court under this Act may be enforced in the same manner as orders made in any action pending therein. [8 Edw. 7, c. 69, s. 178 (part)]; 1910, c. 7, s. 221.

Appeals from order.

225. Subject to Rules of Court, an appeal from any order or decision made or given in the winding-up of a company by the Court under this Act shall lie in the same manner and subject to the same conditions as an appeal from any order or decision of the Court in cases within its ordinary jurisdiction. [8 Edw. 7, c. 9, s. 181 (*part*)]; 1910, c. 7, s. 222.

Voluntary Winding-up.

Circumstances in which company may be wound up voluntarily.

226. A company may be wound up voluntarily—

(1.) When the period (if any) fixed for the duration of the company by the Act, charter, or instrument of incorporation has expired; or when the event (if any) has occured, upon the occurrence of

which it is provided by the Act or charter or instrument of incorporation that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up:

(2.) If the company resolves by special resolution that the company be wound up voluntarily:

(3.) If the company, although it may be solvent as respects creditors, resolves by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up. [8 Edw. 7, c. 69, s. 182]; 1910, c. 7, s. 223.

Commencement of voluntary winding-up.

227. A voluntary winding-up shall be deemed to commence at the time of the passing of the resolution authorising the winding-up. [8 Edw. 7, c. 69, s. 183]; 1910, c. 7, s. 224.

Effect of voluntary winding-up on status of company.

228. When a company is wound up voluntarily, the company shall, from the commencement of the winding-up, cease to carry on its business, except so far as may be required for the beneficial winding-up thereof:

Provided that the corporate state and corporate powers of the company shall, notwithstanding anything to the contrary in its articles, continue until it is dissolved. [8 Edw. 7, c. 69, s. 184]; 1910, c. 7, s. 225.

Notice of resolution to wind up voluntarily.

229. When a company has resolved by special or extraordinary resolution to wind up voluntarily, it shall give notice of the resolution by advertisement in the Gazette. [8 Edw. 7, c. 69, s. 185]; 1910, c. 7, s. 226.

Consequences of voluntary winding-up.

230. The follow ng consequences shall ensue on the voluntary winding-up of the company:—

(*a.*) The property of the company shall be applied in satisfaction of its liabilities pari passu, and, subject thereto, shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company:

(*b.*) The company in general meeting shall appoint one or more liquidators for the purpose of winding up the affairs and distributing the assets of the company, and may fix the remuneration to be paid to him or them.

(*c.*) On the appointment of a liquidator all the powers of the directors shall cease, except so far as the company in general meeting, or the liquidator, sanctions the continuance thereof:

(*d.*) The liquidator may, without the sanction of the Court, exercise all powers by this Act given to the liquidator in a winding-up by the Court:

(*e.*) The liquidator may exercise the powers of the Court under this Act of settling a list of contributories, and of making calls and shall pay the debts of the company, and adjust the rights of the contributories among themselves:

(*f.*) The list of contrib tories shall be prima facie evidence of the liability of the persons named therein to be contributories:

(*g.*) When several liquidators are appointed, every power hereby given may be exercised by such one or more of them as may be determined at the time of their appointment, or in default of such determination by any number not less than two:

(*h.*) If from any cause whatever there is no liquidator acting, the Court may, on the application of a contributory, appoint a liquidator:

(*i.*) The Court may, on cause shown, remove a liquidator, and appoint another liquidator. [8 Edw. 7, c. 69, s. 186]; 1910, c. 7, s. 227.

Notice by liquidator of his appointment.

231. (1.) The liquidator in a voluntary winding-up shall, within twenty-one days after his appointment, file with the Registrar a notice of his appointment in the form prescribed.

(2.) If the liquidator fails to comply with the requirements of this section, he shall be liable to a fine not exceeding twenty-five dollars for every day during which the default continues. [8 Edw. 7, c. 69, s. 187]; 1910, c. 7, s. 228.

Rights of creditors in a voluntary winding-up.

232. (1.) Every liquidator appointed by a company in a voluntary winding-up shall, within seven days from his appointment, send notice by post to all persons who appear to him to be creditors of the company that a meeting of the creditors of the company will be held on a date, not less than fourteen nor more than twenty-one days after his appointment, and at a place and hour, to be specified in the notice, and shall also advertise notice of the meeting once in the Gazette and once at least in two local newspapers circulating in the district where the registered office or principal place of business of the company was situate.

(2.) At the meeting to be held in pursuance of the foregoing provisions of this section the creditors shall determine whether an application shall be made to the Court for the appointment of any person as liquidator in the place of or jointly with the liquidator appointed by the company, or for the appointment of a committee of inspection, and, if the creditors so resolve, an application may be made accordingly to the Court at any time, not later than fourteen days after the date of the meeting, by any creditor appointed for the purpose of the meeting.

(3.) On any such application the Court may make an order either for the removal of the liquidator appointed by the company and for the appointment of some other person as liquidator or for the appointment of some other person to act as liquidator jointly with the liquidator appointed by the company, or for the appointment of a committee of inspection either together with or without any such appointment of a liquid-

ator or such other order as, having regard to the interests of the creditors and contributories of the company, may seem just.

(4.) No appeal shall lie from any order of the Court upon an application under this section.

(5.) The Court shall make such order as to the costs of the application as it may think fit, and if it is of opinion that, having regard to the interests of the creditors in the liquidation, there were reasonable grounds for the application, may order the costs of the application to be paid out of the assets of the company, notwithstanding that the application is dismissed or otherwise disposed of adversely to the applicant. [8 Edw. 7, c. 69, s. 188]; 1910, c. 7, s. 229.

Power to fill vacancy in office of liquidator.

233. (1.) If a vacancy occurs by death, resignation, or otherwise in the office of liquidator appointed by the company in a voluntary winding-up, the company in general meeting may, subject to any arrangement with its creditors, fill the vacancy.

(2.) For that purpose a general meeting may be convened by any contributory or, if there were more liquidators than one, by the continuing liquidators.

(3.) The meeting shall be held in manner prescribed by the articles, or in such manner as may, on application by any contributory or by the continuing liquidators, be determined by the Court. [8 Edw. 7, c. 69, s. 189]; 1910, c. 7, s. 230.

Delegation of authority to appoint liquidators.

234. (1.) A company about to be, or in course of being, wound up voluntarily may, by extraordinary resolution, delegate to its creditors, or to any committee of them, the power of appointing liquidators or any of them, and of supplying vacancies among the liquidators, or enter into any arrangement with respect to the powers to be exercised by the liquidators, and the manner in which they are to be exercised.

(2.) Any act done by creditors in pursuance of any such delegated power shall have the same effect as if it had been done by the company. [8 Edw. 7, c. 69, s. 190]; 1910, c. 7, s. 231.

Arrangement when binding on creditors.

235. (1.) Any arrangement entered into between a company about to be, or in the course of being, wound up voluntarily and its creditors shall, subject to any right of appeal under this section, be binding on the company if sanctioned by any extraordinary resolution, and on the creditors if acceded to by three-fourths in number and value of the creditors.

(2.) Any creditor or contributory may, within three weeks from the completion of the arrangement, appeal to the Court against it, and the Court may thereupon, as it thinks just, amend, vary, or confirm the arrangement. [8 Edw. 7, c. 69, s. 191]; 1910, c. 7, s. 232.

Power of liquidator to accept shares, etc., as

236. (1.) Where a company is proposed to be, or is in course of being, wound up altogether voluntarily, and the whole or part of its business or

property is proposed to be transferred or sold to another company (in this section called "the transferee company"), the liquidator of the first-mentioned company (in this section called "the transferor company") may, with the sanction of a special resolution of that company, conferring either a general authority on the liquidator or an authority in respect of any particular arrangement, receive, in compensation or part compensation for the transfer or sale, shares, policies, or other like interests in the trans feree company, for distribution among the members of the transferor company, or may enter into any other arrangement whereby the members of the transferor company may, in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the transferee company.

consideration for sale of property of company.

(2.) Any sale or arrangement in pursuance of this section shall be binding on the members of the transferor company.

(3.) If any member of the transferor company who did not vote in favour of the special resolution at either of the meetings held for passing and confirming the same expresses his dissent therefrom in writing addressed to the liquidator, and left at the registered office of the company within seven days after the confirmation of the resolution, he may require the liquidator either to abstain from carrying the resolution into effect, or to purchase his interest at a price to be determined by agreement or by arbitration in manner provided by this section.

(4.) If the liquidator elects to purchase the member's interest, the purchase money must be paid before the company s dissolved, and be raised by the liquidator in such manner as may be determined by special resolution.

(5.) A special resolution shall not be invalid for the purposes of this section by reason that it is passed before or concurrently with a resolution for winding up the company, or for appointing liquidators; but, if an order is made within a year for winding up the company by or subject to the supervision of the Court, the special resolution shall not be valid unless sanctioned by the Court.

(6.) For the purpose of an arbitration under this section the provisions of the "Companies Clauses Act" with respect to the settlement of disputes by arbitration shall be incorporated with this Act, and in the construction of those provisions this Act shall be deemed to be the special Act and "the company" shall mean the transferor company, and any appointment by the said incorporated provisions directed to be made under the hand of the secretary, or any two of the directors, may be made under the hand of the liquidator, or, if there is more than one liquidator, then of any two or more of the liquidators. [8 Edw. 7, c. 69, s. 192]; 1910, c. 7, s. 233.

237. (1.) Where a company is being wound up voluntarily, the liquidator or any contributory or creditor may apply to the Court to determine any

Power to apply to Court.

question arising in the winding-up, or to exercise, as respects the enforcing of calls, or any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court.

(2.) The Court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as the Court thinks fit, or may make such other order on the application as the Court thinks just. [8 Edw. 7, c. 69, s. 193]; 1910, c. 7, s. 234.

Power of liquidator to call general meeting

238. (1.) Where a company is being wound up voluntarily, the liquidator may summon general meetings of the company for the purpose of obtaining the sanction of the company by special or extraordinary resolution or for any other purposes he may think fit.

(2.) In the event of the winding-up continuing for more than one year, the liquidator shall summon a general meeting of the company at the end of the first year from the commencement of the winding-up, and of each succeeding year, or as soon thereafter as may be convenient, and shall lay before the meeting an account of his acts and dealings and of the conduct of the winding-up during the preceding year. [8 Edw. 7, c. 69, s. 194]; 1910, c. 7, s. 235.

Final meeting and dissolution

239. (1.) In the case of every voluntary winding-up, as soon as the affairs of the company are fully wound up, the liquidator shall make up an account of the winding-up, showing how the winding-up has been conducted and the property of the company has been disposed of; and thereupon shall call a general meeting of the company for the purpose of laying before it the account, and giving any explanation thereof.

(2.) The meeting shall be called by advertisement in the Gazette, specifying the time, place, and object thereof, and published continuously for one month at least before the meeting.

(3.) Within one week after the meeting, the liquidator shall make a return to the Registrar of the holding of the meeting and of its date, and in default of so doing shall be liable to a fine not exceeding twenty-five dollars for every day during which the default continues.

(4.) The Registrar on receiving the return shall forthwith register it, and on the expiration of three months from the registration of the return the company shall be deemed to be dissolved:

Provided that the Court may, on the application of the liquidator or of any other person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the company is to take effect for such time as the Court thinks fit.

(5.) It shall be the duty of the person on whose application an order of the Court under this section is made, within seven days after the making of the order, to file with the Registrar an office copy of the order, and if

that person fails so to do he shall be liable to a fine not exceeding twenty-five dollars for every day during which the default continues. [8 Edw. 7, c. 69, s. 195]; 1910, c. 7, s. 236.

240. All costs, charges, and expenses properly incurred in the voluntary 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 claim . [8 Edw. 7, c. 69, s. 196]; 1910, c. 7, s. 237.

Costs of voluntary liquidation

241. The voluntary winding-up of a company shall not bar the r ght of any creditor or contributory to have it wound up by the Court, if the Court is of opini n that the rights of the creditors or that the rights of the contributories will be prejudiced by a voluntary winding-up. [8 Edw. 7, c. 69, s. 197]; 1910, c. 7, s. 238.

Saving for rights of creditors and contributors.

242. Where a company is be ng wound up voluntarily, and an order is made for winding-up by the Court, the Court may, if it thinks fit, by the same or any subsequent order, provide for the adoption of all or any of the proceedings in the voluntary w nding-up. [8 Edw. 7, c. 69, s. 198]; 1910, c. 7, s. 239.

Power of Court to adopt proceedings of voluntary winding-up.

Winding-up subject to Supervision of Court.

243. When a company has by special or extraordinary resolution resolved to wind up voluntarily, the Court may make an order that the voluntary winding-up shall continue, but subject to such supervision of the Court, and with such liberty for creditors, contributories, or others to apply to the Court, and generally on such terms and conditions as the Court think just. [8 Edw. 7, c. 69, s. 199 ; 1910, c. 7, s. 240.

Power to order winding-up subject to supervision.

244. A petition for the continuance of a voluntary winding-up subject to the supervision of the Court shall, for the purpose of giving jurisdiction to the Court over actions, be deemed to be a petition for wind ng-up by the Court. [8 Edw. 7, c. 69, s. 200]; 1910, c. 7, s. 241.

Effect of petition for winding-up subject to supervision.

245. The Court may, in deciding between a winding-up by the Court and a winding-up subject to supervision, in the appointment of liquidators and in all other matters relating to the winding-up subject to supervision, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence. [8 Edw. 7, c. 69, s. 201]; 1910, c. 7, s. 242.

Court may have regard to wishes of creditors and contributories.

246. (1.) Where an order is made for a winding-up subject to supervision, the Court may, by the same or any subsequent order, appoint any additional liquidator.

Power for Court to appoint or remove liquidators.

(2.) A liquidator appointed by the Court under this section shall have the same powers, be subject to the same obligations, and in all respects stand in the same position as if he had been appointed by the company.

(3.) The Court may remove any liquidator so appointed by the Court or any liquidator continued under the supervision order and fill any vacancy occasioned by the removal, or by death or resignation. [8 Edw. 7, c. 69, s. 202]; 1910, c. 7, s. 243.

Effect of supervision order.

247. (1.) Where an order is made for a winding-up subject to supervision, the liquidator may, subject to any restrictions imposed by the Court, exercise all his powers, without the sanction or intervention of the Court, in the same manner as if the company were being wound up altogether voluntarily.

(2.) An order for a winding-up subject to supervision shall for all purposes, including the staying of actions and other proceedings, the making and enforcement of calls, and the exercise of all other powers, be deemed to be an order for winding-up by the Court. [8 Edw. 7, c. 69, s. 203]; 1910, c. 7, s. 244.

Supplemental Provisions.

Avoidance of transfers, etc., after commencement of winding-up.

248. (1.) In the case of voluntary winding-up, every transfer of shares, except transfers made to or with the sanction of the liquidator, and every alteration in the status of the members of the company made after the commencement of the winding-up shall be void.

(2.) In the case of a winding-up by or subject to the supervision of the Court, every disposition of the property (including things in action) of the company, and every transfer of shares or alteration in the status of its members, made after the commencement of the winding-up, shall unless the Court otherwise orders, be void. [8 Edw. 7, c. 69, s. 205]; 1910, c. 7, s. 245.

Debts of all descriptions to be proved.

249. In every winding-up under this Act, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value. [8 Edw. 7, c. 69, s. 206]; 1910, c. 7, s. 246.

Preferential payments.

250. (1.) In a winding-up there shall be paid in priority to all other debts—

[1913 Act.]

(*a.*) All assessed taxes, rates, real-property tax, personal-property tax, wild-land tax, coal-land tax, timber-land tax, or income-tax, assessed on the company up to the first day of January next before that date, and not exceeding in the whole one year's assessment; and

(*b.*) All wages or salary of any clerk or servant in respect of services rendered to the company during three months before the said date, not exceeding two hundred and fifty dollars; and

(*c*.) All wages of any workman or labourer, whether payable for time or for piece work, in respect of services rendered to the company during three months before the said date; and

(*d*.) Unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, all amounts (not exceeding in any indiyidual case five hundred dollars) due in respect of compensation under the "Workmen's Compensation Act."

(2.) The foregoing debts shall—

(*a*.) Rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions; and

(*b*.) In so far as the assets of the company available for payment of general creditors are insufficient to meet them have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.

(3.) Subject to the retention of such sums as may be necessary for the costs and expenses of the winding-up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them.

(4.) In the event of the landlord or other person distraining or having distrained on any goods or effects of the company within one month next before the date of a winding-up order, the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof:

Provided that in respect of any money paid under any such charge the landlord or other person shall have the same rights of priority as the person to whom the payment is made.

(5.) The date hereinbefore in this section referred to is—

(*a*.) In the case of a company ordered to be wound up compulsorily which had not previously commenced to be wound up voluntarily the date of the winding-up order; and

(*b*.) In any other case, the date of the commencement of the winding-up. [8 Edw. 7, c. 69, s. 209]; 1910, c. 7, s. 247.

251. Any conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property which would, if made or done by or against an individual, be deemed a fraudulent preference shall, if made or done by or against a company, be deemed, in the event of its being wound up, a fraudulent preference of its creditors and be invalid accordingly. [8 Edw. 7, c. 69 s. 210 (*part*)]; 1910, c. 7, s. 248.

Fraudulent preference.

252. Where any company is being wound up by or subject to the supervision of the Court any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the com-

Avoidance of certain attachments, executions, etc.

mencement of the winding-up shall be void to all intents. [8 Edw. 7, c. 69, s. 211]; 1910, c. 7, s. 249.

General scheme of liquidation may be sanctioned.

253. (1.) The liquidator may, with the sanction following, that is to say:—

(*a.*) In the case of a winding-up by the Court with the sanction either of the Court or of the committee of inspection:

(*b.*) In the case of a voluntary winding-up with the sanction of an extraordinary resolution of the company,—

do the following things or any of them:—

(*c.*) Pay any classes of creditors in full:

(*d.*) Make any compromise or arrangement with creditors or persons claiming to be creditors, or having or alleging themselves to have any claim, present or future, certain or contingent ascertained or sounding only in damages against the company or whereby the company may be rendered liable:

(*e.*) Compromise all calls and liabilities to calls, debts, and liabilities capable of resulting in debts, and all claims, present or future certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and a contributory, or alleged contributory, or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding-up of the company, on such terms as may be agreed, and take any security for the discharge of any such call, debt, liability, or claim, and give a complete discharge in repect thereof.

(2.) In the case of a winding-up by the Court, the exercise by the liquidator of the powers of this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers. [8 Edw. 7, c. 69, s. 214]; 1910, c. 7, s. 250.

Power of Court to assess damages against delinquent directors, etc.

254. (1.) Where in the course of winding up a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager, or liquidator, or any officer of the company, has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of the liqudator, or of any creditor or contributory, examine into the conduct of the promoter, director, manager, liquidator, or officer, and compel him to repay or restore the money or property or any part thereof, respectively, with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the

misapplication, retainer, misfeasance, or breach of trust as the Court thinks just.

(2.) This section shall apply notwithstanding that the offence is one for which the offender may be criminally responsible.

(3.) Where an order for payment of money is made under this section, the order shall be deemed to be a final judgment. [8 Edw. 7, c. 69, s. 215]; 1910, c. 7, s. 251.

Prosecution of delinquent directors, etc.

255. (1.) If it appears to the Court in the course of a winding-up by or subject to the supervision of the Court that any past or present director, manager, officer, or member of the company has been guilty of an offence in relation to the company for which he is criminally responsible, the Court may, on the application of any person interested in the winding-up, or of its own motion, direct the liquidator to prosecute for the offence, and may order the costs and expenses to be paid out of the assets of the company.

(2.) If it appears to the liquidator in the course of a voluntary winding-up that any past or present director, manager, officer, or member of the company has been guilty of any offence in relation to the company for which he is criminally responsible, the liquidator, with the previous sanction of the Court, may prosecute the offender, and all expenses properly incurred by him in the prosecution shall be payable out of the assets of the company in priority to all other liabilities. [8 Edw. 7, c. 69, s. 217]; 1910, c. 7, s. 252.

Meetings to ascertain wishes of creditors or contributories.

256. (1.) Where by this Act the Court is authorised, in relation to winding-up, to have regard to the wishes of creditors or contributories, as proved to it by any sufficient evidence, the Court may, if it thinks fit, for the purpose of ascertaining those wishes, direct meetings of the creditors or contributories to be called, held, and conducted in such manner as the Court directs, and may appoint a person to act as chairman of any such meeting, and to report the result thereof to the Court.

(2.) In the case of creditors, regard shall be had to the value of each creditor's debt.

(3.) In the case of contributories, regard shall be had to the number of votes conferred on each contributory by the articles. [8 Edw. 7, c. 69, s. 219]; 1910, c. 7, s. 253.

Books of company to be evidence.

257. Where any company is being wound up, all books and papers 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. [8 Edw. 7, c. 69, s. 220]; 1910, c. 7, s. 254

Inspection of books.

258. After an order for a winding-up by or subject to the supervision of the Court, the Court may make such order for inspection by creditors and contributories of its books and papers as the Court thinks just, and any books and papers in the possession of the company may be inspected by

creditors or contributories accordingly, but not further or otherwise. [8 Edw. 7, c. 69, s. 221]; 1910, c. 7, s. 255.

Disposal of books and papers of company.

259. (1.) When a company has been wound up and is about to be dissolved, the books and papers of the company and of the liquidators may be disposed of as follows, that is to say:—

(*a.*) In the case of winding-up by or subject to the supervision of the Court, in such way as the Court directs:

(*b.*) In the case of a voluntary winding-up, in such way as the company by extraordinary resolution directs.

(2.) After two years from the dissolution of the company no responsibility shall rest on the company or the liquidators or any person to whom the custody of the books and papers has been committed, by reason of the same not being forthcoming to any persons claiming to be interested therein. [8 Edw. 7, c. 69, s. 222]; 1910, c. 7, s. 256.

Power of Court to declare dissolution of comapny void.

260. (1.) Where a company has been dissolved, the Court may at any time within one year of the date of the dissolution, on an application being made for the purpose by the liquidator of the company or by any other person who appears to the Court to be interested, make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved.

(2.) It shall be the duty of the person on whose application the order was made, within seven days after the making of the order, to file with the Registrar an office copy of the order; and if that person fails so to do he shall be liable to a fine not exceeding twenty-five dollars for every day during which the default continues. [8 Edw. 7, c. 69, s. 223]; 1910, c. 7, s. 257.

Information as to pending liquidations.

261. (1.) If the winding-up is not concluded within one year after its commencement, the liquidator shall, at such intervals as may be prescribed, until the winding-up is concluded, send to the Registrar a statement in the prescribed form and containing the prescribed particulars with respect to the proceedings in and position of the liquidation.

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

(3.) If a liquidator fails to comply with the requirements of this section, he shall be liable to a fine not exceeding one hundred dollars for each day during which the default continues.

(4.) If it appears from any such statement or otherwise that a liquidator has in his hands or under his control any money representing unclaimed or undistributed assets of the company which have remained unclaimed or undistributed for six months after the date of their receipt, the liquidator shall forthwith pay the same into the Provincial Treasury with a copy of the statement referred to in subsection (1), and shall be entitled to the prescribed certificate of receipt for the money so paid, and that certificate shall be an effectual discharge to him in respect thereof.

(5.) Any person claiming to be entitled to any money paid into the Provincial Treasury in pursuance of this section may apply to the Minister of Finance and Agriculture for payment of the same, and the said Minister may, on a certificate by the liquidator that the person claiming is entitled, make an order for the payment to that person of the sum due.

(6.) Any person dissatisfied with the decision of the said Minister in respect of any claim made in pursuance of this section may appeal to the Court. [8 Edw. 7, c. 69, s. 224]; 1910, c. 7, s. 258.

Judicial notice of signature of officers.

262. In all proceedings under this Part of this Act, all Courts, Judges, and persons judicially acting, and all officers, judicial or ministerial, of any Court, or employed in enforcing the process of any Court, shall take judicial notice of the signature of any officer of the Court appended to or impressed on any document made, issued, or signed under the provisions of this Part of this Act, or any official copy thereof. [8 Edw. 7, c. 69, s. 225]; 1910, c. 7, s. 259.

Special commission for receiving evidence.

263. (1.) The Judges of the County Courts shall be Commissioners for the purposes of taking evidence under this Act, and the Court may refer the whole or any part of the examination of any witnesses under this Act to any person hereby appointed Commissioner, who is hereby required to act as such Commissioner.

(2.) Every Commissioner shall, in addition to any other powers which he might lawfully exercise, have in the matter so referred to him all the same powers of summoning and examining witnesses, of requiring the production or delivery of documents, of punishing defaults by witnesses, and of allowing costs and expenses to witnesses as the Court which made the winding-up order.

(3.) The examination so taken shall be returned or reported to the Court which made the order in such manner as that Court directs. [8 Edw. 7, c. 69, s. 226]; 1910, c. 7, s. 260.

Affidavits etc.

264. (1.) Any affidavit required to be sworn under the provisions or for the purposes of this Part of this Act may be sworn before any person lawfully authorised to take and receive affidavits pursuant to the "Evidence Act."

(2.) 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 person attached, appended, or subscribed to any such affidavit or to any other document to be used for the purposes of this Part of this Act. [8 Edw. 7, c. 69, s. 228]; 1910, c. 7, s. 261.

Returns by officers in winding-up.

265. The officers of the Courts acting in the winding-up of companies shall make to the Registrar at Victoria, such returns of the business of their respective Courts and offices, at such times and in such manner and form as may be prescribed, and from those returns the Registrar shall cause books to be prepared which shall be open for public information and searches. [8 Edw. 7, c. 69, s. 235]; 1910, c. 7, s. 262.

Proceedings of Registrar.

266. (1.) All documents purporting to be orders or certificates made or issued by the Registrar for the purposes of this Act, and to be sealed with his seal of office, shall be received in evidence and deemed to be such orders or certificates without further proof, unless the contrary is shown.

(2.) A certificate purporting to be signed by the Provincial Secretary that any order made, certificate issued, or act done is the order, certificate, or act of the Lieutenant-Governor in Council shall be conclusive evidence of the fact so certified. [8 Edw. 7, c. 59, s. 236]; 1910, c. 7, s. 263.

Rules and Fees.

Rules and fees for winding-up.

267. (1.) The Lieutenant-Governor in Council may make general rules for carrying into effect the objects of this Part of this Act.

(2.) All general rules made under this section shall be laid before the Legislative Assembly within three weeks after they are made, if the Legislative Assembly is then sitting, and, if it is not sitting, within three weeks after the beginning of the next session of the Legislative Assembly, and shall be judicially noticed, and shall have effect as if enacted by this Act.

(3.) The Lieutenant-Governor in Council may, by any such rules or directions, repeal, alter, or amend any rules made and directions given by the like authority under the "Companies Act, 1897," or the "Companies Winding-up Act, 1898." which were in force on the first day of July, 1910, and such last-mentioned rules and directions and the fees payable thereunder shall continue in force and apply to any winding-up under this Act until repealed, altered, or amended.

(4.) There shall be paid in respect of proceedings under this Act in relation to the winding-up of companies such fees as the Lieutenant-Governor in Council may direct, and the Lieutenant-Governor in Council may further direct by whom and in what manner the same are to be collected and accounted for, and to what account they are to be paid. [8 Edw. 7, c. 69, s. 237 (*part*)]; 1910, c. 7, s. 264.

Removal of Defunct Companies from Register.

Registrar may strike defunct company off register.

268. (1.) Where a company incorporated under any public Act in this Province, or a registered extra-provincial company, has failed for any period of two years after such incorporation or registration to send or file any return notice or document required to be made or filed or sent to the Registrar pursuant to this Act or any former public Act, or the Registrar has reasonable cause to believe that such company or an extra-provincial licensed company is not carrying on business or in operation, he shall send to the company by post a registered letter inquiring whether such company is carrying on business or in operation and notifying it of its default (if any); and [1913 Act.]

(2.) If within one month no reply to such letter is received by the Registrar, or such company fails to fulfil the lawful requirements of the Registrar or notifies the Registrar that it is not carrying on business or in operation, he may, at the expiration of another fourteen days, publish in the Gazette a notice that at the expiration of two months from the date of that notice the name of such company mentioned therein will, unless cause is shown to the contrary, be struck off the register, and the company, if one incorporated as aforesaid, will be dissolved.

(3.) At the expiration of the time mentioned in such last-mentioned notice, the Registrar shall, unless cause to the contrary is previously shown by such company, strike the name of such company off the register, and shall publish notice thereof in the Gazette for one month, and on such last-mentioned publication the company, being an incorporated company as aforesaid, shall be dissolved; or, being an extra-provincial company, shall be deemed to have ceased to do business in the Province, under its licence or certificate of registration: Provided that the liability (if any) of every director, managing officer, and member of any such company shall continue and may be enforced as if the name of said company had not been struck off the register.

(4.) If any such company or a member or creditor thereof feels aggrieved by the name of such company having been struck off the register in pursuance of this section, the company or member or creditor may, before the completion of the last-mentioned publication, apply to the Court; and the Court, if satisfied that the company was at the time of the striking-off carrying on business or in operation and that it is just to do so, may, upon such terms as the Court may see fit to impose, including the payment of any costs and expenses, order the name of the company to be restored to the register, and thereupon the company shall be deemed to have continued in existence as if the name thereof had never been struck off; and the Court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position, as nearly as may be, as if the name of the company had never been struck off. [1913 Act.

(5.) A letter or notice authorised or required for the purpose of this section to be sent to any such company may be sent by post addressed to the company at its registered or head office in the Province; or, if no office has been registered, addressed to the care of some director or officer of the company; or, if there be no director or officer of the company whose name and address are known to the Registrar, the letter or notice in identical form may, in the case of a company incorporated as aforesaid, be sent to each of the persons who subscribed the memorandum of association, addressed to him at the address mentioned in the memorandum; and in the case of an extra-provincial company sent to the attorney of such company.

1913 Act.

(6.) Where a company is being wound up, and the Registrar has reasonable cause to believe either that no liquidator is acting or that the affairs of the company are fully wound up and the returns required to be made by the liquidator have not been made for a period of three consecutive months, after notice by the Registrar demanding the returns has been sent by post to the registered address of the company and to the liquidator at his last-known place of business, the provisions of this section shall apply in like manner as if the Registrar had not within one month after sending the letter first mentioned received any answer thereto. [8 Edw. 7, c. 69, s. 242]; 1910, c. 7, s. 265; 1911, c. 8, s. 25.

PART IX.

Registration, Office and Fees.

Appointment of officers.

269. (1.) The Lieutenant-Governor in Council may appoint such Assistant Registrars, clerks, and servants as may be deemed necessary for the registration of companies under this Act, and the carrying-out of such other duties as may be imposed upon them, and may make regulations with respect to their duties, and may remove any persons so appointed.

(2.) The Lieutenant-Governor in Council may direct a seal or seals to be prepared for the authentication of documents required for or connected with the registration of companies.

Inspection of documents.

1913 Act.]

(3.) Any person may inspect the documents kept by the Registrar on payment of such fees as may be appointed by the Lieutenant-Governor in Council, not exceeding twenty-five cents for each inspection; and any person may require a certificate of the incorporation of any company, or a copy or extract of any other document or any part of any other document, to be certified by the Registrar, on payment for the certificate, certified copy, or extract of the prescribed fees, not exceeding one dollar for a certificate of incorporation, and not exceeding ten cents for each folio of a certified copy or extract.

(4.) A copy of or extract from any document kept and registered at the office for the registration of companies, certified to be a true copy under the hand of the Registrar or a Deputy or an Assistant Registrar (whose official position it shall not be necessary to prove), shall, in all legal proceedings be admissible in evidence as of equal validity with the original document.

Copies.

(5.) Whenever any act is by this Act directed to be done to or by the Registrar, it shall, until the Lieutenant-Governor in Council otherwise directs, be done to or by the existing Registrar, or, in his absence, to or by such person as the Lieutenant-Governor in Council may for the time being authorise. [8 Edw. 7, c. 69, s. 243]; 1910, c. 7, s. 266.

270. (1.) There shall be paid to the Registrar in respect of the several matters mentioned in Table B in the First Schedule to this Act the several fees therein specified, or such smaller fees as the Lieutenant-Governor in Council may from time to time direct.

Fees.

(2.) All fees paid to the Registrar in pursuance of this Act shall be paid into the Provincial Treasury. [8 Edw. 7, c. 69, s. 244]; 1910, c. 7, s. 267.

PART X.

APPLICATION OF ACT TO COMPANIES FORMED AND REGISTERED UNDER FORMER COMPANIES ACTS.

271. In the application of this Act to existing companies, it shall apply in the same manner in the case of a limited company, other than a company limited by guarantee, as if the company had been formed and registered under this Act as a company limited by shares; in the case of a company limited by guarantee, as if the company had been formed and registered under this Act as a company limited by guarantee; in the case of a company specially limited under section 56 of the "Companies Act, 1897," as if the company had been formed and registered under this Act as a company specially limited under Part V. of this Act; and in the case of a company other than a limited company, as if the company had been formed and registered under this Act as an unlimited company:

Application of Act to companies formed under former Companies Acts.

Provided that reference, express or implied, to the date of registration shall be construed as a reference to the date at which the company was registered under the Acts or Ordinances, as the case may be, under which it was registered. [8 Edw. 7, c. 69, s. 245]; 1910, c. 7, s. 268.

272. Save as hereinbefore provided, this Act shall apply to every company registered under any former public Act or Ordinance, except the "Companies Act, 1878," and the "Companies Act, 1890," in the same manner as it is hereinafter in this Act declared to apply to companies registered but not formed under this Act:

Application of Act to companies registered under former Companies Acts

Provided that reference, express or implied, to the date of registration shall be construed as a reference to the date at which the company was registered under the aforesaid Acts or Ordinances, as the case may be. [8 Edw. 7, c. 69, s. 246]; 1910, c. 7, s. 269.

Mode of transferring shares.

273. Any existing company may cause its shares to be transferred in manner hitherto in use, or in such other manner as the company may direct. [8 Edw. 7, c. 69, s. 248]; 1910, c. 7, s. 270.

PART XI.

Companies authorised to register under this Act.

Companies capable of being registered.

274. (1.) With the exceptions and subject to the provisions mentioned and contained in this section,—

(*a*.) Any company consisting of three or more members which was in existence on the eighth day of May, 1897; and

(*b*.) Any company formed after the date aforesaid, whether before or after the commencement of this Act, in pursuance of any Act of the Legislature other than this Act, including a specially incorporated company under the "Water Clauses Consolidation Act, 1897," or of letters patent, or being otherwise duly constituted by law, and consisting of five or more members,—

may at any time register under this Act as an unlimited company, or as a company limited by shares, or as a company limited by guarantee; and the registration shall not be invalid by reason that it has taken place with a view to the company being wound up.

(2.) Provided as follows:—

(*c*.) A company having the liability of its members limited by Act of the Legislature or letters patent, and not being a joint-stock company as hereinafter defined, shall not register in pursuance of this section:

(*d*.) A company having the liability of its members limited by Act of the Legislature or letters patent shall not register in pursuance of this section as an unlimited company or as a company limited by guarantee:

(*e*.) A company that is not a joint-stock company as hereinafter defined shall not register in pursuance of this section as a company limited by shares:

(*f*.) A company shall not register in pursuance of this section without the assent of a majority of such of its members as are present in person or by proxy (in cases where proxies are allowed by the

regulations of the company) at a general meeting summoned for the purpose:

(*g*.) Where a company not having the liability of its members limited by Act of the Legislature or letters patent is about to register as a limited company, the majority required to assent as aforesaid shall consist of not less than three-fourths of the members present in person or by proxy at the meeting:

(*h*.) Where a company is about to register as a company limited by guarantee, the assent to its being so registered shall be accompanied by a resolution declaring that each member undertakes to contribute to the assets of the company, in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceased to be a member, and of the costs and expenses of winding-up, for the adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount.

(3.) In computing any majority under this section when a poll is demanded, regard shall be had to the number of votes to which each member is entitled according to the regulations of the company.

(4.) Save and except a specially incorporated company under the "Water Clauses Consolidation Act, 1897," a company registered under any former Act or Ordinance bringing into force the Imperial "Companies Act, 1862" (25 & 26 Vict., c. 89), or registered under the "Companies Act, 1897," shall not be registered in pursuance of this section. [8 Edw. 7, c. 69, s. 249]; 1910, c. 7, s. 271.

Definition of "joint-stock company."

275. For the purposes of this Part of this Act, as far as relates to registration of companies as companies limited by shares, a "joint-stock company" means a company having a permanent paid-up or nominal share capital of fixed amount divided into shares, also of fixed amount, or held and transferable as stock, or divided and held partly in one way and partly in the other, and formed on the principle of having for its members the holders of those shares or that stock, and no other persons; and such a company when registered with limited liability under this Act shall be deemed to be a company limited by shares. [8 Edw. 7, c. 69, s. 250]; 1910, c. 7, s. 272.

Requirements for registration by joint-stock companies.

276. Before the registration in pursuance of this Part of this Act of a joint-stock company there shall be delivered to the Registrar the following documents, that is to say:—

(1.) A list showing the names, addresses, and occupations of all persons who on a day named in the list, not being more than six clear days before the day of registration, were members of the company, with the addition of the shares or stock held by them respectively, distinguishing, in cases where the shares are numbered, each share by its number:

(2.) A copy of any private Act of the Legislature, Royal charter, letters patent, deed of settlement, contract of copartnery, memandum and articles of association and by-laws, or any other instrument constituting or regulating the company; and

(3.) If the company is intended to be registered as a limited company, a statement specifying the following particulars, that is to say:—

(*a.*) The nominal share capital of the company and the number of shares into which it is divided,'or the amount of stock of which it consists;

(*b.*) The number of shares taken and the amount paid on each share;

(*c.*) The name of the company, with the addition of the word "limited" as the last word thereof; and

(*d.*) In the case of a company intended to be registered as a company limited by guarantee, the resolution declaring the amount of the guarantee. [8 Edw. 7, c. 69, s. 252]; 1910, c. 7, s. 273.

Requirements for registration by other than joint-stock companies.

277. Before the registration in pursuance of this Part of this Act of any Company not being a joint-stock company, there shall be delivered to the Registrar—

(1.) A list showing the names, addresses, and occupations of the directors or other managers (if any) of the company; and

(2.) A copy of any Act of the Legislature, letters patent, deed of settlement, contract of copartnery, or other instrument constituting or regulating the company; and

(3.) In the case of a company intended to be registered as a company limited by guarantee, a copy of the resolution declaring the amount of the guarantee. [8 Edw. 7, c. 69, s. 253]; 1910, c. 7, s. 274.

Authentication of statements of existing companies.

278. The lists of members and directors and any other particulars relating to the company required to be delivered to the Registrar shall be verified by a statutory declaration of any two or more directors or other principal officers of the company. [8 Edw. 7, c. 59, s. 254]; 1910, c. 7, s. 275.

Registrar may require evidence as to nature of company.

279. The Registrar may require such evidence as he thinks necessary for the purpose of satisfying himself whether any company proposing to be registered is or is not a joint-stock company as hereinbefore defined. 1910, c. 7, s. 276.

Exemption of certain companies from payment of fees

280. No fees shall be charged in respect of the registration in pursuance of this Part of this Act of a company if it has already paid the same fees as if it had originally been registered under this Act, otherwise the same fees shall be paid as are payable by a company registering under this Act. [8 Edw. 7, c. 69, s. 257]; 1910, c. 7, .s 277.

1913 Act.]

281. When a company registers in pursuance of this Part of this Act with limited liability, the word "limited" shall form and be registered as part and the last word of its name. [8 Edw. 7, c. 69, s. 258]; 1910, c. 7, s. 278.

Addition of "limited" to name.

282. On compliance with the requirements of this Part of this Act with respect to registration, and on payment of such fees (if any) as are payable under Table B in the First Schedule to this Act, the Registrar shall certify under his hand that the company applying for registration is incorporated as a company under this Act, and in the case of a limited company that it is limited, and thereupon the company shall be incorporated, and shall have perpetual succession and a common seal, with power to hold lands. [8 Edw. 7, c. 69, s. 259]; 1910, c. 7, s. 279.

Certificate of registration of existing companies.

[1913 Act.

283. All property, real and personal (including things in action), belonging to or vested in a company at the date of its registration in pursuance of this Part of this Act shall, on registration, pass to and vest in the company as incorporated under this Act for all the estate and interest of the company therein. [8 Edw. 7, c. 69, s. 260]; 1910, c. 7, s. 280.

Vesting of property on registration.

284. Registration of a company in pursuance of this Part of this Act shall not affect the rights or liabilities of the company in respect of any debt or obligation incurred, or any contract entered into by, to, with, or on behalf of the company before registration. [8 Edw. 7, c. 69, s. 261]; 1910, c. 7, s. 281.

Saving for existing liabilities.

285. All actions and other legal proceedings which at the time of the registration of the company in pursuance of this Part of this Act are pending by or against the company, or the public officer or any member thereof, may be continued in the same manner as if the registration had not taken place; nevertheless, execution shall not issue against the effects of any individual member of the company on any judgment, decree, or order obtained in any such action or proceeding; but, in the event of the property and effects of the company being insufficient to satisfy the judgment, decree, or order, an order may be obtained for winding up the company. [8 Edw. 7, c. 69, s. 262]; 1910, c. 7, s. 282.

Continuation of existing actions.

286. When a company is registered in pursuance of this Part of this Act,—

Effect of registration under Act.

(1.) All provisions contained in any Act of the Legislature, deed of settlement, contract of copartnery, letters patent, or other instrument constituting or regulating the company, including, in the case of a company registered as a company limited by guarantee, the resolution declaring the amount of the guarantee, shall be deemed to be conditions and regulations of the company, in the same manner and with the same incidents as if so much thereof as would, if the company had been formed under this Act, have been required to be inserted in the memorandum were contained

in a registered memorandum, and the residue thereof were contained in the registered articles:

(2.) All the provisions of this Act shall apply to the company, and the members, contributories, and creditors thereof, in the same manner in all respects as if it had been formed under this Act, subject as follows, that is to say:—

(*a.*) The regulations in Table A in the First Schedule to this Act shall not apply unless adopted by special resolution;

(*b.*) The provisions of this Act relating to the numbering of shares shall not apply to any joint-stock company whose shares are not numbered;

(*c.*) Subject to the provisions of this section, the company shall not have power to alter any provision contained in any Act of the Legislature relating to the company:

(*d.*) Subject to the provisions of this section, the company shall not have power, without the sanction of the Lieutenant-Governor in Council, to alter any provision contained in any letters patent relating to the company;

(*e.*) The company shall not have power to alter any provision contained in a Royal charter or letters patent with respect to the objects of the company;

(*f.*) In the event of the company being wound up, every person shall be a contributory, in respect of the debts and liabilities of the company contracted before registration, who is liable to pay or contribute to the payment of any debt or liability of the company contracted before registration, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members among themselves in respect of any such debt or liability; or to pay or contribute to the payment of the costs and expenses of winding up the company, so far as relates to such debts or liabilities as aforesaid; and every contributory shall be liable to contribute to the assets of the company in the course of the winding-up, all sums due from him in respect of any such liability as aforesaid; and, in the event of the death of any contributory, the provisions of this Act with respect to the personal representatives, heirs, and devisees of deceased contributories shall apply:

(3.) The provisions of this Act with respect to—

(*a.*) The registration of an unlimited company as limited;

(*b.*) The powers of an unlimited company on registration as a limited company to increase the nominal amount of its share capital and to provide that a portion of its share capital shall not be capable of being called up except in the event of winding-up;

(c.) The power of a limited company to determine that a portion of its share capital shall not be capable of being called up except in the event of winding-up,—

shall apply, notwithstanding any provisions contained in any Act of the Legislature, Royal charter, deed of settlement, contract of copartnery, letters patent, or other instrument constituting or regulating the company:

(4.) Nothing in this section shall authorise the company to alter any such provisions contained in any deed of settlement, contract of copartnery, letters patent, or other instrument constituting or regulating the company, as would, if the company had originally been formed under this Act, have been required to be contained in the memorandum and are not authorised to be altered by this Act:

(5.) Nothing in this Act shall derogate from any power of altering its constitution or regulations which may, by virtue of any Act of the Legislature, deed of settlement, contract of copartnery, letters patent, or other instrument constituting or regulating the company, be vested in the company. [8 Edw. 7, c. 69, s. 263]; 1910, c. 7, s. 283.

Power to substitute memorandum and articles for deed of settlement.

287. (1.) Subject to the provisions of this section, a company registered in pursuance of this Part of this Act may, by special resolution, alter the form of its constitution by substituting a memorandum and articles for a deed of settlement.

(2.) The provisions of this Act with respect to confirmation by the Court and registration of an alteration of the objects of a company shall, so far as applicable, apply to an alteration under this section, with the following modifications:—

(a.) There shall be substituted for the copy of the altered memorandum required to be delivered to the Registrar a copy of the substituted memorandum and articles; and

(b.) On the registration of the alteration being certified by the Registrar, the substituted memorandum and articles shall apply to the company in the same manner as if it were a company registered under this Act with that memorandum and those articles, and the company's deed of settlement shall cease to apply to the company.

(3.) An alteration under this section may be made either with or without any alteration of the objects of the company under this Act.

(4.) In this section the expression "deed of settlement" includes any contract of copartnery or other instrument constituting or regulating the company, not being an Act of the Legislature, a Royal charter, or letters patent. [8 Edw. 7, c. 69, s. 264]; 1910, c. 7, s. 284.

Power of Court to stay or restrain proceedings.

288. The provisions of this Act with respect to staying and restraining actions and proceedings against a company at any time after the pre-

sentation of a petition for winding-up and before the making of a winding-up order shall, in the case of a company registered in pursuance of this Part of this Act, where the application to stay or restrain is by a creditor, extend to actions and proceedings against any contributory of the company. [8 Edw. 7, c. 69, s. 265]; 1910, c. 7, s. 285.

Actions stayed on winding-up order.

289. Where an order has been made under this Act for winding-up a company registered in pursuance of this Part of this Act, no action or proceeding shall be commenced or proceeded with against the company or any contributory of the company in respect of any debt of the company, except by leave of the Court, and subject to such terms as the Court may impose. [8 Edw. 7, c. 69, s. 266]; 1910, c. 7, s. 286.

PART XII.

Miscellaneous and Supplemental.

Legal Proceedings, Offences, etc.

Prosecution of offences.

290. All violations of the provisions of this Act made punishable by any fine may be prosecuted under the "Summary Convictions Act." [8 Edw. 7, c. 69, s. 276]; 1910, c. 7, s. 287.

Court may apply fine to payment of costs: otherwise pay into Treasury.

291. The Court imposing any fine under this Act may direct that the whole or any part thereof be applied in or towards payment of the costs of the proceedings, or in or towards the rewarding the person on whose information or at whose suit the fine is recovered; and subject to any such direction all fines under this Act shall, notwithstanding anything in any other Act, be paid into the Provincial Treasury. [8 Edw. 7, c. 69, s. 277]; 1910, c. 7, s. 288.

Insolvent plaintiff. Judge may order security for costs.

292. Where a limited company is plaintiff in any action or other legal proceeding, any Judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given. [8 Edw. 7, c. 69, s. 278]; 1910, c. 7, s. 289.

Relief against breach of trust.

293. If in any proceeding against a director, or person occupying the position of director, of a company for negligence or breach of trust it appears to the Court hearing the case that the director or person is or may be liable in respect of the negligence or breach of trust, but has acted honestly and reasonably, and ought fairly to be excused for the negligence or breach of trust, that Court may relieve him, either wholly or partly, from

his liability on such terms as the Court may think proper. [8 Edw. 7, c. 69, s. 279]; 1910, c. 7, s. 290.

294. If any person or persons trade or carry on business within the Province under any name or title of which "limited" is the last word, that person or those persons shall, unless duly incorporated with limited liability or licensed or registered, and entitled to use the word "limited" as the last word of their name, be liable to a fine not exceeding twenty-five dollars for every day upon which that name or title has been used. [8 Edw. 7, c. 69, s. 282]; 1910, c. 7, s. 291.

No one to use "limited" as part of name unless incorporated.

295. All applications to the Court authorised by this Act in which the procedure is not otherwise prescribed may, in all actions pending or other proceeding already in Court, be made to the Court by motion or to a Judge in Chambers by summons, as may be most convenient, and in all other cases to a Judge in Chambers by petition. 1910, c. 7, s. 292.

Applications to the Court.

296. A Judge in Chambers may adjourn any matter before him into Court for further argument and consideration. 1910, c. 7, s. 293.

Power to adjourn.

297. The Lieutenant-Governor in Council shall have power at any time to remit or relieve from, either absolutely or upon condition, any penalty imposed or to which a company may be liable for the infraction of this Act. 1898, c. 13, s. 19; 1910, c. 7, s. 294.

Power to relieve from penalties.

Authentication of Documents issued by Lieutenant-Governor in Cou cil.

298. Any approval, sanction, or licence, or revocation of licence, which under this Act may be given or made by the Lieutenant-Governor in Council may be under the hand of any person authorised in that behalf by the Lieutenant-Governor in Council. [8 Edw. 7, c. 69, s. 284]; 1910, c. 7, s. 295.

Authentication of documents issued by Lieut.-Governor in Council.

Repeal of Acts and Transitional Provisions.

299. The repeal of the Acts mentioned in the "Revised Statutes, 1897," chapter 44, section 160, shall be subject to the following provisoes:—

Saving clause.

(*a*.) That such repeal shall not be held or taken to in any way alter limit, or affect the corporate existence, rights, privileges, powers, and liabilities of the company incorporated under the said repealed Acts, or any or either of them;

(*b*.) That the provisions of sections 37, 38, 89, and 90 of said chapter 44 shall apply to every company incorporated under the said repealed Acts or any or either of them; and

Application of ss. 37, 38, 89, and 90 to all companies.

(*c*.) That every company incorporated under the said repealed Acts, or any or either of them, may dispose of the whole or any portion of its assets, rights, powers, privileges, and franchise by resolution duly passed to such effect at a general or special meeting of the

Disposition by companies under repealed Acts of assets, etc., by resolution.

shareholders representing at least two-thirds in value of the paid-up capital of the company, which meeting shall be held in the city, town, or district where the company has its chief place of business in the Province: Provided always that at least one month's notice of such meeting, signed by the secretary, or, in the event of his death or absence, by the acting-secretary, or if there be neither secretary or acting-secretary, then by one of the trustees, shall be published in at least four issues of the Gazette and of some newspaper published in the city, town, or district aforesaid: Provided always that nothing herein contained shall be construed or allowed to prejudice any claim against the corporation:

Construction to be placed on repealing clause

Provided also that the power hereby conferred shall be deemed to be enabling and not imperative, and shall in nowise limit, control, or affect any power of sale vested in any company incorporated under the repealed Acts by its memorandum of association, or any provisions or conditions as to the exercise of such power contained in its articles of association or by-laws. R.S. 1897, c. 44, s. 160 (*part*); 1900, c. 5, s. 11; 1912, c. 3, s. 31.

Saving clause.

300. (1.) The repeal of the Acts mentioned in the "Companies Act, 1910," section 296, shall not affect Table A in the First Schedule to the "Companies Act, 1862," pursuant to the "Companies Ordinance, 1866," or any part thereof, or in Table A in the First Schedule to the "Companies Act, 1897," or any part thereof (either as originally contained in those Schedules respectively or as altered in pursuance of section 71 of the "Companies Act, 1862," or section 121 of the "Companies Act, 1897," respectively), so far as the same applies to any company existing on the first day of July, 1910.

(2.) The mention of particular matters in this section or in any other section of this Act shall not prejudice the general application of the "Interpretation Act" with regard to the effect of repeals. [8 Edw. 7, c. 69, s. 286]; 1910, c. 7, s. 296.

Reference to documents.

301. Where any repealed enactment is mentioned or referred to in any document, that document shall be read as if the corresponding provision (if any) of this Act were therein mentioned or referred to and substituted for the repealed enactment. [8 Edw. 7, c. 69, s. 291]; 1910, c. 7, s. 297.

Saving of pending proceedings for winding-up.

302. The provisions of this Act with respect to winding-up shall not apply to any company of which the winding-up has commenced before the first day of July, 1910, but every such company shall be wound up in the same manner and with the same incidents as if this Act had not passed, and, for the purposes of the winding-up, the Act or Acts under which the winding-up commenced shall be deemed to remain in full force. [8 Edw. 7, c. 69, s. 287]; 1910, c. 7, s. 298.

303. Every conveyance, mortgage, or other deed made before the first day of July, 1910, in pursuance of any enactment repealed by the "Companies Act, 1910," shall be of the same force as if that Act had not passed, and for the purposes of that deed the repealed enactment shall be deemed to remain in full force. [8 Edw. 6, c. 69, s. 288]; 1910, c. 7, s. 299.

Saving of deeds.

304. (1.) Whenever, before the first day of July, 1910, any shares in the capital of any company incorporated under the "Companies Act, 1897," credited as fully or partly paid up, shall have been issued for a consideration other than cash, and at or before the issue of such shares no contract, or no sufficient contract, was filed with the Registrar in compliance with section 50 of the "Companies Act, 1897," the company or any person interested in such shares or any of them may apply to the Court for relief and the Court, if satisfied that the omission to file a contract or sufficient contract was accidental or due to inadvertence, or that for any reason it is just and equitable to grant relief, may make an order for the filing with the Registrar of a sufficient contract in writing, and directing that on such contract being filed within a specified period it shall, in relation to such shares, operate as if it had been duly filed with the Registrar aforesaid before the issue of such shares.

Relief where shares have been issued as fully paid up and no contract filed.

(2.) Any such application may be made in the manner prescribed by this Act, and either before or after an order has been made or an effective resolution has been passed for the winding-up of such company, and either before or after the commencement of any proceedings for enforcing the liability on such shares consequent on the omission aforesaid; and any such application shall, if not made by the company, be served on the company.

(3.) Any such order may be made on such terms and conditions as the Court may think fit, and the Court may make such order as to costs as it deems proper, and may direct that an office copy of the order shall be filed with the Registrar aforesaid, and the order shall in all respects have full effect.

(4.) Where the Court in any such case is satisfied that the filing of the requisite contract would cause delay or inconvenience, or is impracticable, it may, in lieu thereof, direct the filing of a memorandum in writing, in a form approved by the Court, specifying the consideration for which the shares were issued, and may direct that on such memorandum being filed within a specified period it shall, in relation to such shares, operate as if it were a sufficient contract in writing within the meaning of section 50 of the "Companies Act, 1897," and had been duly filed with the Registrar aforesaid before the issue of such shares.

(5.) The jurisdiction by this section given to the Court is not by implication to curtail or derogate from its jurisdiction to grant relief in any such case under the "Companies Act, 1897," or otherwise. 1903-04, c. 12, s. 7; 1910, c. 7, s. 300.

Reference to 1905, chapter 12.

305. Whenever, in any Act passed before the twelfth day of March, 1906, the Act of 1905, chapter 12, is referred to or cited as "An Act to provide for the Registration of Companies' Mortgages" or "Companies' Mortgages Registration Act, 1905," these words shall be struck out, and in lieu thereof shall be inserted the "Companies Act, 1897," 1906, c. 10, s. 6; 1907, c. 8, s. 7; 1910, c. 7, s. 301.

Offices.

Former registration offices, registers, official receivers, etc., continued.

306. (1.) The office existing at the commencement of this Act for registration of joint-stock companies shall be continued as if it had been established under this Act.

Existing offices to be continued.

(2.) Registers of companies kept in any existing office shall be deemed part of the registers of companies to be kept under this Act.

Power of Lieut.-Governor in Council.

(3.) The existing Registrars, Deputy and Assistant Registrars, officers, clerks, and servants in those offices shall during the pleasure of the Lieutenant-Governor in Council hold the offices and receive the salaries hitherto held and received by them, but subject to any regulations of the Lieutenant-Governor in Council with regard to the execution of their duties. [8 Edw. 7, c. 69, s. 289]; 1910, c. 7, s. 302.

Rules and Regulations.

Power to make rules.

307. The Lieutenant-Governor in Council may from time to time make rules and regulations for carrying out the purpose of this Act, including matters in respect whereof no express or only partial or imperfect provision has been made. 1910, c. 7, s. 303.

Power to make rules.

308. Subject to this Act and to any rules made by the Lieutenant-Governor in Council, the Registrar may make rules and regulations for the management of his office and the conduct of business therein. 1910, c. 7, s. 304.

Saving for existing rules of procedure, etc.

309. Until revoked and except as varied under the powers of this Act the general rules and orders and scales of fees, under the "Companies Act, 1897," or the "Companies Winding-up Act, 1898," in force on the tenth day of March, 1910, and the Rules of Court then in force respectively with respect to the procedure for reduction of capital, and to winding up companies, and the practice and procedure for winding up companies respectively in force on the same date, shall, so far as they are not inconsistent with this Act, continue in force. [8 Edw. 7, c. 69, s. 290]; 1910, c. 7, s. 305.

Sections 34, 74, 83, 119, and 120 applicable to all companies.

310. Sections 34, 74, 83, 119, and 120 of this Act shall apply to all companies heretofore or hereafter incorporated by any public Act of the Legislature. 1903-04, c. 12, s. 9; 1907, c. 8, s. 3; 1910, c. 7, s. 307.

SCHEDULES.

FIRST SCHEDULE.

TABLE A.

REGULATIONS FOR MANAGEMENT OF A COMPANY LIMITED BY SHARES.

Preliminary.

1. In these regulations, unless the context otherwise requires, expressions defined in the "Companies Act," or any statutory modification thereof in force at the date at which these regulations become binding on the company, shall have the meanings so defined; and words importing the singular shall include the plural, and vice versa, and words importing the masculine gender shall include females, and words importing persons shall include bodies corporate.

Business.

2. The directors shall have regard to the restrictions on the commencement of business imposed by section 96 of the "Companies Act," if, and so far as, those restrictions are binding upon the company.

Shares.

3. Subject to the provisions (if any) in that behalf of the memorandum of association of the company, and without prejudice to any special rights previously conferred on the holders of existing shares in the company, any share in the company may be issued with such preferred, deferred, or other special rights or such restrictions, whether in regard to dividend, voting, return of share capital, or otherwise, as the company may from time to time by special resolution determine.

4. If at any time the share capital is divided into different classes of shares, the rights attached to any class (unless otherwise provided by the terms of issue of the shares of that class) may be varied with the consent in writing of the holders of three-fourths of the issued shares of that class, or with the sanction of an extraordinary resolution passed at a separate general meeting of the holders of the shares of the class. To every such separate general meeting the provisions of these regulations relating to general meetings shall, mutatis mutandis, apply, but so that the necessary quorum shall be two persons at least holding or representing by proxy one-third of the issued shares of the class.

5. No share shall be offered to the public for subscription except upon the terms that the amount payable on application shall be at least five per cent of the nominal amount of the share; and the directors shall, as regards any allotment of shares, duly comply with such of the provisions of sections 94 and 97 of the "Companies Act" as may be applicable thereto.

6. Every person whose name is entered as a member in the register of members shall, without payment, be entitled to a certificate under the common seal of the company specifying the share or shares held by him and the amount paid up thereon; provided that, in respect of a share or shares held jointly by several persons, the company shall not be bound to issue more than one certificate, and delivery of a certificate for a share to one of several joint holders shall be sufficient delivery to all.

7. If a share certificate is defaced, lost, or destroyed, it may be renewed on payment of such fee (if any), not exceeding twenty-five cents, and on such terms (if any) as to evidence and indemnity as the directors think fit.

8. No part of the funds of the company shall be employed in the purchase of, or in loans upon the security of, the company's shares.

Lien.

9. The company shall have a lien on every share (not being a fully paid share) for all moneys (whether presently payable or not) called or payable at a fixed time in respect of that share, and the company shall also have a lien on all shares (other than fully paid shares) standing registered in the name of a single person for all moneys presently payable by him or his estate to the company; but the directors may at any time declare any share to be wholly or in part exempt from the provisions of this clause. The company's lien (if any) on a share shall extend to all dividends payable thereon.

10. The company may sell, in such manner as the directors think fit, any shares on which the company has a lien, but no sale shall be made unless some sum in respect of which the lien exists is presently payable, nor until the expiration of fourteen days after a notice in writing, stating and demanding payment of such part of the amount in respect of which the lien exists as is presently payable, has been given to the registered holder for the time being of the share, or the person entitled by reason of his death or bankruptcy to the share.

11. The proceeds of the sale shall be applied in payment of such part of the amount in respect of which the lien exists as is presently payable, and the residue shall (subject to a like lien for sums not presently payable as existed upon the shares prior to the sale) be paid to the person entitled to the shares at the date of the sale. The purchaser shall be registered as the holder of the shares, and he shall not be bound to see to the application of the purchase money, nor shall his title to the shares be affected by any irregularity or invalidity in the proceedings in reference to the sale.

Calls on Shares.

12. The directors may from time to time make calls upon the members in respect of any moneys unpaid on their shares: Provided that no call shall exceed one-fourth of the nominal amount of the share, or be payable at less than one month from the last call; and each member shall (subject to receiving at least fourteen days' notice specifying the time or times of payment) pay to the company at the time or times so specified the amount called on his shares.

13. The joint holders of a share shall be jointly and severally liable to pay all calls in respect thereof.

14. If a sum called in respect of a share is not paid before or on the day appointed for payment thereof, the person from whom the sum is due shall pay interest upon the sum at the rate of five per centum per annum from the day appointed for the payment thereof to the time of the actual payment, but the directors shall be at liberty to waive payment of that interest wholly or in part.

15. The provisions of these regulations as to payment of interest shall apply in the case of non-payment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the amount of the share, or by way of premium, as if the same had become payable by virtue of a call duly made and notified.

16. The directors may make arrangements on the issue of shares for a difference between the holders in the amount of calls to be paid and in the times of payment.

17. The directors may, if they think fit, receive from any member willing to advance the same all or any part of the moneys uncalled and unpaid upon any shares held by him, and upon all or any of the moneys so advanced may (until the same would, but for such advance, become presently payable) pay interest at such rate (not exceeding, without the sanction of the company in general meeting, six per cent.) as may be agreed upon between the member paying the sum in advance and the directors.

Transfer and Transmission of Shares.

18. The instrument of transfer of any shares in the company shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain a holder of the share until the name of the transferee is entered in the register of members in respect thereof.

19. Shares in the company shall be transferred in the following form, or in any usual or common form which the directors shall approve:—

> I, *A. B.*, of , in consideration of the sum of $ paid to me by *C. D.*, of (hereinafter called "the said transferee"), do hereby transfer to the said transferee the share [*or* shares] numbered in the undertaking called the Company, Limited, to hold unto the said transferee, his executors, administrators, and assigns, subject to the several conditions on which I held the same at the time of the execution hereof; and I, the said transferee, do hereby agree to take the said share [*or* shares] subject to the conditions aforesaid.
>
> As witness our hands the day of .
>
> Witness to the signatures of, etc.

20. The directors may decline to register any transfer of shares, not being fully paid shares, to a person of whom they do not approve, and may also decline to register any transfer of shares on which the company has a lien. The directors may also suspend the registration of transfers during the fourteen days immediately preceding the ordinary general meeting in each year. The directors may decline to recognize any instrument of transfer unless—

(*a*.) A fee not exceeding fifty cents is paid to the company in respect thereof; and

(*b*.) The instrument of transfer is accompanied by the certificate of the shares to which it relates, and such other evidence as the directors may reasonably require to show the right of the transferor to make the transfer.

21. The executors or administrators of a deceased sole holder of a share shall be the only persons recognized by the company as having any title to the share. In the case of a share registered in the names of two or more holders, the survivors or survivor, or the executors or administrators of the deceased survivor, shall be the only persons recognized by the company as having any title to the share.

22. Any person becoming entitled to a share in consequence of the death or bankruptcy of a member shall, upon such evidence being produced as may from time to time be required by the directors, have the right either to be registered as a member in respect of the share, or, instead of being

registered himself, to make such transfer of the share as the deceased or bankrupt person could have made; but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by the deceased or bankrupt person before the death or bankruptcy.

23. A person becoming entitled to a share by reason of the death or bankruptcy of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company.

Forfeiture of Shares.

24. If a member fails to pay any call or instalment of a call on the day appointed for the payment thereof, the directors may, at any time thereafter during such time as any part of such call or instalment remains unpaid, serve a notice on him requiring payment of so much of the call or instalment as is unpaid, together with any interest which may have accrued.

25. The notice shall name a further day (not earlier than the expiration of fourteen days from the date of the notice) on or before which the payment required by the notice is to be made, and shall state that in the event of non-payment at or before the time appointed the shares in respect of which the call was made will be liable to be forfeited.

26. If the requirements of any such notice as aforesaid are not complied with, any share in respect of which the notice has been given may at any time thereafter, before the payment required by the notice has been made, be forfeited by a resolution of the directors to that effect.

27. A forfeited share may be sold or otherwise disposed of on such terms and in such manner as the directors think fit, and at any time before a sale or disposition the forfeiture may be cancelled on such terms as the directors think fit.

28. A person whose shares have been forfeited shall cease to be a member in respect of the forfeited shares, but shall, notwithstanding, remain liable to pay to the company all moneys which, at the date of forfeiture, were presently payable by him to the company in respect of the shares, but his liability shall cease if and when the company receives payment in full of the nominal amount of the shares.

29. A statutory declaration in writing that the declarant is a director of the company, and that a share in the company has been duly forfeited on a date stated in the declaration, shall be conclusive evidence of the facts therein stated as against all persons claiming to be entitled to the share, and that declaration, and the receipt of the company for the consideration (if any) given for the share on the sale or disposition thereof, shall constitute a good title to the share, and the person to whom the share is sold or disposed of shall be registered as the holder of the share and shall not be bound to see to the application of the purchase money (if any), nor shall his title to the share be affected by any irregularity or invalidity in the proceedings in reference to the forfeiture, sale, or disposal of the share.

30. The provisions of these regulations as to forfeiture shall apply in the case of non-payment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the amount of the share or by way of premium, as if the same had been payable by virtue of a call duly made and notified.

Conversion of Shares into Stock.

31. The directors may, with the sanction of the company previously given in general meeting, convert any paid-up shares into stock, and may with the like sanction reconvert any stock into paid-up shares of any denomination.

32. The holders of stock may transfer the same, or any part thereof, in the same manner and subject to the same regulations as, and subject to which, the shares from which the stock arose might previously to conversion have been transferred, or as near thereto as circumstances admit; but the directors may from time to time fix the minimum amount of stock transferable, and restrict or forbid the transfer of fractions of that minimum, but the minimum shall not exceed the nominal amount of the shares from which the stock arose.

33. The holders of stock shall, according to the amount of the stock held by them, have the same rights, privileges, and advantages as regards dividends, voting at meetings of the company, and other matters as if they held the shares from which the stock arose, but no such privilege or advantage (except participation in the dividends and profits of the company) shall be conferred by any such aliquot part of stock as would not, if existing in shares, have conferred that privilege or advantage.

34. Such of the regulations of the company (other than those relating to share warrants) as are applicable to paid-up shares shall apply to stock, and the words "share" and "shareholder" therein shall include "stock" and "stockholder."

Share Warrants.

35. The company may issue share warrants, and accordingly the directors may in their discretion, with respect to any share which is fully paid up, on application in writing signed by the person registered as holder of the share, and authenticated by such evidence (if any) as the directors may from time to time require as to the identity of the person signing the request, and on receiving the certificate (if any) of the share, and such fee as the directors may from time to time require, issue under the company's seal a warrant, duly stamped, stating that the bearer of the warrant is entitled to the shares therein specified, and may provide by coupons or otherwise for the payment of dividends, or other moneys, on the shares included in the warrant.

36. A share warrant shall entitle the bearer to the shares included in it, and the shares shall be transferred by the delivery of the share warrant, and the provisions of the regulations of the company with respect to transfer and transmission of shares shall not apply thereto.

37. The bearer of a share warrant shall, on surrender of the warrant to the company for cancellation, and on payment of such sum as the directors may from time to time prescribe, be entitled to have his name entered as a member in the register of members in respect of the shares included in the warrant.

38. The bearer of a share warrant may at any time deposit the warrant at the office of the company, and so long as the warrant remains so deposited the depositor shall have the same right of signing a requisition for calling a meeting of the company, and of attending and voting and exercising the other privileges of a member at any meeting held after the expiration of two clear days from the time of deposit, as if his name were inserted in the register of members as the holder of the shares included in the deposited warrant. Not more than one person shall be recognized as depositor of

the share warrant. The company shall, on two days' written notice return the deposited share warrant to the depositor.

39. Subject as herein otherwise expressly provided, no person shall, as bearer of a share warrant, sign a requisition for calling a meeting of the company, or attend, or vote, or exercise any other privilege of a member at a meeting of the company, or be entitled to receive any notices from the company; but the bearer of a share warrant shall be entitled in all other respects to the same privileges and advantages as if he were named in the register of members as the holder of the shares included in the warrant, and he shall be a member of the company.

40. The directors may from time to time make rules as to the terms on which (if they shall think fit) a new share warrant or coupon may be issued by way of renewal in case of defacement, loss, or destruction.

Alteration of Capital.

41. The directors may, with the sanction of an extraordinary resolution of the company, increase the share capital by such sum, to be divided into shares of such amount, as the resolution shall prescribe.

42. Subject to any direction to the contrary that may be given by the resolution sanctioning the increase of share capital, all new shares shall, before issue, be offered to such persons as at the date of the offer are entitled to receive notices from the company of general meetings in proportion, as nearly as the circumstances admit, to the amount of the existing shares to which they are entitled. The offer shall be made by notice specifying the number of shares offered, and limiting a time within which the offer, if not accepted, will be deemed to be declined, and after the expiration of that time, or on the receipt of an intimation from the person to whom the offer is made that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company. The directors may likewise so dispose of any new shares which (by reason of the ratio which the new shares bear to shares held by persons entitled to an offer of new shares) cannot, in the opinion of the directors, be conveniently offered under this article.

43. The new shares shall be subject to the same provisions with reference to the payment of calls, lien, transfer, transmission, forfeiture, and otherwise as the shares in the original share capital.

44. The company may, by special resolution,—

(*a*.) Consolidate and divide its share capital into shares of larger amount than its existing shares:

(*b*.) By subdivision of its existing shares, or any of them, divide the whole or any part of its share capital into shares of smaller amount than is fixed by the Memorandum of Association, subject, nevertheless, to the provisions of paragraph (*d*) of sub-section (1) of Section 48 of the "Companies Act":

(*c*.) Cancel any shares which, at the date of the passing of the resolution have not been taken or agreed to be taken by any person:

(*d*.) Reduce its share capital in any manner and with, and subject to, any incident authorised, and consent required, by law.

General Meetings.

45. The statutory general meeting of the company shall be held within the period required by Section 73 of the "Companies Act."

46. A general meeting shall be held once in every year at such time (not being more than fifteen months after the holding of the last preceding

general meeting) and place as may be prescribed by the company in general meeting, or, in default, at such time in the month following that in which the anniversary of the company's incorporation occurs, and at such place as the directors shall appoint. In default of a general meeting being so held, a general meeting shall be held in the month next following, and may be convened by any two members in the same manner as nearly as possible as that in which meetings are to be convened by the directors.

47. The above-mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary.

48. The directors may, whenever they think fit, convene an extraordinary general meeting, and extraordinary general meetings shall also be convened on such requisition, or, in default, may be convened by such requisitionists, as provided by Section 74 of the "Companies Act." If at any time there are not within the Province sufficient directors capable of acting to form a quorum, any director or any two members of the company may convene an extraordinary general meeting in the same manner as nearly as possible as that in which meetings may be convened by the directors.

Proceedings at General Meeting.

49. Seven days' notice at the least (exclusive of the day on which the notice is served or deemed to be served, but inclusive of the day for which notice is given), specifying the place, the day, and the hour of meeting, and, in case of special business, the general nature of that business, shall be given in manner hereinafter mentioned, or in such other manner (if any) as may be prescribed by the company in general meeting, to such persons as are, under the regulations of the company, entitled to receive such notices from the company; but the non-receipt of the notice by any member shall not invalidate the proceedings at any general meeting.

50. All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting, with the exception of sanctioning a dividend, the consideration of the accounts, balance-sheets, and the ordinary report of the directors and auditors, the election of directors and other officers in the place of those retiring by rotation, and the fixing of the remuneration of the auditors.

51. No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business; save as herein otherwise provided, three members personally present shall be a quorum.

52. If within half an hour from the time appointed for the meeting a quorum is not present, the meeting, if convened upon the requisition of members, shall be dissolved; in any other case it shall stand adjourned to the same day in the next week, at the same time and place, and, if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting, the members present shall be a quorum.

53. The chairman (if any) of the board of directors shall preside as chairman at every general meeting of the company.

54. If there is no such chairman, or if at any meeting he is not present within fifteen minutes after the time appointed for holding the meeting or is unwilling to act as chairman, the members present shall choose some one of their number to be chairman.

55. The chairman may, with the consent of any meeting at which a quorum is present (and shall if so directed by the meeting), adjourn the meeting from time to time and from place to place, but no business shall

be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place. When a meeting is adjourned for ten days or more, notice of the adjourned meeting shall be given as in the case of an original meeting. Save as aforesaid, it shall not be necessary to give any notice of an adjournment or of the business to be transacted at an adjourned meeting.

56. At any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands, unless a poll is (before or on hte declaration of the result of the show of hands) demanded by at least three members, and, unless a poll is so demanded, a declaration by the chairman that a resolution has, on a show of hands, been carried, or carried unanimously, or by a particular majority, or lost, and an entry to that effect in the book of the proceedings of the company, shall be conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of, or against, that resolution.

57. If a poll is duly demanded it shall be taken in such manner as the chairman directs, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

58. In the case of an equality of votes, whether on a show of hands or on a poll, the chairman of the meeting at which the show of hands takes place or at which the poll is demanded shall be entitled to a second or casting vote.

59. A poll demanded on the election of a chairman, or on a question of adjournment, shall be taken forthwith. A poll demanded on any other question shall be taken at such time as the chairman of the meeting directs.

Votes of Members.

60. On a show of hands every member present in person shall have one vote. On a poll every member shall have one vote for each share of which he is the holder.

61. In the case of joint holders the vote of the senior who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint holders; and for this purpose seniority shall be determined by the order in which the names stand in the register of members.

62. A member of unsound mind, or in respect of whom an order has been made by any Court having jurisdiction in lunacy, may vote, whether on a show of hands or on a poll, by his committee, curator bonis, or other person in the nature of a committee or curator bonis appointed by that Court, and any such committee, curator bonis, or other person may, on a poll, vote by proxy.

63. No member shall be entitled to vote at any general meeting unless all calls or other sums presently payable by him in respect of shares in the company have been paid.

64. On a poll votes may be given either personally or by proxy.

65 The instrument appointing a proxy shall be in writing under the hand of the appointer or of his attorney duly authorised in writing, or, if the appointer is a corporation, either under the common seal or under the hand of an officer or attorney so authorised. No person shall act as a proxy unless he is entitled on his own behalf to be present and vote at the meeting at which he acts as proxy, or he has been appointed to act at that meeting as proxy for a corporation.

66. The instrument appointing a proxy and the power of attorney or other authority (if any) under which it is signed, or a notarially certified

copy of that power or authority, shall be deposited at the registered office of the company not less than forty-eight hours before the time for holding the meeting at which the person named in the instrument proposes to vote, and in default the instrument of proxy shall not be treated as valid.

67. An instrument appointing a proxy may be in the following form, or in any other form which the directors shall approve:—

Company, Limited.

I, , of , in the County of , being a member of the Company, Limited, hereby appoint , of , as my proxy to vote for me and on my behalf at the [ordinary or extraordinary, as the case may be] general meeting of the company to be held on the day of , and at any adjournment thereof.

Signed this day of .

Directors.

68. The number of the directors and the names of the first directors shall be determined in writing by a majority of the subscribers of the memorandum of association.

69. The remuneration of the directors shall from time to time be determined by the company in general meeting.

70. The qualification of a director shall be the holding of at least one share in the company, and it shall be his duty to comply with the provisions of section 81 of the "Companies Act."

Powers and Duties of Directors.

71. The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company as are not, by the "Companies Act," or any statutory modification thereof for the time being in force, or by these articles, required to be exercised by the company in general meeting, subject nevertheless to any regulation of these articles, to the provisions of the said Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

72. The directors may from time to time appoint one or more of their body to the office of managing director or manager for such term and at such remuneration (whether by way of salary, or commission, or participation in profits, or partly in one way and partly in another) as they may think fit, and a director so appointed shall not, while holding that office, be subject to retirement by rotation, or taken into account in determining the rotation of retirement of directors; but his appointment shall be subject to determination ipso facto if he ceases from any cause to be a director, or if the company in general meeting resolve that his tenure of the office of managing director or manager be determined.

73. The amount for the time being remaining undischarged of moneys borrowed or raised by the directors for the purposes of the company (otherwise than by the issue of share capital) shall not at any time exceed the issued share capital of the company without the sanction of the company in general meeting.

74. The directors shall duly comply with the provisions of the "Companies Act," or any statutory modification thereof for the time being in force, and in particular with the provisions in regard to the registration of

the particulars of mortgages and charges affecting the property of the company, or created by it, and to keeping a register of the directors, and to sending to the Registrar of Companies an annual list of members, and a summary of particulars relating thereto, and notice of any consolidation or increase of share capital or conversion of shares into stock, and copies of special resolutions, and a copy of the register of directors and notifications of any changes therein.

75. The directors shall cause minutes to be made in books provided for the purpose—

(*a*.) Of all appointments of officers made by the directors;

(*b*.) Of the names of the directors present at each meeting of the directors and of any committee of the directors;

(*c*.) Of all resolutions and proceedings at all meetings of the company, and of the directors, and of committees of directors;

and every director present at any meeting of directors or committee of directors shall sign his name in a book to be kept for that purpose.

The Seal.

76. The seal of the company shall not be affixed to any instrument except by the authority of a resolution of the board of directors, and in the presence of at least two directors and of the secretary or such other person as the directors may appoint for the purpose; and these two directors and secretary or other person as aforesaid shall sign every instrument to which the seal of the company is so affixed in their presence.

Disqualifications of Directors.

77. The office of director shall be vacated if the director—

(*a*.) Ceases to be a director by virtue of section 81 of the "Companies Act"; or

(*b*.) Holds any other office of profit under the company except that of managing director or manager; or

(*c*.) Becomes bankrupt; or

(*d*.) Is found lunatic or becomes of unsound mind; or

(*e*.) Is concerned or participates in the profits of any contract with the company:

Provided, however, that no director shall vacate his office by reason of his being a member of any company which has entered into contracts with or done any work for the company of which he is director; but a director shall not vote in respect of any such contract or work, and if he does so vote his vote shall not be counted.

Rotation of Directors.

78. At the first ordinary meeting of the company the whole of the directors shall retire from office, and at the ordinary meeting in every subsequent year one-third of the directors for the time being, or, if their number is not three or a multiple of three, then the number nearest to one-third, shall retire from office.

79. The directors to retire in every year shall be those who have been longest in office since their last election, but as between persons who became directors on the same day those to retire shall (unless they otherwise agree among themselves) be determined by lot.

80. A retiring director shall be eligible for re-election.

81. The company at the general meeting at which a director retires in manner aforesaid may fill up the vacated office by electing a person thereto.

82. If at any meeting at which an election of directors ought to take place the places of the vacating directors are not filled up, the meeting shall stand adjourned till the same day in the next week, at the same time and place, and, if at the adjourned meeting the places of the vacating directors are not filled up, the vacating directors or such of them as have not had their places filled up shall be deemed to have been re-elected at the adjourned meeting.

83. The company may from time to time in general meeting increase or reduce the number of directors, and may also determine in what rotation the increased or reduced number is to go out of office.

84. Any casual vacancy occurring in the board of directors may be filled up by the directors, but the person so chosen shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.

85. The directors shall have power at any time, and from time to time, to appoint a person as an additional director who shall retire from office at the next following ordinary general meeting, but shall be eligible for election by the company at that meeting as an additional director.

86. The company may by extraordinary resolution remove any director before the expiration of his period of office, and may by an ordinary resolution appoint another person in his stead; the person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.

Proceedings of Directors.

87. The directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings, as they think fit. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes the chairman shall have a second or casting vote. A director may, and the secretary on the requisition of a director shall, at any time summon a meeting of the directors.

88. The quorum necessary for the transaction of the business of the directors may be fixed by the directors, and unless so fixed shall (when the number of directors exceeds three) be three.

89. The continuing directors may act notwithstanding any vacancy in their body, but, if and so long as their number is reduced below the number fixed by or pursuant to the regulations of the company as the necessary quorum of directors, the continuing directors may act for the purpose of increasing the number of directors to that number, or of summoning a general meeting of the company, but for no other purpose.

90. The directors may elect a chairman of their meetings and determine the period for which he is to hold office; but, if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the directors present may choose one of their number to be chairman of the meeting.

91. The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit; any committee so formed shall in the exercise of the powers so delegated conform to any regulations that may be imposed on them by the directors.

92. A committee may elect a chairman of their meetings; if no such chairman is elected, or if at any meeting the chairman is not present within

five minutes after the time appointed for holding the same, the members present may choose one of their number to be chairman of the meeting.

93. A committee may meet and adjourn as they think proper. Questions arising at any meeting shall be determined by a majority of votes of the members present, and in case of an equality of votes the chairman shall have a second or casting vote.

94. All acts done by any meeting of the directors or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

Dividends and Reserve.

95. The company in general meeting may declare dividends, but no dividend shall exceed the amount recommended by the directors.

96. The directors may from time to time pay to the members such interim dividends as appear to the directors to be justified by the profits of the company.

97. No dividend shall be paid otherwise than out of profits.

98. Subject to the rights of persons (if any) entitled to shares with special rights as to dividends, all dividends shall be declared and paid according to the amounts paid on the shares; but, if and so long as nothing is paid up on any of the shares in the company, dividends may be declared and paid according to the amounts of the shares. No amount paid on a share in advance of calls shall, while carrying interest, be treated for the purposes of this article as paid on the share.

99. The directors may, before recommending any dividend, set aside out of the profits of the company such sums as they think proper as a reserve or reserves, which shall, at the discretion of the directors, be applicable for meeting contingencies, or for equalizing dividends, or for any other purpose to which the profits of the company may be properly applied, and pending such application may, at the like discretion, either be employed in the business of the company or be invested in such investments (other than shares of the company) as the directors may from time to time think fit.

100. If several persons are registered as joint holders of any share, any one of them may give effectual receipts for any dividend payable on the hare.

101. Notice of any dividend that may have been declared shall be given. in manner hereinafter mentioned to the persons entitled to share therein

102. No dividend shall bear interest against the company.

Accounts.

103. The directors shall cause true accounts to be kept—

Of the sums of money received and expended by the company and the matter in respect of which such receipt and expenditure takes place; and

Of the assets and liabilities of the company.

104. The books of account shall be kept at the registered office of the company, or at such other place or places as the directors think fit, and shall always be open to the inspection of the directors.

105. The directors shall from time to time determine whether and to what extent and at what times and places and under what conditions or regulations the accounts and books of the company or any of them shall be open to the inspection of members not being directors, and no member (not being a director) shall have any right of inspecting any account or book or document of the company except as conferred by Statute or authorised by the directors or by the company in general meeting.

106. Once at least in every year the directors shall lay before the company in general meeting a profit and loss account for the period since the preceding account or (in the case of the first account) since the incorporation of the company, made up to a date not more than six months before such meeting.

107. A balance-sheet shall be made out in every year and laid before the company in general meeting made up to a date not more than six months before such meeting. The balance-sheet shall be accompanied by a report of the directors as to the state of the company's affairs, and the amount which they recommend to be paid by way of dividend, and the amount (if any) which they propose to carry to a reserve fund.

108. A copy of the balance sheet and report shall, seven days previously to the meeting, be sent to the persons entitled to receive notices of general meetings in the manner in which notices are to be given hereunder.

Audit.

109. Auditors shall be appointed and their duties regulated in accordance with sections 119 and 120 of the "Companies Act," or any statutory modification thereof for the time being in force

Notices.

110. A notice may be given by the company to any member either personally or by sending it by post to him to his registered address, or (if he has no registered address in the Province of British Columbia) to the address (if any) within the said Province supplied by him to the company for the giving of notices to him.

Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the notice, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

111. If a member has no registered address in the Province of British Columbia and has not supplied to the company an address within the said Province for the giving of notices to him, a notice addressed to him and advertised in a newspaper circulating in the neighbourhood of the registered office of the company shall be deemed to be duly given to him on the day on which the advertisement appears.

112. A notice may be given by the company to the joint holders of a share by giving the notice to the joint holder named first in the register in respect of the share.

113. A notice may be given by the company to the persons entitled to a share in consequence of the death or bankruptcy of a member by sending it through the post in a prepaid letter addressed to them by name, or by the title of representatives of the deceased, or trustee of the bankrupt, or by any like description, at the address (if any) in the Province of British Columbia supplied for the purpose by the persons claiming to be so entitled, or (until such an address has been so supplied) by giving the notice in any

manner in which the same might have been given if the death or bankruptcy had not occurred.

114. Notice of every general meeting shall be given in some manner hereinbefore auhorised to (*a*) every member of the company (including bearers of share warrants) except those members who (having no registered address within the Province of British Columbia) have not supplied to the company an address within the said Province for the giving of notices to them, and also to (*b*) every person entitled to a share in consequence of the death or bankruptcy of a member, who, but for his death or bankruptcy, would be entitled to receive notice of the meeting. No other persons shall be entitled to receive notices of general meetings.

TABLE B.

TABLE OF FEES TO BE PAID TO THE REGISTRAR OF JOINT-STOCK COMPANIES BY A COMPANY HAVING A CAPITAL DIVIDED INTO SHARES.

1. For registration of a company whose nominal capital does not exceed $10,000, a fee of $25 00

2. For registration of a company whose nominal capital exceeds $10,000, the above fee of $25, with the following additional fees, regulated according to the amount of nominal capital, that is to say:—
   - For every $5,000 of nominal capital, or part of $5,000, after the first $10,000, up to $25,000 .... $5 00
   - For every $5,000 of nominal capital, or part of $5,000, after the first $25,000, up to $500,000 .... $2 50
   - For every $5,000 of nominal capital, or part of $5,000, after the first $500,000 .... $1 25

3. For registration of any increase of capital made after the first registration of the company, the same fees per $5,000 or part of $5,000 as would have been payable if such increased capital had formed part of the original capital at the time of registration. This provision shall apply to an extra-provincial company licensed or registered which increases its capital, excepting an insurance company.

4. For a licence to or registration of any extra-provincial company, excepting an insurance company, the same fees as are payable for incorporating a new company. In the case of an extra-provincial company having a nominal capital exceeding $450,000 which proves to the satisfaction of the Registrar that it is actually carrying on an established business beyond the Province in which at least fifty per cent. of its subscribed capital is invested, there shall be accepted in commutation of the fees prescribed by this table a fee of 250 00

5. For registration under this Act of any existing company, the certificate of registration whereof is issued pursuant to section 130 hereof, or the capital whereof is increased, the same fees as are payable for registering a new company hereunder, allowing credit as part of such fees for the amount of fees paid by such company in respect of its original registration. (See section 280.)

6. For a licence to or registration under this Act of any extra-provincial company already registered in this Province as a foreign company..	$10 00
And in addition thereto, if the licence or certificate of registration under this Act is issued pursuant to section 131 hereof, the same fees as are payable for registering a new company hereunder, allowing credit as part of such fees for the amount of fees paid by such extra-provincial company in respect of its original registration in this Province.	
7. For registering or filing any document hereby required or authorised to be registered or filed, other than the memorandum of association..	1 00
8. For making a record of any fact hereby authorised or required to be recorded by the Registrar, a fee of....................	1 00
9 Publication in the Gazette according to the scale of charges as defined in Schedule A of the "Statutes and Journals Act."	
10. For each and every search..............................	25

The scale of fees provided by this Table B shall apply to, and the fees therein specified shall be taken on all registrations, proceedings, or transactions relating to companies incorporated and carrying on business under any Act repealed by the "Companies Act, 1897," dealt with in the office of the Registrar after the twentieth day of May, 1898.

FEES TO BE PAID ON REGISTRATION OF MORTGAGE OR CHARGE.

11. Where the amount of the mortgage or charge does not exceed $1,000...	$ 5 00
12. Where the amount of the mortgage or charge exceeds $1.000..	10 00

Provided that in the case of a series of debentures registered in accordance with subsection (3) of section 102 the above fees shall be charged on the first debenture of such series, and a further fee of fifteen cents on each subsequent debenture of the series. Provided further that where a mortgage or charge requiring registration under section 102 of this Act is one that also requires to be registered under the provisions of the "Land Registry Act" or of the "Bills of Sale Act," or where a series of debentures is registered in accordance with subsection (3) of said section 102, and such debentures are secured by a Trust Deed which requires registration pursuant to the "Land Registry Act," the fee for registering the same shall be one dollar. R. S. 1897, c. 44; 1898, c. 13, ss. 15, 17;1900, c. 5, s. 12; 1905, c. 11, ss. 3, 6; 1906, c. 10; 1911, c. 8, ss. 26, 27.

TABLE B.—PART II.

TABLE OF FEES TO BE PAID TO THE REGISTRAR OF JOINT-STOCK COMPANIES BY A COMPANY NOT HAVING A CAPITAL DIVIDED INTO SHARES.

1. For registration of a company whose number of members, as stated in the articles of association, does not exceed 20.......	$ 10 00

2. For registration of a company whose number of members, as stated in the articles of association, exceeds 20, but does not exceed 100	25 00
3. For registration of a company whose number of members, as stated in the articles of association, exceeds 100, but is not stated to be unlimited, the above fee of $25, with an additional $1 for every 50 members or less number than 50 members after the first 100.	
4. For registration of a company in which the number of members is stated in the articles of association to be unlimited, a fee of	100 00
5. For registration of any increase on the number of members made after the registration of the company in respect of every 50 members, or less than 50 members, of such increase	1 00
6. Provided that no one company shall be liable to pay on the whole a greater fee than $100 in respect of its number of members, taking into account the fee paid on the first registration of the company.	
7. For registering any document hereby required or authorised to be registered, other than the memorandum of association	1 00
8. For making a record of any fact hereby authorised or required to be recorded by the Registrar of Companies, a fee of	1 00

R. S. 1897, c. 44, Sch. 1; 1910, c. 7, Sch. 1.

SECOND SCHEDULE

FORM A.

MEMORANDUM OF ASSOCIATION OF A COMPANY LIMITED BY SHARES.

1st. The name of the Company is "The Eastern Steam Packet Company, Limited."

2nd. The registered office of the Company will be situate in

3rd. The objects for which the Company is established are: "The conveyance of passengers and goods in ships or boats between such places as the Company may from time to time determine, and the doing of all such other things as are incidental or conducive to the attainment of the above object."

4th. The liability of the members is limited.

5th. The share capital of the Company is dollars, divided into shares of dollars each.

WE, the several persons whose names and addresses are subscribed, are desirous of being formed into a Company, in pursuance of this Memorandum of Association, and we respectively agree to take the number of shares in the capital of the Company set opposite our respective names.

Names, Addresses, and Descriptions of Subscribers.			Number of Shares taken by each Subscriber.
"1. John Jones, of	, in the County of	, Merchant	200
"2. John Smith, of	, in the County of	..	25
"3. Thomas Green, of	, in the County of	..	30
"4. John Thompson, of	, in the County of	..	40
"5. Caleb White, of	, in the County of	..	15
Total shares taken........................			310

Dated the day of , 19 .
Witness to the above signatures:

Name..
Address..
Occupation..

FORM B.

MEMORANDUM AND ARTICLES OF ASSOCIATION OF A COMPANY LIMITED BY GUARANTEE AND NOT HAVING A SHARE CAPITAL.

Memorandum of Association.

1st. The name of the Company is "The Highland Hotel Company, Limited."

2nd. The registered office of the Company will be situate in .

3rd. The objects for which the Company is established are: "Facilitating travelling in the Province by providing hotels and conveyances by water and by land for the accommodation of travellers, and the doing of all such other things as are incidental or conducive to the attainment of the above objects."

4th. The liability of the members is limited.

5th. Every member of the Company undertakes to contribute to the assets of the Company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the Company contracted before he ceases to be a member, and the costs, charges, and expenses of winding-up, and for the adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding fifty dollars.

WE, the several persons whose names and addresses are subscribed, are desirous of being formed into a Company, in pursuance of this Memorandum of Association.

Names, Addresses, and Descriptions of Subscribers.

"1. John Jones, of , in the County of , Merchant.
"2. John Smith, of , in the County of
"3. Thomas Green, of , in the County of
"4. John Thompson, of , in the County of
"5. Caleb White, of , in the County of
Dated the day of , 19 .

Witness to the above signatures:

Name..........

Address..........

Occupation..........

ARTICLES OF ASSOCIATION TO ACCOMPANY PRECEDING MEMORANDUM OF ASSOCIATION.

Number of Members.

1. The Company, for the purpose of registration, is declared to consist of five hundred members.

2. The directors hereinafter mentioned may, whenever the business of the Association requires it, register an increase of members.

General Meetings.

3. The first general meeting shall be held at such time, not being less than one month nor more than three months after the incorporation of the Company, and at such place as the directors may determine.

4. A general meeting shall be held once in every year at such time (not being more than fifteen months after the holding of the last preceding general meeting) and place as may be prescribed by the Company in general meeting, or in default, at such time in the month following that in which the anniversary of the Company's incorporation occurs, and at such place, as the directors shall appoint. In default of a general meeting being so held, a general meeting shall be held in the month next following, and may be convened by any two members in the same manner as nearly as possible as that in which meetings are to be convened by the directors.

5. The above-mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary.

6. The directors may, whenever they think fit, and shall, on a requisition made in writing by any five or more members, convene an extraordinary general meeting.

7. Any requisition made by the members must state the object of the meeting proposed to be called, and must be signed by the requisitionists and deposited at the registered office of the Company.

8. On receipt of the requisition the directors shall forthwith proceed to convene a general meeting; if they do not proceed to cause a meeting to be held within twenty-one days from the date of the requisition being so deposited, the requisitionists, or any other five members, may themselves convene a meeting.

Proceedings at General Meetings.

9. Seven days' notice at the least, specifying the place, the day, and the hour of meeting, and in case of special business the general nature of the

business, shall be given to the members in manner hereinafter mentioned, or in such other manner (if any) as may be prescribed by the Company in general meeting; but the non-receipt of such a notice by any member shall not invalidate the proceedings at any general meeting.

10. All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting, with the exception of the consideration of the accounts, balance-sheets, and the ordinary report of the directors and auditors, the election of directors and other officers in the place of those retiring by rotation, and the fixing of the remuneration of the auditors.

11. No business shall be transacted at any meeting except the declaration of a dividend, unless a quorum of members is present at the commencement of the business. The quorum shall be ascertained as follows, that is to say: If the members of the Company at the time of the meeting do not exceed ten in number, the quorum shall be five; if they exceed ten, there shall be added to the above quorum one for every five additional members up to fifty, and one for every ten additional members after fifty, with this limitation, that no quorum shall in any case exceed thirty.

12. If within one hour from the time appointed for the meeting a quorum of members is not present, the meeting, if convened on the requisition of the members, shall be dissolved; in any other case it shall stand adjourned to the same day in the following week at the same time and place; and if at such adjourned meeting a quorum of members is not present, it shall be adjourned sine die.

13. The chairman (if any) of the directors shall preside as chairman at every general meeting of the Company.

14. If there is no such chairman, or if at any meeting he is not present at the time of holding the same, the members present shall choose some one of their number to be chairman of that meeting.

15. The chairman may, with the consent of the meeting, adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

16. At any general meeting, unless a poll is demanded by at least three members, a declaration by the chairman that a resolution has been carried and an entry to that effect in the book of proceedings of the Company shall be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

17. If a poll is demanded in manner aforesaid, the same shall be taken in such manner as the chairman directs, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

Votes of Members.

18. Every member shall have one vote and no more.

19. If any member is a lunatic or idiot he may vote by his committee, curator bonis, or other legal curator.

20. No member shall be entitled to vote at any meeting unless all moneys due from him to the Company have been paid.

21. On a poll votes may be given either personally or by proxy. A proxy shall be appointed in writing under the hand of the appointer, or, if such appointer is a corporation, under its common seal.

22 No person shall act as a proxy unless he is a member, or unless he is appointed to act at the meeting as proxy for a corporation.

The instrument appointing him shall be deposited at the registered office of the Company not less than forty-eight hours before the time of holding the meeting at which he proposes to vote.

23. Any instrument appointing a proxy shall be in the following form:—

Company, Limited.

, of , in the County of , being a member of the Company, Limited, hereby appoint , of , as my proxy, to vote for me and on my behalf at the [ordinary *or* extraordinary, *as the case may be*] general meeting of the Company to be held on the day of , and at any adjournment thereof.

Signed this day of , 19 .

Directors.

24. The number of directors, and the names of the first directors, shall be determined by the subscribers of the Memorandum of Association.

25. Until directors are appointed the subscribers of the Memorandum of Association shall for all the purposes of the "Companies Act" be deemed to be directors.

Powers of Directors.

26. The business of the Company shall be managed by the directors, who may exercise all such powers of the Company as are not by the "Companies Act," or by any statutory modification thereof for the time being in force, or by these articles required to be exercised by the Company in general meeting; but no regulation made by the Company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

Election of Directors.

27. The directors shall be elected annually by the Company in general meeting.

Audit.

28. Auditors shall be appointed and their duties regulated in accordance with sections 119 and 120 of the "Companies Act," or any statutory modification thereof for the time being in force, and for this purpose the said sections shall have effect as if the word "members" were substituted for "shareholders," and as if "first general meeting" were substituted for "statutory meeting."

Notices.

29. A notice may be given by the Company to any member either personally, or by sending it by post to him to his registered address.

30. Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the notice, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Names, Addresses, and Descriptions of Subscribers.

"1. John Jones, of , in the County of Merchant.
"2. John Smith, of , in the County of
"3. Thomas Green, of , in the County of
"4. John Thompson, of , in the County of
"5. Caleb White, of , in the County of

Dated the day of , 19 .

Witness to the above signatures:

Name..

Address..

Occupation..

FORM C.

MEMORANDUM AND ARTICLES OF ASSOCIATION OF A COMPANY LIMITED BY GUARANTEE AND HAVING A SHARE CAPITAL

Memorandum of Association.

1st. The name of the Company is "The Killarney Hotel Company, Limited."

2nd. The registered office of the Company will be situate in .

3rd. The objects for which the Company is established are: "The facilitating travelling in the mountains of British Columbia by providing hotels and conveyances by sea and by land for the accommodation of travellers and the doing all such other things as are incidental or conducive to the attainment of the above object."

4th. The liability of the members is limited.

5th. Every member of the Company undertakes to contribute to the assets of the Company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the Company, contracted before he ceases to be a member, and the costs charges, and expenses of winding up the same and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding one hundred dollars.

6th. The share capital of the Company shall consist of dollars, divided into shares of dollars each.

WE, the several persons whose names and addresses are subscribed, are desirous of being formed into a Company, in pursuance of this Memorandum of Association, and we respectively agree to take the number of shares in the capital of the Company set opposite our respective names.

Names, Addresses, and Descriptions of Subscribers.		Number of Shares taken by each Subscriber.
"1. John Jones, of	, in the County of ..	200
"2. John Smith of	, in the County of ..	25
"3. Thomas Green, of	, in the County of ..	30
"4. John Thompson, of	, in the County of ..	40
"5. Caleb White, of	, in the County of ..	15
Total shares taken....................		310

Dated the day of , 19 .
Witness to the above signatures:

Name..
Address..
Occupation...

Articles of Association to Accompany Preceding Memorandum of Association.

1. The directors may, with the sanction of the Company in general meeting, reduce the amount of shares in the Company.

2. The directors may, with the sanction of the Company in general meeting, cancel any shares belonging to the Company.

3. All the articles of Table A of the "Companies Act" shall be deemed to be incorporated with these articles and to apply to the Company.

Names, Addresses, and Descriptions of Subscribers.

"1. John Jones, of , in the County of Merchant.
"2. John Smith, of , in the County of
"3. Thomas Green, of , in the County of
"4 John Thompson, of , in the County of
"5. Caleb White, of , in the County of

Dated the day of , 19 .
Witness to the above signatures:

Name..
Address..
Occupation...

FORM D.

MEMORANDUM AND ARTICLES OF ASSOCIATION OF AN UNLIMITED COMPANY HAVING A SHARE CAPITAL.

Memorandum of Association.

1st. The name of the Company is "The Patent Stereotype Company."

2nd. The registered office of the Company will be situate in

3rd. The objects for which the Company is established are: "The working of a patent method of founding and casting stereotype plates, of which method John Smith, of Vancouver, is the sole patentee."

WE, the several persons whose names are subscribed, are desirous of being formed into a Company, in pursuance of this Memorandum of Association, and we respectively agree to take the number of shares in the capital of the Company set opposite our respective names.

Names, Addresses, and Descriptions of Subscribers.			Number of Shares taken by each Subscriber.
"1. John Jones, of	, in the County of	Merchant	3
"2. John Smith, of	, in the County of	..	2
"3. Thomas Green, of	, in the County of	..	1
"4. John Thompson, of	, in the County of	..	2
"5. Caleb White, of	, in the County of	..	2
	Total shares taken....................		10

Dated the day of , 19 .

Witness to the above signatures:

Name..

Address...

Occupation..

Articles of Association to accompany the Preceding Memorandum of Association.

1. The share capital of the Company is dollars, divided into twenty shares of dollars each.

2. All the articles of Table A of the "Companies Act" shall be deemed to be incorporated with these articles and to apply to the Company.

Names, Addresses, and Descriptions of Subscribers.

"1. John Jones, of , in the County of Merchant.
"2. John Smith, of , in the County of
"3. Thomas Green, of , in the County of
"4. John Thompson, of , in the County of
"5. Caleb White, of , in the County of

Dated the day of , 19 .

Witness to the above signatures.

Name..

Address...

Occupation..

FORM E.

(*As required by Part III. of the Act.*)

SUMMARY OF SHARE CAPITAL AND SHARES OF THE COMPANY, LIMITED.

made up to the day of , 19 (being the fourteenth day after the date of the first ordinary general meeting in 19).

Nominal share capital, $, divided into[1] { shares of $ each / shares of $ each.

[1] When there are shares of different kinds or amounts (*e.g.*, preference and ordinary or $10 and $5), state the numbers and nominal values separately

Total number of shares taken up to the day of , 19 (which number must agree with the total shown in the list as held by existing members).

Number of shares issued subject to payment wholly in cash.

Number of shares issued as fully paid up otherwise than in cash

Number of shares issued as partly paid up to the extent of per share otherwise than in cash.....................

[1]There has been called up on each of shares, $.

There has been called up on each of shares, $.

[2]There has been called up on each of shares, $.

[3]Total amount of calls received, including payments on application and allotment.................................. $.

Total amount (if any) agreed to be considered as paid on shares which have been issued as fully paid up otherwise than in cash.. $.

Total amount (if any) agreed to be considered as paid on shares which have been issued as partly paid up to the extent of per share.......................... $.

Total amount of calls unpaid.......................... $.

Total amount (if any) of sums paid by way of commission in respect of shares or debentures or allowed by way of discount since date of last summary..................... $.

Total amount (if any) paid on [4] shares forfeited...... $.

Total amount of shares and stock for which share warrants are outstanding.. $.

Total amount of share warrants issued and surrendered respectively since date of last summary................. $.

Number of shares or amount of stock comprised in each share warrant.. $.

Total amount of debt due from the Company in respect of all mortgages and charges which are required to be registered with the Registrar of Companies, or which would require registration if created after the twelfth day of March, 1906..

STATEMENT in the form of a balance-sheet made up to the day of , 19 , containing the particulars of the capital, liabilities, and assets of the Company.

The Return must be signed at the end by the manager or secretary of the Company.

Presented for filing by..........................

LIST OF PERSONS holding shares in the Company, Limited, on the day of , 19 , and of persons who have held shares therein at any time since the date of the last Return, showing their names and addresses, and an account of the shares so held.

1Where various amounts have been called or there are shares of different kinds, state them separately.

2Include what has been received on forfeited as well as on existing shares.

3State the aggregate number of shares forfeited (if any).

Folio in Register Ledger containing Particulars.	Names, Addresses and Occupations.				Account of Shares.					Remarks.
	Surname.	Christian Name.	Address.	Occupation	*Number of Shares held by Existing Members at Date of Return.	†Particulars of Shares transferred since the Date of the Last Return by Persons who are still Members.		†Particulars of Shares transferred since the Date of the Last Return by Persons who have ceased to be Members.		
						Number.	Date of ‡Registration of Transfer.	Number.	Date of ‡Registration of Transfer.	

NAMES AND ADDRESSES of the persons who are the Directors of the Limited, on the day of , 19 .

Names	Addresses

(*Signature*).....................
(*State whether manager or secretary*).................

1910, c. 7, Sch. 2.

FORM F.

FORM OF STATEMENT TO BE PUBLISHED BY INSURANCE COMPANIES, SOCIETIES AND OTHER ASSOCIATIONS.

(*Section 115.*)

**The share capital of the Company is , divided into shares of each.

The number of shares issued is .

*The aggregate number of shares held, and not the distinctive numbers, must be stated, and the column must be added up throughout so as to make one total to agree with that stated in the summary to have been taken up.

†The date of registration of each transfer should be given as well as the number of shares transferred on each date. The particulars should be placed opposite the name of the transferor and not opposite that of the transferee, but the name of the transferee may be inserted in the "Remarks" column immediately opposite the particulars of each transfer.

‡When the shares are of different classes these columns may be subdivided so that the number of each class held or transferred may be shown separately.

**If the Company has no share capital, the portion of the Statement relating to capital and shares must be omitted.

Calls to the amount of dollars per share have been made, under which the sum of dollars has been received.

The liabilities of the Company on the first day of January (*or* July) were:—

Debts owing to sundry persons by the Company—

On judgment, $.

On specialty, $.

On notes or bills, $.

On simple contracts, $.

On estimated liabilities, $.

The assets of the Company on that day were:—

Government securities [*stating them*],

Bills of exchange and promissory notes, $

Cash at the bankers, $.

Other securities, $.

1910, c. 7, Sch. 1, Form C.

STATEMENT IN LIEU OF PROSPECTUS.

(*Section 91.*)

The nominal share capital of the Company.	$.
Divided into............................	Shares of $ each. Shares of $ each. Shares of $ each.
Names, descriptions and addresses of directors or proposed directors.	
Minimum subscription (if any) fixed by the Memorandum or Articles of Association on which the Company may proceed to allotment.	
Number and amount of shares and debentures agreed to be issued as fully or partly paid up otherwise than in cash. The consideration for the intended issue of shares and debentures.	1. shares of $ fully paid. 2. shares upon which $ per share credited as paid. 3. debenture , $. 4. Consideration.
Names and addresses of (*a*) vendors of property purchased or acquired, or proposed to be (*b*) purchased or acquired by the Company. Amount (in cash, shares, or debentures) payable to each separate vendor.	
Amount (if any) paid or payable (in cash or shares or debentures) for any such property, specifying amount (if any) paid or payable for goodwill.	Total purchase price. $ Cash............... Shares............. Debentures......... Goodwill...........$

(*a*.) For definition of vendor, see section 90 (2) of the "Companies Act." (*b*.) See section 90 (3) of the "Companies Act."

STATEMENT IN LIEU OF PROSPECTUS—*Concluded.*

Amount (if any) paid or payable as commission for subscribing or agreeing to subscribe, or procuring or agreeing to procure, subscriptions for any shares or debentures in the Company; or, Rate of the commission..................	Amount paid. Amount payable. Rate per cent.
Estimated amount of preliminary expenses..	$.
Amount paid or intended to be paid to any promoter. Consideration for the payment.	Name of promoter. Amount, $. Consideration.
Dates of and parties to every material contract (other than contracts entered into in the ordinary course of the business intended to be carried on by the Company, or entered into more than two years before the filing of this statement).	
Time and place at which the contracts or copies thereof may be inspected.	
Names and addresses of the auditors of the Company (if any).	
Full particulars of the nature and extent of the interest of every director in the promotion of or in the property proposed to be acquired by the Company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares, or otherwise, by any person, either to induce him to become or to qualify him as a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the Company.	
Whether the articles contain any provisions precluding holders of shares or debentures receiving and inspecting balance-sheets or reports of the auditors or other reports.	Nature of the provisions.

(Signatures of the persons above named as directors or proposed directors, or of their agents authorised in writing.) ....
....
....

COMPANIES ACT AMENDMENT ACT, 1913.

AN ACT TO AMEND THE "COMPANIES ACT."

R.S.B.C. 1911, c. 39.

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:—

Short title.

1. This Act may be known and cited as the "Companies Act Amendment Act, 1913."

Amends s. 2.

2. Section 2, of Chapter 39, of the "Revised Statutes of British Columbia, 1911," being the "Companies Act," is hereby amended by striking out the words and figures in the seventy-ninth line and substituting the following:—

" 'Company'—Secs. 110A, 129 (3), 174."

Amends s. 18.

3. Subsection (1) of section 18 of said chapter 39 is hereby amended by striking out the words "or has ceased to carry on business" in the eighth line, and by adding after the word "Registrar" in the ninth line ; the following: "or except where an extra-provincial company, licensed or registered, has ceased or is deemed to have ceased to carry on business in the Province."

Amends s. 19.

4. Subsection (1) of section 19 of said chapter 39 is hereby amended by adding the following proviso:—

"Provided that no such alteration shall be valid if the company would be thereby enabled to exercise all or any of the powers of a trust company, as defined by the 'Trust Companies Regulation Act'."

5. Subsection (1) of section 26 of said chapter 39 is hereby amended by adding thereto the following proviso:—

Refusal of certificate to "trust company."

"Provided that the Registrar may refuse to issue a certificate of incorporation to any proposed company which by its memorandum, takes all or any of the powers of a 'trust company' as defined by the 'Trust Companies Regulation Act'. Upon such refusal application may, with the consent of the Registrar, be made to the Lieutenant-Governor in Council, who shall have power to approve and direct the issue of a certificate of incorporation to such proposed company."

Amends s. 34.

6. Subsection (6) of section 34 of said chapter 39 is hereby amended by striking out the word "registered" in the first line; and by adding after the words, "subsection (3) hereof," in the fifth line, the following: "and (unless the company be relieved in accordance with section 143A of this Act) a copy of the entries in the register required to be kept as provided by section 143 of this Act."

Amends s. 96.

7. Subsection (1) (b) of section 96 of said chapter 39 is hereby amended by adding after the word "subscription," in the fifth line, the following; "or in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, on the shares payable in cash"; and by adding after the word "with," in the last line of subsection (c), the word "and"; and by adding the following as subsection (d):—

"(d) In the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, there has been filed with the Registrar a statement in lieu of prospectus."

Amends s. 102.

8. Subsection (3) of section 102 of said chapter 39 is hereby amended by striking out the words, "or a true copy thereof" in the sixteenth line; and by inserting after the word "series," in the seventeenth line, "or a true copy of such deed or debenture."

9. The said chapter 39 is hereby amended by adding thereto after section 110 the following section:—

Definition of "company."

"110A. The word 'company' in sections 102 to 110 (both inclusive) of this Act shall mean and include any company, society, or association incorporated by or under any public Act of the Province."

Amends s. 129, subsec. (2).

10. Subsection (2) of section 129 of said chapter 39 is hereby amended by substituting the word "creditors" for the word "directors" in the sixth line.

Extra-provincial companies to file amendments to charter and regulations.

11. Every extra-provincial company licensed as a company under this or some former Act shall file with the Registrar any amendment to its charter or regulations, and without prejudice to any other provisions of this Act applicable to such company shall comply with the provisions of sections 51, 70, 71, 78, 83, 89 and 90 of the "Companies Act".

Amends s. 143.

12. Section 143 of said chapter 39 is hereby amended by inserting the words "licensed or" between the words "company" and "registered" in the first line.

13. Section 159 of said chapter 39 is hereby repealed, and said chapter 39 is amended by adding thereto after section 143 the following section:—

Powers of attorney by extra-provincial companies

"143A. (1). The Registrar may accept from any extra-provincial company a power of attorney which varies in substance from that called for by clause (d) of section 153 or section 158 of this Act, in that it omits to empower the attorney named therein to issue and transfer shares or stock, upon its being shown to his satisfaction either that the company is not a public company the shares or stock whereof are upon the market, ot that although the company is a public company, and the shares or stock thereof are upon the market, yet that, either owing to the small quantity of the shares or stock of the company held in the Province, and

to the fact that the company does not propose to place any of the shares or stock upon the market in the Province, or to the fact that the consent of the holders of shares or stock within the Province has been obtained, the preponderance of convenience is in favour of exempting the company from empowering their attorney in the manner specified:

"(a.) The license or certificate of registration issued to the company under the provisions of section 154 or section 160 of this Act, as the case may be, shall state, after the name, address, and occupation of the attorney, that such attorney is not empowered to issue or transfer shares or stock:

"(b.) The company shall thereupon be relieved from compliance with section 143 of this Act.

"(2.) Any company which has heretofore filed a power of attorney empowering its attorney to issue and transfer shares and stock may have such power of attorney amended on summary application to the Registrar, and on satisfying him as aforesaid, and shall thereafter be relieved in manner aforseaid. The Registrar may direct the amendment to be given publicity in such manner as he may deem necessary."

Amends s. 144.

14. Section 144 of said chapter 39 is hereby amended by substituting for the figures "1899," in the fourth line, the figures "1897".

Amends s. 149.

15. Section 149 of said chapter 39 is hereby amended by inserting after the word "Act," in the seventh line, the words "or for other good cause."

Amends s. 152.

16. Section 152 of said chapter 39 is hereby amended by adding thereto the following proviso:—

"Provided that the Registrar may refuse to issue a license to any such extra-provincial company which is authorized by its charter to exercise all or any of the powers of a 'trust company' as defined by the 'Trust Companies Regulation Act.' Upon such refusal, application may, with the consent of the Registrar, be made to the Lieutenant-Governor in Council, who shall have power to approve and direct the issue of a license to such company."

Amends s. 153.

17. Subsection (d) of section 153 of said chapter 39 is hereby amended by adding after the word "notices," in the eighth line, the words "to issue and transfer shares or stock."

Amends s. 157.

18. Section 157 of said chapter 39 is hereby amended by adding thereto the following proviso:—

"Provided that the Registrar may refuse to issue a certificate of registration to any such extra-provincial company which is authorized by its charter to exercise all or any of the powers of a 'trust company' as defined by the 'Trust Companies Regulation Act.' Upon such refusal

application may, with the consent of the Registrar, be made to the Lieutenant-Governor in Council, who shall have power to approve and direct the issue of a certificate of registration to such company."

19. Subsection (1) of section 250 of said chapter 39 is hereby amended by substituting for the words "that date," in the sixth line, the words "the date hereinafter mentioned." Amends s. 250.

20. Subsection (1) of section 268 of said chapter 39 is hereby repealed, and the following is substituted therefor:— Repeals and re-enacts s. 268, subsec. (1).

"268. (1.) Where a company incorporated under any public Act in the Province, or an extra-provincial company, licensed or registered, has failed for any period of two years after such incorporation or licensing or registration to send or file any return, notice, or document required to be made or filed or sent to the Registrar pursuant to this Act or any former public Act, or the Registrar has reasonable cause to believe that such company is not carrying on business or in operation, he shall send to the company by post a registered letter inquiring whether such company is carrying on business or in operation and notifying it of its default (if any):

"(a.) The period of two years hereinbefore mentioned shall in its application to companies already licensed be deemed to commence on the first day of March, 1913."

21. Subsection (4) of section 268 of said chapter 39 is hereby repealed and the following is substituted therefor:— Repeals and re-enacts s. 268, subsec. (4).

"(4.) If a company or any member or creditor thereof feels aggrieved, by the company having been struck off the register, the Court, on the application of the company or member or creditor, may, if satisfied that the company was at the time of the striking-off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register, and thereupon the company, being an incorporated company as aforesaid, shall be deemed to have continued in existence, or, being an extra-provincial company, shall be deemed to be still entitled to do business in the Province, as if its name in either case had not been struck off; and the Court may by the order give such directons and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off:

"(a.) Due notice shall be given to the Registrar of any such application to the Court, and no order made thereupon shall have any effect until the lawful requirements of the Registrar in respect of any such company have been fulfilled:

"(b.) An office copy of the order shall be filed with the Registrar within fifteen days from the date thereof, and shall by him be registered:

"(c.) If no application as aforesaid is made within one year from the date on which the name of a company shall have been struck off pursuant to this section, any other company or society may, subject to the provisions of section 18, be incorporated, licensed, or registered by the same or a similar name, or may, subject as aforesaid, change its name to the same or a similar name; and in such case the Court shall, in and by the order aforesaid, make provision that the company whose name shall have been struck off shall, as a condition of having its name restored to the register, forthwith change its name subject to and in accordance with the provisions of this Act:

"(d.) Any company whose name has been prior to the twenty-sixth day of August, 1912, published in the Gazette pursuant to this section may apply to the Court as hereinbefore provided and the time mentioned in the last preceding subsection shall be deemed to have commenced on the twenty-sixth day of August, 1912:

"Provided that where since that date a company or society has been incorporated or an extra-provincial company licensed or registered by a name identical with or similar to the name of any such company, the Court shall in and by its order make provision that the company whose name has been published as aforesaid shall, as a condition of having its name restored to the register, forthwith change its name, subject to and in accordance with the provisions of this Act:

"(e.) Notwithstanding any proceedings heretofore taken or purporting to have been taken under or by virtue of the provisions of section 268 of this Act, the following companies, to wit:—

Texada Kirk Lake Gold Mines, Limited;
Squamish Hop Ranch, Limited;
Columbia Fruit and Land Company, Limited;
The Nahmint River Lumber Company, Limited;
Metropolitan Building Company, Limited; and
Coxon and Company, Limited,—

are hereby declared to be in existence and shall be deemed to have always been and continued in existence as if the names thereof had never been struck off the register or the said companies dissolved by said proceedings; and it is further declared that the Star Exploring and Mining Company is entitled and shall not be deemed to have ceased to do business

in the Province under its certificate of registration; and the names of the companies aforesaid shall be forthwith restored to the register."

22. Subsection (6) of section 268 of said chapter 39 is hereby amended by striking out the words after "wound up" in the first line up to and including the words "wound up" in the third line.

Amends s. 268, subsec. (6).

23. Subsection (3) of section 269 of said chapter 39 is hereby amended by striking out all the words after the word "inspection" in line four, and substituting therefor the following: "and any person may require a copy or extract of any document or part thereof on payment for the copy or extract of the prescribed fees, not exceeding ten cents for each folio, and a further fee not exceeding one dollar if such copy or extract is required to be certified as a true copy."

Amends s. 269, subsec. (3).

24. Section 280 of said chapter 39 is hereby amended by striking out all words after the word "Act" in line four, and substituting the following: "otherwise there shall be charged the difference between the fees already paid and the fees payable for the incorporation of a company under this Act."

Amends s. 280.

25. The following is added as subsection (a) to section 282 of said chapter 39:—

Amends s. 282.

"(a.) The Registrar shall, at the cost of the company applying for registration, publish such certificate for four weeks in the Gazette."

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